

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

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ENVR. APPEALS BOARD

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Ram, Inc.,	)	Docket No. SWDA-06-2005-5301
	)	
	)	
Respondent	)	

INITIAL DECISION

I. Introduction and Procedural Background

This proceeding was initiated on August 19, 2005 by the filing of a complaint pursuant to Section 9006 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act<sup>1</sup> ("RCRA" or "Act"), 42 U.S.C. § 6991e, and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), by the Director of Multimedia Planning and Permitting Division, U.S. Environmental Protection Agency, Region 6 ("Complainant"). The Complaint charges Ram, Inc. ("Respondent" or "Ram") with failing to comply with requirements of the State Underground Storage Tank ("UST") regulations issued by the Oklahoma Corporation Commission ("OCC") and found under Title 165 of the Oklahoma Administrative Code ("OAC"), Chapter 25, cited as OAC 165:25. See 40 C.F.R. § 282.86.<sup>2</sup>

Complainant alleged that Respondent failed to comply with the UST regulations at five of its facilities. The Complaint alleged that Respondent was liable for a total of twenty violations and sought a penalty totaling \$279,752.

Ram, through counsel, filed its Answer and Request for Hearing ("Answer") on October 13, 2005. The Answer admitted certain factual allegations and denied others, emphasizing that Respondent's facilities have been inspected by OCC many times before and found to be in compliance. Respondent argued that the penalty was excessive for various reasons, including, *inter alia*, that violations at a facility should be considered a single process violation rather than being multiplied by the number of tanks involved, the periods of alleged noncompliance were in

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By the Hazardous and Solid Waste Amendment of 1984, Congress added Subtitle I, RCRA to the SWDA. The national Underground Storage Tank program is set forth in Sections 901 through 904 of Subtitle I (42 U.S.C. § 6991 *et seq*) and the Federal regulations are found at 40 C.F.R. Part 280.

The Oklahoma UST program was authorized pursuant to 40 C.F.R. Part 281 on August 12, 1992 by the U.S. Environmental Protection Agency ("EPA") (57 Fed. Reg. 41,874) and became effective on October 14, 1992. The approved State regulations were identified in the Federal Register on January 18, 1996 (61 Fed. Reg. 1221) and are listed at 40 C.F.R. § 282.86.

fact periods of compliance, the penalty was disproportionate to the harm and gravity of the violations, and Respondent is unable to pay such a penalty.<sup>3</sup> Additionally, Respondent contended that the penalty should be mitigated because it relied on independent contractors and consultants for compliance with the requirements at issue.

On February 3, 2006, the Administrative Law Judge ("ALJ") issued an order directing the parties to exchange prehearing information on or before March 6, 2006. Complainant filed its prehearing exchange on March 3, 2006. On March 6, 2006, Respondent sent copies of its prehearing exchange by courier to the ALJ, Regional Hearing Clerk, and Complainant.

On April 14, 2006, Respondent filed a Motion to Request Additional Discovery and Brief in Support Thereof ("Ram Motion"). Ram asserted that Complainant's inspection and calculation of penalties against Respondent were inconsistent with the inspection and enforcement policies and practices of OCC, the EPA-delegated enforcement authority of the UST program in Oklahoma, and inconsistent with EPA's own inspection and enforcement policies. Ram requested: 1) copies of all EPA inspection records and enforcement documents for UST facilities located in Oklahoma, including facilities owned and operated by Native American tribes, Native American individuals, and/or located in Indian Country in Oklahoma; 2) copies of all of EPA's evaluations of Oklahoma's UST Program; 3) copies of EPA's communications with OCC regarding Ram; and 4) a copy of the Memorandum of Understanding or similar documents executed between EPA and OCC regarding UST regulation and enforcement in effect at the time of EPA's inspection of Respondent's facility in February 2005 (Ram Motion at 2). The discovery request was denied upon the basis that settlements involve a myriad of factors and are thus not relevant to what may be an appropriate penalty in the instant proceeding and because of Complainant's contention that compliance with the request was unreasonably expensive and unduly burdensome.

