

1 Since RAM, Incorporated, did not conduct annual tests
2 of the pressurized lines every year, it is assumed that
3 conducting tests would cost approximately \$100 per UST for
4 each year period, using the discount rate and so forth.

5 Essentially, it's going to be the same economic
6 benefit as the previous one.

7 Essentially, they failed to test the Line Leak
8 Detector in Count 8, and they failed to test the line in
9 Count 9, so these counts are going to be very similar.

10 Now, so the economic benefit is -- is essentially the
11 same as the previous one. Again, the matrix in this one
12 is extremely harmful if the lines are not tested.

13 Since you are only testing them once a year, it's
14 extremely important that you test it at the time you
15 have -- within that 12-month period.

16 Again, the tightness tests on the pressurized line is
17 to catch the small leaks. As a matter of fact, the regs
18 say that you have to -- it has to be able to detect a
19 .1-gallon per hour leak with -- with one and a half times
20 the operating pressure. So it is extremely important that
21 that test be done, and no later than 12 months.

22 Therefore the potential for harm, although we are not
23 saying it leaked, we are saying the potential for harm, if
24 there was a problem with this line, was very high and
25 would be a major.

1 The deviation from the requirements, again, is very
2 high, because it says it has to be done within a 12-month
3 period or use a monthly monitor.

4 If you'll look at the gravity base, again, we never
5 gave any type of violator-specific adjustments.

6 Sensitivity was 1.

7 The days of noncompliance was 1.5; was the same
8 amount of days as the previous one, the 94 days.

9 It ended up with the three tanks, it ended up with
10 1,500 times 1 times 1 times 1.5 times 3; \$6,750. Then you
11 add in your economic component and came up with the
12 \$6,940.96 for this particular count.

13 Q Okay. Thank you.

14 A Uh-huh.

15 Q Let's move on to Count 10.

16 A Okay. "Failure to Provide" --

17 Q And Count 10 actually transitions us into Goodwin's
18 One Stop.

19 A Okay. Okay. "Failure to Provide Spill Prevention
20 for New Tanks."

21 The economic benefit component was considered
22 insignificant in this case. Again --

23 Q Do you recall the facts for this count, Mr. Cernerero?

24 A I'm sorry, I didn't --

25 Q Do you recall the facts for this count?

1 A Yes. This is -- this is Goodwin's One Stop grocery
2 store. That's the one where we observe -- or I observed,
3 and also the state inspector observed, that the spill
4 bucket -- one of the spill buckets -- and I think it was
5 the premium, I don't have my notes in front of me -- it
6 had a crack, a gap. Not just a crack, excuse me. Not
7 just a crack, but a gap in the wall of the spill bucket.

8 In reviewing that, that could cause a release if your
9 product came -- was able to go through the -- the gap, or
10 even if it was just spilled. If it was just spilled, you
11 could go in and cause contamination.

12 Therefore, what we -- what we had calculated was what
13 was the penalty for this particular spill bucket not being
14 adequate enough, according to the regulations.

15 Again, the matrix that we used was \$1,500, because we
16 felt like it was a major-major. Major deviation from the
17 requirements, a major deviation or major potential for
18 harm.

19 The reason why we said major potential for harm is
20 because it would be very likely that you would actually
21 get a release from this particular spill bucket. Again,
22 it wasn't just a little crack, it was a gap that was in --
23 in the spill bucket.

24 And again, potential for deviation of the
25 requirements, the requirements require that you have a

1 spill bucket that will not allow releases into the
2 environment; therefore we use the --

3 Q That -- one moment.

4 MS. BEAVER: At this time, Your Honor, I'd -- I
5 would like to ask that the record could reflect that
6 the corresponding Government exhibits to this count
7 are 27 -- that have been offered and stipulated to
8 are Plaintiff's Exhibit 27 and 28.

9 And I believe that there are duplicate photos of
10 that at Exhibit 4 and 6. Let me confirm that.

11 That is correct. So Complainant's Exhibits 4,
12 6, 27, and 28 are the corresponding pictures for this
13 count.

14 Q (By Ms. Beaver:) Okay. Mr. Cernero.

15 A Okay. In this particular case, the matrix was
16 \$1,500. There was no adjustments in any of the items
17 except the -- well, we had to go with the number of days
18 of noncompliance.

19 I don't know when the spill bucket cracked. All I
20 know, it was cracked when I got there. I gave them some
21 leeway and basically just said, okay, it was one day of
22 violation.

23 There was really no -- there was no increase because
24 of the days of noncompliance, and it ended up being just
25 strictly a \$1,500 fine for failure to have an adequate

1 spill bucket.

2 MS. BEAVER: Okay. Your Honor, at this time, I
3 would like to offer into evidence Government's
4 Exhibit 31. I have provided -- it's a color --
5 actually, I have provided a copy for Respondent
6 already, and the Respondent did not object --

7 MR. KELLOGG: No objection.

8 MS. BEAVER: -- to this exhibit, and I can
9 provide one for Your Honor.

10 THE COURT: Okay. Without objection, then, the
11 photo identified as Government's Exhibit 31 is
12 admitted into evidence.

13 Q (By Ms. Beaver:) Mr. Cernero.

14 A Yes.

15 Q Do you recognize what Government's Exhibit 31 is?

16 A Yes, that's at Goodwin's. It is the -- they are
17 filling -- they are filling the tanks at that spill
18 bucket, I believe, that had the -- the gap in it. I was
19 there when they were getting product.

20 Q Okay. Does that exhibit -- how does that exhibit
21 corroborate what you're explaining about the potential for
22 a release?

23 A Well, as you can -- if you look at the exhibit, you
24 can see that there is some spills around there. To begin
25 with, the spillage -- well, I can't see it in there, but

1 the fact that the product doesn't come up to the level of
2 the -- of the gap doesn't necessarily mean that it has
3 enough capacity.

4 Essentially, what we are saying is that just the mere
5 loading of the fuel causes splashing. It could have been
6 very potential -- a high potential for gasoline or diesel
7 to get into the -- go right through the gap, is basically
8 what I'm saying.

9 Q Okay.

10 A And there is indication that there is some spillage,
11 even on the concrete right here.

12 Q Okay. Thank you. And you indicate that you thought
13 that your day of -- days of noncompliance was calculated
14 as one day.

15 A Yes. I mean I don't -- I don't know when it cracked,
16 so I don't know -- no one had any documentation, so I gave
17 them the benefit of the doubt and said okay, I know it's
18 cracked today. I know it's at least a one-day violation.

19 Q How likely is it, in your opinion, that the crack
20 just happened that day?

21 A Probably almost impossible. I would say that it
22 occurred over several -- I don't know, maybe in the matter
23 of several months, maybe even a year; I don't know.

24 The other two -- even though we did not account --
25 make a count for the other two spill buckets, the other

1 two spill buckets were also warped; the plastic on those
2 were warped, although they were not cracked or that they
3 had failed. I did not cite them, but I can see that
4 there's a situation there that's a potential for a crack
5 that could happen.

6 Q Okay. Thank you. If -- if you have summarized that
7 Count 10, Mr. Cernero, we can move on --

8 A Okay.

9 Q -- to Count 12.

10 A Okay. Count 12 is, again, at Goodwin's.

11 Q Again, excuse me one moment. Recognizing that
12 Count 11 has been withdrawn, we will move on to Count 12.

13 A Count 12 is "Failure to Conduct Stick Readings as
14 Required for Inventory Control and Tank Tightness Testing
15 Method," at Goodwin's. And there's no -- essentially, no
16 release detection, according to the regulation.

17 I did not -- because the economic benefit would have
18 been very insignificant, at least in my opinion, we did
19 not calculate an economic benefit. It was basically --
20 mainly some labor involved here, but to try to calculate
21 that and come up with any kind of a significant cost
22 probably would not be worth doing it.

23 We went right to the gravity base. Essentially, they
24 are not -- they did not have a release detection system in
25 place, according to the regulations, because they were not

1 measuring every day that they were in operation.

2 In my discussions with the operator and with
3 Ms. Twilah Monroe, she indicated that they were not
4 monitoring -- they were not sticking the tanks every day
5 that they were in operation.

6 Again, failure to have a release detection system, an
7 adequate release detection system is a -- potential for
8 harm is a major potential for harm. Failure to have a
9 release detection --

10 Q Mr. Cernero, let me interject. I'm a little bit
11 confused, for whatever reason. When I read the caption
12 here, I see "Failure to Conduct Stick Reading," and what I
13 hear you saying is failure to perform release detection.
14 Help me understand what's the relationship.

15 A In this particular case, this method of Inventory
16 Control and Tank Tightness Testing is allowed. So
17 there -- and that's what they were using in this
18 particular case.

19 When I did my inspection and when I did my records
20 review, in this particular method, when using inventory
21 control, you must stick the tanks every day that you're in
22 operation.

23 There was no records produced that showed me that
24 this particular site, this particular facility, was
25 actually sticking the tanks every day; it was more like

1 once a week; therefore, this method was not in compliance
2 with the EPA regulations and the state regulations to
3 qualify it as a release detection method.

4 Failure to stick the tanks every day they are in
5 operation essentially says they are not in compliance with
6 the Inventory Control and Tank Tightness Testing method,
7 which is in the regulations of both OCC and EPA's regs,
8 although we're only qualifying in the OCC regs.
9 Therefore, they don't have a release detection system.
10 And that's -- that's my answer.

11 Q And your -- your period of violation?

12 A The period of violation we used in this particular
13 case -- since you are required to maintain at least 12
14 months' worth of records for your release detection, I
15 chose one year, actually 366 days, because at the time I
16 was there, they were still out of compliance, so we used a
17 factor of three, because it was 366 days of violation.

18 There was three tanks.

19 There was no adjustments for violator-specific or
20 sensitivity. It just had to do with the days of
21 noncompliance times the number of tanks times 1,500, and
22 it ended up being \$13,500.

23 In that particular case, I did not consider the
24 economic benefit as significant.

25 Q Why was the degree of harm major for this one, this

1 Count 12?

2 A This -- again, failure to have a release detection is
3 a major component of the Underground Storage Tank
4 requirements. Therefore, failure to have a release
5 detection system is a major deviation from the -- from the
6 regulations.

7 And also major potential for harm. If you do not
8 have the proper release detection in place, you could have
9 a potential where you have a release and not know it
10 because the recordkeeping, the information, is not
11 sufficient to determine if there is a leak.

12 Q If -- if the Respondent had an inventory control
13 system in place, would that affect the degree of harm or
14 the potential for harm?

15 A Are you saying a system? Are you saying an
16 in-compliance system, or just any system?

17 Q Any system that was not in compliance.

18 A It would have to be in compliance with EPA regs. It
19 is not a method -- this method of release detection is
20 very -- again, it's a temporary method of release
21 detection, and it has to be done properly.

22 You have to measure to the eighth of an inch, you
23 have to measure every day that you are in compliance --
24 that you are -- that you are in operation.

25 You have to measure the water that's in the tank

1 every -- every month. You have to reconcile your records
2 every day to determine your overage and shortage, and you
3 have to reconcile it at the end of the month.

4 There's a lot of procedures that you have to go
5 through to constitute an acceptable method of release
6 detection under the OCC regulations. And --

7 Q And why is that important?

8 A Because if you have a release that occurs and you do
9 not detect it, it could occur for a long period of time
10 and cause contamination, could get in ground water, could
11 cause soil contamination, could cause potential for
12 vapors, explosions, and that type of thing.

13 Q Okay. Thank you, Mr. Cernero. Did you summarize the
14 amounts that you were asking -- that we were arguing for
15 that count?

16 A Yes, I believe so.

17 Q Okay.

18 A It's \$13,500.

19 Q Okay. Moving on to -- we've withdrawn Count 13, so
20 we will now move to Count 14.

21 A Okay. Count 14 is Monroe -- yeah, Monroe station.

22 Q Right, Monroe's Service Station.

23 A In this particular case, this was a tank that was in
24 temporary closure, and it was officially a temporary
25 closure according to the state; however, one of the tanks

1 that we inspected did have product in it -- eight or nine
2 inches or something like that, I can't remember from my
3 notes -- but it did have product in it; therefore, it
4 should have had some method of release detection that they
5 should have been monitoring on a -- on a monthly basis.