A hearing on this matter was held in McAlester, Oklahoma, on May 9 through 11, 2006. At the opening of the hearing, Complainant dropped Counts 5, 6, 11, 13, 18 and 19 from the Complaint (Transcript "Tr." 14), thereby reducing the proposed penalty to \$175,062.75.<sup>4</sup> Respondent stipulated to liability on each count not dropped or dismissed by Complainant, but contested the amount of the proposed penalties on that basis that they were so excessive as to be a violation of substantive due process (Tr. 56, 23).

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

## **II. Findings of Fact**

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Respondent withdrew its inability to pay argument prior to the pre-hearing exchange.

Tr. 14; Post-Hearing Brief at 60. Counts 5, 6, 11, and 19 alleged the failure to document that a corrosion control expert designed a field-installed cathodic protection system at Citgo Quik Mart, Goodwin's One Stop, and Longtown Citgo Station. Count 13 involved the failure to test Cathodic Protection Systems for metallic flex-connectors at Goodwin's One Stop, and Count 18 involved the failure to conduct tank tightness testing every five years when using the inventory and tank tightness method of release detection at Longtown Citgo Station.

1. Ram, Inc. ("Ram") is a corporation incorporated in the State of Oklahoma (Tr. 619) (Complainant Exhibit "CX" 1). Mr. Ronald Allford is the President of Ram (Tr. 619), (CX 1).
2. Ram as a corporation is a "person" as defined by OAC 165:25-1-11 (40 C.F.R. § 280.12).
3. Ram is categorized by the federal government as a small business employing 80 to 85 persons (Tr. 621).
4. Ram is the owner of the five gasoline and convenience store facilities identified in the Complaint, which are: (1) Citgo Quik Mart, 1400 E. Carl Albert, McAlester, OK, State ID No. 6112639; (2) Citgo Thrif-T-Mart, 650 S. Main, McAlester, OK, State ID No. 6113782; (3) Goodwin's One Stop, 1000 Penn Avenue, Hartshorne, OK, State ID No. 6112635; Monroe's Service Station, 320 N. Main, Eufaula, OK, State ID No. 4604346; and (5) Longtown Citgo, HWY 9, Eufaula, OK, State ID No. 6104478 (CX 7 at 3). Ram does not operate all five facilities. Goodwin's One Stop and Citgo Thrif-T-Mart are not operated by Ram employees but instead Ram has Marketing Agreements with marketers at these facilities (Tr. 623; Respondent Exhibits "RX" 46-48).
5. Pursuant to OAC 165:25-1-41 [40 C.F.R. § 280.22], Respondent submitted documentation to the OCC in order to register its USTs.
6. Ram is an "owner and/or operator" of USTs and UST systems located at the facilities listed in finding 4.
7. Ram is in the petroleum marketing business selling gasoline, diesel, propane, kerosene and solvents (Tr. 620). Ram is a fuel and convenience store marketer that provides wholesale and retail petroleum products to the public.
8. Ram has stipulated to liability for each and every count that has not been dropped by EPA, which includes at Citgo Quik Mart: Count 1 (failure to provide spill prevention for three new tanks), Count 2 (failure to provide adequate spill prevention capacity for six tanks), Count 3 (failure to conduct monthly release detection monitoring of a tank during temporary closure), Count 4 (failure to conduct monthly release detection monitoring for five tanks); at the Citgo Thrif-T-Mart: Count 7 (failure to operate cathodic protection system continuously for three tanks), Count 8 (failure to test automatic line leak detectors annually for three tanks), Count 9 (failure to test pressurized lines annually or use monthly monitoring for three tanks); at Goodwin's One Stop: Count 10 (failure to provide adequate spill prevention for one tank), Count 12 (failure to conduct stick readings and Tank Tightness Testing as required for Inventory Control; no release detection for three tanks); at Monroe's Service Station: Count 14 (failure to conduct release detection for a tank in temporary closure), Count 15 (failure to operate cathodic protection systems continuously for four tanks in temporary closure), Count 16 (failure to test cathodic protection systems within six months of installation, then every three years

thereafter for four tanks), Count 17 (failure to conduct an integrity test prior to installing a cathodic protection system for four tanks); and at Longtown Citgo: Count 20 (failure to conduct an integrity test prior to installing a cathodic protection system for four tanks) (Tr. 56, 65).