6 Looking at the records, there was no record showing
7 that they had conducted release detection, monthly release
8 detection with that particular tank.

9 When we do the calculation again, the reason why we
10 used the matrix of 1,500 is because it's a major potential
11 for harm if it leaked -- I'm not saying it leaked.

12 It was a major deviation from regulation. It had
13 zero -- this one didn't have any type of release
14 detection; therefore, the matrix was a major-major.

15 Now, the other issues that we had, there was no
16 violator-specific adjustments.

17 There was no sensitivity multiplier adjustments.

18 However, there was an adjustment for the days of
19 noncompliance. We chose -- again, although it says one
20 day here, actually, it should have been one year.

21 Q Why should it have been -- why should the days of
22 noncompliance for Count 14 be one year when it says one
23 day --

24 A Well --

25 Q -- on the -- in the Complaint?

1 A It should have been one year because we said you have
2 to maintain at least 12 months' worth of data. You have
3 to -- you have to keep at least 12 months' worth of
4 release detection records.

5 So we only went back for one year; although, for some
6 reason or another, we used one day. It was a typo.

7 And it ended up to be a penalty of \$1,500. It should
8 have been actually a penalty of -- a factor of 3; it
9 should have been \$4,500.

10 So actually, in the Complaint, the penalty was
11 actually miscalculated; and therefore, it was actually
12 less than what it should have been.

13 Q Okay.

14 A But the gist of it was the matrix was 1,500, there
15 was no adjustments, and it should have been a day
16 multiplier of three, because we considered we didn't have
17 any records that they were doing release detection for at
18 least 12 months.

19 Q Okay.

20 A That's as far as back as we know.

21 Q Okay. Thank you, Mr. Cernero. We can move on to
22 Count 15.

23 A Okay. This is --

24 Q And if you can first explain a little bit about what
25 the count is.

1 A Okay.

2 Q What the violation was --

3 A Okay.

4 Q -- and then --

5 A Okay. Then again, this is a "Failure to Operate a
6 Cathodic Protection System Continuously for Tanks in
7 Temporary Closure." Again, this is Monroe station.

8 This is the tanks, I believe it was four -- yes, four
9 tanks that were placed in temporary closure and were not
10 being used, except for that one tank in the last count
11 that had product in it.

12 This count has to do with the fact that the cathodic
13 protection system --

14 MR. KELLOGG: I'm sorry, there was a truck --

15 THE WITNESS: Oh, I'm sorry.

16 MR. KELLOGG: -- and I couldn't hear you.

17 THE WITNESS: I'm sorry. Okay.

18 MR. KELLOGG: Please go ahead.

19 THE WITNESS: The problem -- the problem with
20 this particular violation was that these tanks, those
21 four tanks were placed in temporary closure.

22 According to the regulations, if you are going
23 to put a tank in temporary closure and it's empty,
24 all the tanks are empty, you don't have to do release
25 detection; however, it still requires that cathodic

1 protection system stay on board; it has to be done,
2 all the bells and whistles for cathodic protection
3 has to be -- has to be taken care of.

4 And the reason for that is a temporary closed
5 tank assumes that sometime in the future, it's going
6 to be placed or could be placed in operation.

7 If you fail to keep the cathodic protection
8 system on during that temporary closure, for however
9 long it may be, maybe five years, 10 years, maybe
10 three months, whatever it is, has to be maintained
11 because corrosion will occur, regardless of whether
12 there's product in the tank, whether you are using
13 it; it's still going to deteriorate.

14 As long as you have your cathodic protection
15 system on it and it's intact and it's working, at
16 least you are going to stop the corrosion from
17 occurring so that if you did want to put it back into
18 permanent -- or into an operational mode, the tanks
19 are not going to be rusted out.

20 So therefore, it was in violation of the
21 regulations. Based on the nature --

22 Q (By Ms. Beaver:) When you say "it," you mean the
23 four tanks?

24 A Four tanks, right; four tanks. If they were to be
25 placed -- since they were in temporary closure, the

1 regulations do require that you maintain the cathodic
2 protection system.

3 Q Okay. What -- let's -- let's do days of
4 noncompliance first, and then go back to the matrix.

5 A Okay.

6 Q What did you calculate as the days of noncompliance?

7 A I calculated the day that it was taken out of
8 service, which was, according to the -- there was -- the
9 registration form, it was taken out of service, I believe,
10 in August of '01.

11 Then, of course, the day that I said they supposedly
12 got back in compliance was 02-16-05. It was a hundred --
13 1,279 days of noncompliance due to this violation;
14 therefore, the matrix or the multiplier was 5.5, because
15 of the number of days out of compliance.

16 Now --

17 Q So when you say the tanks were taken out of
18 compliance around --

19 A Out of service.

20 Q -- August of 2001 --

21 A They were taken out of service.

22 Q Taken out of service, I'm sorry.

23 A Right.

24 Q And that was the start date that you used for your
25 days of noncompliance --

1 A Right.

2 Q -- is that -- is the assumption there that they
3 failed to operate the cathodic protection system on August
4 '01, in August of '01, when they took the tank out of
5 service?

6 A Yes. And I --

7 Q The tanks out of service.

8 A Yes, but I think there's also -- that's -- that is
9 correct. There was no -- there was no indication that the
10 cathodic -- we don't know when the cathodic protection
11 system was shut off. But at the time of the inspection,
12 it was not there.

13 And as far as we know, we don't know -- of course,
14 this gets into the other count, which is Count 16.

15 Q Well, let's stay with Count 15 and not confuse the
16 issues, because I will get confused.

17 A Okay.

18 Q So let's stay with Count 15.

19 A Okay, okay. Well, all I'm saying is that based on
20 the fact that it was taken out of temporary closure -- or
21 taken out of service -- taken out of service temporarily,
22 August 17th of '01, that's the date that we used when we
23 determined that the cathodic protection system was no
24 longer working.

25 Q What -- help me understand. What evidence are you

1 relying on? Or was there any evidence to indicate that
2 the corrosion protection system was operating after August
3 of '01? Was there any evidence to indicate that the
4 system was operating after August of '01?

5 A No. And again, I don't want to bring up the next
6 count, but we had no -- no cathodic protection tests to
7 show that it ever worked.

8 Q Okay. And when we get to the next count, let's talk
9 about it first --

10 A Okay.

11 Q -- and then we can refer back.

12 A Okay.

13 Q But I just don't want to confuse --

14 A Okay.

15 Q -- the issues right now, at this point.

16 Okay. Now, let's back up to the matrix, still with
17 Count 15.

18 A Right.

19 Q At Monroe Service Station, for the four tanks. Let's
20 talk about your matrix assignment.

21 A Okay. Now, the matrix again -- and I don't
22 recollect -- for some reason we -- I know the reason, but
23 this was not considered a major-major, it was considered a
24 moderate-major.

25 And I don't have what was in the Complaint, but it

1 was a reduction -- or the potential for harm was not as
2 great as a major. And I don't have, in my information in
3 front of me, why the -- what the option was that we chose.

4 THE COURT: Well, wouldn't it be logical the
5 reason for that would be that there was considered to
6 be little --

7 THE WITNESS: May have --

8 THE COURT: -- or no product in the tanks,
9 right?

10 THE WITNESS: Right. Exactly. Right. And the
11 potential for harm is a whole lot less than when they
12 are in active tanks.

13 Q (By Ms. Beaver:) So --

14 A So I believe it was the potential for harm was a
15 moderate, and the deviation from the regulation was major,
16 to my recollection.

17 Q Right. So in the Complaint, you did moderate-major.

18 A Right.

19 Q For those reasons that the Judge clarified.

20 A Right.

21 Q And that you --

22 A I forgot what I did on that. But I know that it was
23 less potential for harm, because they were empty.

24 Q Right.

25 A Except for that one tank.

1 Q Right. The distinction is Count 14. Go ahead and
2 summarize the distinction between the matrix assignment
3 for Count 14 and Count 15.

4 A Yeah. The difference is that this -- these
5 particular tanks were not used -- not being used.

6 Q "These" in what count?

7 A I'm sorry?

8 Q I'm -- I'm wanting to qualify, for terms of the
9 record -- I want the record to accurately reflect what you
10 mean by "these."

11 A The tanks --

12 Q So my question was if you could go ahead and
13 summarize the difference between your matrix assignments
14 between Count 14 and Count 15, both at Monroe's Service
15 Station. All five tanks have been taken out of service.
16 The difference --

17 A All five tanks are taken out of service; however, one
18 of them had product in it.

19 Q And that was the tank that was the subject of which
20 count?

21 A Fourteen.

22 Q Fourteen? Okay.

23 A Right. And that was that potential for -- major
24 potential for harm versus the other four tanks that did
25 not have product in them and did not have cathodic

1 protection on -- the potential for harm was not as great
2 as the one in 14.

3 Q Okay, great. Now we can move on to Count 16.

4 Oh, first, did you summarize your -- your penalty for
5 15?

6 A Okay. The matrix again, was \$750, no adjustments for
7 the violator-specific adjustment.

8 It was -- the environmental sensitivity was 1.

9 The days of noncompliance factor was 5.5.

10 There was four tanks.

11 A violation of \$16,500 for that particular count.

12 There was no economic benefit that we could see that would
13 be significant to calculate.

14 Ready to go to 16?

15 Q Yes. We can move on to Count 16.

16 A Okay. Failure to -- the next one is failure --
17 again, it's still Monroe -- "Failure to Test Cathodic
18 Protection System Within Six Months of Installation, then
19 Every Three Years Thereafter."

20 The economic-based component was evaluated for
21 avoided costs and delayed costs. Only the avoided cost
22 was considered for this count.

23 Since RAM did not conduct cathodic protection tests
24 within six months of installation and then every three
25 years thereafter, some tests were missed.

1 Q Mr. Cernero.

2 A Yes.

3 Q Let me interject. Could you first explain what
4 count -- the violation of Count 16 is, exactly?

5 A Okay.

6 Q What is that violation and how does it differ from
7 Count 15?

8 A Because the cathodic protection system was supposed
9 to be in operation, there should have been a test -- there
10 should have been a test at least within -- the first test
11 that should have been done for this system should have
12 been within six months of installation.

13 Then every three years thereafter, there should have
14 been a cathodic protection test; in other words, a -- what
15 we call a half cell test or a soil -- a soil to structure
16 potential to make sure that the metal components are being
17 protected properly to prevent corrosion. And again, this
18 has to do with the engineering of corrosion protection or
19 cathodic protection.

20 This particular facility had no records that we had
21 that were sent to us showing that this system was ever
22 tested; although, it had a cathodic protection system, we
23 saw it, we saw the evidence that it had one, there was no
24 indication that it was ever tested, that it ever worked
25 from day one, when it was -- even when it was before

1 temporary closure.

2 Therefore, we said this is a violation that requires
3 that all cathodically-protected tanks must be tested
4 within six months of installation and every three years
5 thereafter.

6 And again, getting back on the economic benefit, it
7 was assumed that conducting the tests would cost
8 approximately \$100 per UST for each test missed. And, of
9 course, using the discount rates and so on and so forth,
10 it was 1,600 days --

11 Q Mr. Cernero.

12 A Yes?

13 Q I'm sorry. I need to ask you to back up for me a
14 little bit. Was the --

15 (Mr. Cernero stepped back from the easel.)

16 Q Not physically.

17 A Okay.

18 Q Figuratively. What's the significance, in Count 16,
19 of the caption "metallic" -- that -- "Failure to Test
20 Cathodic Protection Systems for Metallic Flex Connectors"?

21 A Actually, that was a misprint. It had nothing to do
22 with flex connectors. It had to do with the tanks.

23 If you look at the -- if you look at the actual count
24 in the regulation, the title was -- was misdome. The flex
25 connectors were not the issue; it was the actual tanks

1 that was causing the violation. But if you will read the
2 count, it doesn't mention anything about the flex
3 connectors.

4 Q So the actual allegations in the count were correct?

5 A That's right. And again, because we had so many
6 different counts in there, we had to make adjustments.

7 Q Okay. So then you can continue.

8 A Okay. Again, this one, if you look at the economic
9 benefit, I basically explained that. There was an
10 economic benefit from the standpoint they didn't have to
11 do -- they never -- they avoided doing cathodic protection
12 tests for two or three times for each tank.

13 So based on \$100 a tank, I came up with that they had
14 an economic benefit of avoided cost of \$349.12, which
15 hopefully is reflected here.

16 Q You said based on \$100 per tank?

17 A To do a test.

18 Q And the 86.78 per tank --

19 A Right.

20 Q Is that what you are estimating, or were you -- is
21 the hundred dollars put into a formula that spits out
22 86.78?

23 A It's put into a formula, because --

24 Q Okay.

25 A -- we figure inflation and everything, too.

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2 count, it doesn't mention anything about the flex
3 connectors.

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19 A Right.

20 Q Is that what you are estimating, or were you -- is
21 the hundred dollars put into a formula that spits out
22 86.78?

23 A It's put into a formula, because --

24 Q Okay.

25 A -- we figure inflation and everything, too.

1 Q Okay.

2 A Again, we are not talking about a significant amount
3 of money here, but I did put it in here. Now, as far as
4 the gravity base, again we used the matrix of \$750,
5 because, first of all, this doesn't have product except
6 that one tank. So the potential for harm is much less
7 than the tank that did have -- that did have product.

8 Since there was four tanks, the matrix was 750.

9 There was no adjustments for violator-specific, no
10 adjustments for sensitivity, but there was an adjustment
11 for the days of noncompliance, and that was from September
12 the 30th of 2000, until February 16th of '05 when the
13 inspection was done.

14 The reason why we went to September 30th, '05, is we
15 went back to the day that the tank was -- the violation
16 started six months after the installation, so that's what
17 we started with. Because of the statute of limitations,
18 we could only go back five years from the issuance of the
19 complaint. So we used September -- approximately
20 September, which would be approximately five years from
21 the -- prior to the issuance of the Complaint.

22 Q So for clarification, what would have been the
23 violation date or the date that violation occurred, or
24 that the initial violation occurred?

25 A I don't remember what date that tank was -- those

1 tanks were put in, but it would have been the date that
2 the tank was put in. And I think that says in the count,
3 it does refer to the date, but also refers to the fact
4 that we can't go back that far because of the statute
5 of -- statute of limitations.

6 Q Would it help you refresh your recollection if I
7 showed you the Complaint --

8 A Yes.

9 Q -- that's -- I believe that's in the record as
10 Complainant's Exhibit 8? No, no, no. Sorry.
11 Complainant's Exhibit 7.

12 A Yes. It's Count 16? Yeah, the period was from July
13 22nd, '99. Yeah, that's when the tanks were put in.

14 Q Okay.

15 A The latest date --

16 Q Let me ask you -- let me ask you -- did looking at
17 the Complaint help you remember the day that the tanks
18 were put in operation?

19 A I believe that the July '99 date was the six months
20 after the installation of the tank, so it -- the tank was
21 probably put in at the beginning of '99, I believe.

22 Q Okay. Great. Thank you, Mr. Cernero.

23 A Okay.

24 THE COURT: Maybe at this point, we should give
25 Mr. Cernero a break. And so we'll take a 10-minute

1 recess.

2 THE WITNESS: Thank you.

3 MS. BEAVER: Sounds great, Your Honor. Thank
4 you.

5 *****

6 (A break was taken, after which the following
7 continued:)

8 THE COURT: The hearing will be in order.

9 When you started out your testimony,
10 Mr. Cernero, and you were referring to requirements
11 or activities done by then Respondent above and
12 beyond the requirements, I thought you were referring
13 to Supplemental Environmental Projects. I assume you
14 are very familiar with those.

15 THE WITNESS: Yes, I am.

16 THE COURT: And but those aren't involved here?

17 THE WITNESS: Right.

18 THE COURT: Proceed.

19 MS. BEAVER: Thank you, Your Honor.

20 THE COURT: I just wanted to clarify that.

21 Q (By Ms. Beaver:) Mr. Cernero, I believe we are now
22 at Count 17 --

23 A Seventeen.

24 Q -- having dropped -- no, no, no. We're at 17.

25 And then from 17, we'll go to 20, just for the

1 record, having withdrawn Counts 18 and 19.

2 A We only have two more left, right?

3 Q That's right.

4 A Oh.

5 Q We have two left, 17 and 20.

6 A Okay, 17.

7 Q So first, if you would characterize what the count
8 is, what the violation is, and then explain your penalty
9 calculation.

10 A Okay. Now, this was for --

11 Q So we are still with Monroe's Service Station.

12 A Okay. Okay. I'm sorry. Yeah.

13 Q Count 17.

14 A Count 17. All right. Count 17 was "Failure to
15 Conduct an Integrity Test of Tanks Prior to Installing a
16 Cathodic Protection System."

17 Yeah, let me explain what an integrity test is.

18 Under the regulations, all tanks -- all existing tanks; in
19 other words, tanks that were installed prior to -- on or
20 prior to December 22nd, 1988, had to have an upgrade by
21 December 22nd '98.

22 One of the processes of upgrading an existing tank
23 was to add cathodic protection or protection from rust on
24 steel components; however, the regulation said that if the
25 tank was more than 10 years old and you wanted to put a

1 cathodic protection system -- a cathodic protection system
2 on that particular tank to upgrade it, you had to do what
3 they called an integrity test.

4 And all an integrity test was, was determining
5 whether the tank had a structural integrity enough that --
6 that a cathodic protection system would do any good.

7 It's kind of like buying an old car and you want to
8 put a new engine in it. Is the car rusted out? Does it
9 make any sense to put a new engine in it? If it is, you
10 do an integrity test, and then you can put a new engine.

11 This is very similar to the fact that you want to
12 determine the condition of that tank prior to installing
13 cathodic protection.

14 There's several ways you could do it. One way you
15 can do it is actually have someone to actually go inside
16 and cut a hole in the tank, have someone go and save -- go
17 inside the tank and test the tank from the inside by using
18 various methods of -- of testing the metal, or you can do
19 what they call a mean time to corrosion failure test,
20 which essentially takes soil samples from around the tank,
21 has an expert that's in corrosion protection determine how
22 much more life this particular tank has.

23 Once it gets to a certain point and says yes, it has
24 this much life, then it says okay, put the cathodic
25 protection system on.

1 If it doesn't pass the test either going inside the
2 tank or doing a system that determines that length of life
3 left, and it says no, you can't do it, that tank has to be
4 pulled out because you cannot add cathodic protection on
5 there.

6 This is what this count is about. We said that the
7 Respondent failed to do an integrity test. By failing to
8 do an integrity test, we don't know if the cathodic
9 protection system should have been put on in the first
10 place.

11 Okay. Given that, I'll explain what the penalty --

12 Q And Mr. Cernero, the alternative is to install a new
13 tank --

14 A That's right.

15 Q -- if it doesn't have the structural integrity, is
16 that correct, to do the -- to install a cathodic
17 protection system?

18 A Right.

19 Q The alternative is to --

20 A To pull the tank, put a new one in, or don't even use
21 it. In other words, if the tank is Swiss cheese, you
22 don't want to -- you don't want to try to upgrade it --
23 you don't want to try to upgrade it to protect it from
24 getting holes if it already has holes, or it's almost that
25 the shell under it is so thin, it's not going to last very

1 long.

2 And EPA states -- requires these integrity tests to
3 make sure that people aren't just putting cathodic
4 protection system on it to avoid having to pull the tanks
5 out or getting rid of the tanks.

6 The economic base component was evaluated for avoided
7 and delayed cost in this situation. Only the delayed
8 costs were considered in this count. Since RAM,
9 Incorporated, did not conduct an integrity test prior to
10 the cathodic protection system, the test will be required,
11 as it is now.

12 It is assumed that the conducting of the test would
13 be approximately \$2,800 for each tank. We looked at some
14 costs for doing integrity test, and that was roughly what
15 it cost, is \$2,800 per UST.

16 Again, using the same rates that we did before, it
17 came out that the delayed cost was about \$386.34 per tank,
18 making it a total of -- avoided costs -- of \$1,545.36.
19 And again, excuse me for the cents, but that's just the
20 way the computer kicks it out.

21 So the -- on Count 17, the economic benefit was
22 approximately \$1,500. And that's because they avoided
23 doing an integrity test back when they should have done
24 it, \$28 per -- \$2,800 per tank.

25 So that's the economic benefit. And that was

1 significant in this case, so I went ahead and calculated
2 it.

3 Now, the gravity base on this was that it was \$750,
4 because the potential for harm was not as great as it
5 would be in the other situations.

6 The deviation -- the major -- and I think it's a
7 major deviation from the requirement, but it's a moderate
8 deviation of potential for harm.

9 And again, I wish I had my -- the counts in front of
10 me, I could actually get that information.

11 So it was not as grievous as not having -- no
12 cathodic protection, but the fact is that we are still --
13 we are in a quandary as to whether that tank was good
14 enough to have the cathodic protection put on it in the
15 first place. You're making the assumption that well,
16 hopefully it's not leaking. If the leak detection is in
17 place, at least we know it's not leaking. So we were able
18 to reduce the matrix from -- from normally 1,500, down to
19 750.

20 We did not give -- again, no violator-specific
21 adjustments.

22 The sensitivity was 1.

23 The problem is that the days of noncompliance is very
24 high, because we went back five years because of the
25 statute of limitations. We went back to September 30th of

1 2000, and it ended up being 1,600 days of noncompliance.

2 The days of noncompliance multiplier was five
3 point -- excuse me -- 6, I'm sorry; a multiplier of 6.

4 Multiply all that, and you come up with an \$18,000
5 fine for failure to do an integrity test prior to
6 installing the cathodic protection.

7 Now, the problem here is that if we go back -- if the
8 Respondent goes back and does an integrity test, which
9 would be required to get back into compliance, and it
10 fails, they will have to pull the tank out. If it doesn't
11 fail, they continue on.

12 Q And so in this particular case at Monroe's Service
13 Station --

14 A Is this -- is this -- yeah, that's Monroe. Sorry.

15 Q Yeah, this is Monroe first.

16 A Okay.

17 Q Would it matter if -- or how would it factor in, if
18 at all, to your penalty calculation, if these tanks are
19 placed in permanent closure?

20 A If they are placed --

21 Q If they are --

22 A It still doesn't avoid the penalty. However, we were
23 able to reduce the -- the matrix, because it was not in --
24 is not in operation, it was a temporary closed tank. So
25 even though --

1 Q Three of the four, or all four?

2 A No, the three -- just three of them were -- one tank
3 had product in it, so that -- well, I'm not going to get
4 into that, but it was actually four tanks; it was for four
5 tanks. Four tanks did not have an integrity test prior to
6 installing cathodic protection.

7 Q Okay.

8 A So if they are going -- if the tanks are going to be
9 pulled by the Respondent, that does not relieve them of
10 paying a penalty, because they should have done it. It
11 was something they should have done.

12 However, if they pull the tanks in the future, then
13 there's no point in going back and doing integrity tests;
14 they saved the money for doing the integrity tests.

15 Q Okay.

16 A All right?

17 Q Let's proceed now to Count 20.

18 A Okay. Count 20 is base -- is the same thing, but
19 it's for Long -- I forgot the name of the facility.
20 Longview? Or is it Long --

21 Q Longtown.

22 A Longtown.

23 Q Citgo.

24 A "Failure to Conduct an Integrity Test of Tanks Prior
25 to Installing."

1 Again, it's basically the same economic benefit;
2 however, they also failed to do an integrity test at this
3 facility, at those four tanks. And we also gave the
4 matrix of 750.

5 Now, again, I'm a little confused why we did 750 on
6 this one, but that's what we did. We said it was -- and I
7 believe it was the matrix itself, or the penalty policy,
8 allowed us to go down to 750.

9 And I think it was a -- deviation from the
10 requirements was major, and potential for harm was
11 moderate. Is that correct?

12 Okay. Essentially, this is very close to the one
13 previous to it. The only thing different was the fact
14 that -- well, there was no difference. It's actually the
15 same penalty, the same penalty now.

16 Very similar, these two. The reason why is days of
17 noncompliance. You can only go back five years, so the
18 multiplier for days of noncompliance was the same.
19 Basically, everything was the same.

20 But again, it was because they did not conduct the
21 proper testing prior to installing a cathodic protection
22 system.

23 Q Okay. And so we've been through each count. And
24 your total penalty would be --

25 A It was 179,700 and change, something like that, total

1 penalty.

2 Q Okay. And is this penalty, in your opinion,
3 consistent with the statute, the UST statute?

4 A Yes, because it does not exceed the \$11,000 per tank
5 per day of violation.

6 Q Do you --

7 A It has not exceeded that.

8 Q Okay. Is this penalty, in your opinion, consistent
9 with the penalty policy?

10 A Yes, it is.

11 Q The UST penalty policy?

12 A Yes. I think it's very fair. It -- there is a --
13 there is a flexibility to go higher; although, we -- we
14 feel like this is a very conservative approach to the
15 penalty policy and the violation -- the type of violations
16 that we found.

17 \$179,000 is not out of line from the orders that I --
18 that I have settled with; as a matter of fact, this is --
19 this is somewhere in the middle. I have had penalties as
20 high as \$375,000, and that was under settlement. The
21 actual calculated penalty was more.

22 MS. BEAVER: Okay. I have no further questions
23 at this time, Your Honor, for this witness.

24 THE COURT: You may begin your cross
25 examination. Mr. Kellogg, are you --

1 MR. KELLOGG: Thank you, Your Honor. And I have
2 a brief statement that I would like to make.

3 THE COURT: Yes.

4 MR. KELLOGG: Sir, you may take the witness
5 stand.

6 And Your Honor, I want to hand the witness a
7 notebook which has been provided to counsel. And I
8 don't know if we have provided Your Honor's notebook
9 yet or not --

10 THE COURT: Well, I think you --

11 MR. KELLOGG: -- but it is exhibits that --

12 THE COURT: Well, I think you -- it's one you
13 have mailed to me, right? You have given it to me
14 back --

15 MR. KELLOGG: We have given you the exhibits,
16 but we've also prepared a notebook for you today with
17 tabs, so that you can find them easily --

18 THE COURT: Okay.

19 MR. KELLOGG: -- yourself.

20 THE COURT: They wouldn't fit in my little
21 briefcase.

22 MR. KELLOGG: No. And -- and as we get to a
23 document, if we get to a document that they haven't
24 stipulated to, I will point that out.

25 THE COURT: Yeah.

1 MR. KELLOGG: But so far, all the documents I
2 believe I'm going to cover have been stipulated to.

3 (An off-the-record conversation was held, after
4 which the following continued:)

5 MR. KELLOGG: And I'm handing you the -- I'm
6 sorry it's so big, Judge.

7 THE COURT: Yeah, that's okay.

8 MR. KELLOGG: Seems to be a lot of paper.

9 THE COURT: Yes. You may proceed, Mr. Kellogg.

10 MR. KELLOGG: Thank you, Your Honor.

11 May it please the Court. My name is Robert D.
12 Kellogg, and I'm one of the lawyers for the
13 Respondent in this proceeding.

14 And I wanted to announce to you, Your Honor,
15 that we determined this morning, during the
16 presentation, that to speed this case along, we
17 agreed to stipulate to the violations. We did that
18 to speed this along.

19 That decision was made after we had already
20 prepared our case in a different way. As a result of
21 that, what we would like to present, Your Honor, is I
22 will ask the witness the technical questions about
23 the matters that he has done. My co-counsel,
24 Mr. Shipley, later, we would like to address why
25 we're even in this phase at all, of the case and the

1 penalties.

2 And in doing that, we've had to rearrange our
3 paperwork and our order of presentation and our trial
4 notebook, if you will. And so I may stumble around a
5 little bit, flipping through documents, and I
6 apologize in advance.

7 But we still believe that this would save
8 roughly a day's worth of testimony in this
9 proceeding. And that -- that's what I have to say,
10 Judge.

11 MS. BEAVER: Your Honor, I'm not sure that I
12 understand what the intention is of counsel.

13 MR. KELLOGG: We would like to have me cross
14 examine the witness first, followed by Mr. Shipley.
15 I will address the technical issues, Mr. Shipley will
16 look into more the global effect of his testimony.

17 MS. BEAVER: And is this regarding penalty only,
18 since they have stipulated to liability?

19 MR. KELLOGG: Yes.

20 THE COURT: Mr. Kellogg has answered that
21 question in the affirmative.

22 So you may proceed under that understanding,
23 Mr. Kellogg.

24 MR. KELLOGG: Thank you, Your Honor.
25

CROSS EXAMINATIONBY MR. KELLOGG:

1
2
3
4 Q Good afternoon, Mr. Cernero. I'm -- I'm pleased to
5 meet you. We have not met before, have we?

6 A No, I don't think we did.

7 Q I think you met --

8 A I met --

9 Q -- my partner --

10 A Yes, I have.

11 Q -- perhaps, and Jamie --

12 A Right.

13 Q -- and my other partner, Jamie Taylor Boyd.

14 And you have not been deposed in this case, have you?

15 A Have I? No, I don't think --

16 Q Do you recall being -- having your deposition taken?

17 A Oh, no, no, no, no, I have not. No, I haven't.

18 Q All right. And so -- just so that His Honor will
19 appreciate it, my questions for you, I don't know the
20 answers, either. So we're going to learn about this case
21 together, all right?

22 Let me ask you, when the Underground Storage Tank
23 program first came in to be the UST at the federal level,
24 when was that, sir?

25 A I believe the law was passed somewhere around '84.

1 And again, I have my dates wrong or my -- my years wrong.
2 The actual regs came out somewhere around '87, but it
3 became effective -- actually, the technical regs came out,
4 I believe, December 22nd of '88. That's when it --

5 Q December -- the end of 1988?

6 A Right.

7 Q And the penalty policy that you have testified from
8 was -- was written or put in place, was it not, in 1990?

9 A I believe it was.

10 Q Yes.

11 A I don't have it. Yeah.

12 Q Thank you.

13 A Uh-huh.

14 Q And in 1990, the UST program was brand new, was it
15 not?

16 A It was -- yeah. Well --

17 Q Two years?

18 A For federal -- the federal level. The states had
19 a -- a lot of states had UST programs in place.

20 Q Okay.

21 A Yes.

22 Q Good. Thank you. Now, I want to ask you about
23 the -- well, one last question before I start looking at
24 the counts. Do you know what the price of gasoline was in
25 1990, sir?

1 A Probably a lot less than it is. Probably at 30, 40,
2 50 cents a gallon back then. Well, no, 1990 --

3 COURT REPORTER: I'm sorry? I didn't hear how
4 much.

5 THE WITNESS: The -- I would guess the estimate
6 back in '90 -- well, I really don't know, but I know
7 it was a lot cheaper than it is right now.

8 Q (By Mr. Kellogg:) A lot cheaper --

9 A A whole lot cheaper --

10 Q -- than it is --

11 A Yes, I agree.

12 Q All right. And when -- when you made your decision,
13 or -- well, did you decide that it was RAM that was going
14 to be inspected in February of 2005, or did someone else
15 decide that?

16 A I had -- I had -- I was just a pawn in this whole
17 thing. My understanding was that they needed somebody to
18 do the inspections; Greg Pashia could not do the
19 inspections. And I was given a list and said, "we need to
20 have these inspected."

21 All I asked was that I would -- I wanted to do it
22 within a day or two. So essentially, we picked those
23 facilities that were close, like from Eufaula, McAlester,
24 Hartshorne were all in the general area, and I said,
25 "that's all I'll do." So I did five.

1 Q All right.

2 A Did five inspections.

3 Q And your list that you were given, there were five on
4 it; is that right?

5 A I think there was more than that, but I could not --
6 I was -- I would not have been able to do all of those in
7 one or two days, because there was some that were pretty
8 well spread out. So essentially, we picked the central
9 ones that were around the McAlester area.

10 Q Was everyone on your list RAM, or were there other
11 companies, too?

12 A No, I think on -- no, this situation, it was just
13 RAM.

14 Q Just RAM?

15 A Yeah.

16 Q All right. Now, you -- what day did you leave Dallas
17 to come to do your first inspection?

18 A I don't remember. I probably left the day -- I
19 probably left early February 16th. I don't remember if I
20 stayed the night before; I really don't rec -- I don't
21 remember.

22 Q All right.

23 A But it was just within a day or time (sic).

24 Q Did you go direct to the facility?

25 A Yes.

1 Q Did you -- before you went and made that inspection,
2 did you stop by the offices of the Oklahoma Corporation
3 Commission and look at their files on these facilities?

4 A No. They already -- I already had the information
5 from them. I had the registration or the sheet showing me
6 what -- what was to be -- what -- what tanks were there,
7 how many tanks were there. I had the information before I
8 left, yes. I didn't go by the OCC, no.

9 Q All right.

10 A I met -- I met Mr. Roberts at the time, and we
11 started conducting inspection. We had a very short period
12 of time, so we really moved on getting the inspections
13 done as quickly as possible.

14 Q All right. Now, you -- you said you met Mr. Roberts,
15 and you gestured towards the audience. Is Mr. Roberts
16 present here today?

17 A Yes. (Pointing:) This is Mr. Roberts, right there.

18 Q All right. Thank you. And you said you had the
19 information on RAM --

20 A I had -- I had --

21 Q -- and you described --

22 A I had some of the registration information, where the
23 location of the facility was, the dates the tanks were put
24 in the ground, some of the basic information that you
25 need.

1 Q Basic information?

2 A Yeah.

3 Q Did you have the inspection sheets from the last one
4 or two inspections?

5 A No, I did not.

6 Q All right. Now, I would like to direct your
7 attention to Count 1.

8 No, Judge, the last ones we looked at, just because
9 they are more fresh on our memory, were Counts 17 and 20.

10 A Yeah.

11 Q And that was Longtown, I believe. And so I would
12 like to actually begin with Count 17. I'm sorry. Yeah,
13 Count 17 is Monroe's, and Count 20 is Longtown. And you
14 recall your testimony in general about those two, do you
15 not?

16 A Yeah.

17 Q And --

18 A I don't have everything in front of me, but I --

19 Q -- if you know the exhibit number of your exhibit,
20 it's in that -- no, those are only our exhibits, right?
21 But I don't think you will need to refer to it. Let's
22 just look at 17 and 20. And what I would like to have you
23 do --

24 MS. BEAVER: Your Honor, may I provide the
25 witness with the Complainant's exhibit so that he can

1 have a complete set?

2 MR. KELLOGG: Okay.

3 THE COURT: Yes, please do so.

4 MR. KELLOGG: In fact, that's a good idea. And
5 my apologies for not doing that myself.

6 (Ms. Beaver handed a notebook to the witness.)

7 (An off-the-record conversation was held, after
8 which the following continued:)

9 Q (By Mr. Kellogg:) And if I may try to simplify what
10 it was you said --

11 A Uh-huh.

12 Q -- Mr. Cernerero.

13 A All right.

14 Q You said, in essence, that RAM did not conduct an
15 integrity test before it installed the corrosion
16 protection system; is that right?

17 A I had no evidence that they had conducted an
18 integrity test prior to the installation of the corrosion
19 protection.

20 Q All right. But the penalty you charged was as if it
21 had not been done; isn't that correct?

22 A That's correct.

23 Q All right. And it's not necessarily true that the
24 test wasn't done, it was just that we couldn't document it
25 for you; is that correct?