9. On February 16 and 17, 2005, John Cernero ("Cernero"), an environmental engineer and enforcement officer in the UST program at EPA, conducted an inspection of the five Ram facilities referred to above. Mr. Cernero was accompanied during the inspection by Mr. John Roberts of the OCC (Tr. 60, 62-63; CX 1). On February 17, 2005, they reviewed additional records concerning the USTs at Ram's offices located at 106 6<sup>th</sup> Street, McAlester, Oklahoma. Upon completion of the inspection, Mr. Cernero reviewed the inspection reports, determined the violations and developed a draft complaint (Tr. 64). Notice of this action was given to the State of Oklahoma prior to the issuance of the Complaint pursuant to the Memorandum of Agreement ("MOA") with the State and Section 9006(a)(2) of the Act, 42 U.S.C. § 6991e(a)(2) (CX 7 at 2; Tr. 64, 389).
10. Every year, EPA Region 6's UST office conducts oversight inspections in Oklahoma (Tr. 38). One set of inspections is allowed per year due to limited resources (Tr. 40). In 2004, EPA and OCC conducted a joint inspection of the USTs in the Pittsburg County geographical area (Tr. 40). The geographic area was chosen in consultation with Greg Pashia, an EPA Compliance Officer with the UST office, EPA's UST Section Chief, Willie Kelley, and the manager of the OCC Compliance Office in Oklahoma City, Butch Jeffers (Tr. 37). Citgo Quik Lube, an UST in McAlester, Oklahoma, owned by Ram, was inspected for that geographical area on November 10, 2004 (Tr. 30-31; 40; 43). Three violations were found concerning cathodic protection (Tr. 31). EPA issued a field citation<sup>5</sup> in the amount of \$750 which Ram paid (*Id.*; 44-45). In December 2004, EPA's Gregory Pashia received a phone call from John Roberts of OCC regarding an Aboveground Storage Tank ("AST") release of product from one of Ram's facilities.<sup>6</sup> These violations raised concerns within Region 6 concerning compliance with UST regulations at other facilities owned or operated by Ram (Tr. 32). This led to the EPA inspection of the Ram facilities on February 16 and 17, 2005, referred to in finding 9 (CX 1).
11. Mr. Cernero calculated the proposed penalties in the Complaint (Tr. 65; CX 12; CX 19). He testified that the purpose of penalties was to deter violations and that under the statute, as amended, the maximum penalty was \$11,000 per tank, per day of violation (Tr. 66). In calculating the penalties, he used the EPA Penalty Guidance For Violations of UST Regulations (OSWER Directive 9610.12, November 14, 1990) ("Guidance") (Tr. 67; CX 12). He pointed out that the Guidance or "penalty policy" was made up of two general components, an economic benefit component, which is intended to remove any amount the owner or operator may have gained from noncompliance, and a gravity-based component, which is concerned with the potential for harm and deviation from the

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For field citations, EPA does not use the penalty policy to determine a penalty. Instead, the penalty is based on a table created by EPA headquarters which is designed to deter violations but is usually kept low (Tr. 48-49).

Tr. 32. ASTs are regulated under the Clean Water Act rather than RCRA.

regulations (Tr. 67-68). The economic benefit and gravity-based components are added together to yield a penalty target figure which is included in the complaint (Tr. 82; Guidance at 3).

12. Mr. Cernero testified that the economic benefit component was composed of "avoided costs" (periodic operation and maintenance expenditures averted by the violator's failure to comply) and "delayed costs" (costs deferred by the violation but which will be incurred later to achieve compliance) (Tr. 68, 69). Avoided costs are calculated as avoided expenditures, plus avoided expenditures, multiplied by the interest rate, multiplied by the number of days, and divided by 365 days, which determines the interest incurred [earned] if money is put in the bank. This is multiplied by the marginal tax rate to see what Respondent would actually save (Tr. 69, 70; Guidance at 5). Delayed costs are calculated as delayed expenditures, multiplied by the interest rate, multiplied by the number of days, and divided by 365 days (Tr. 70-71; Guidance at 7).
13. The gravity-based component of the penalty is determined from a matrix having values of Major, Moderate, and Minor for deviation from the requirement on one axis, and Major, Moderate, and Minor for the potential for harm on the other (Tr. 72; Guidance, CX 12). The matrix has nine cells ranging from \$50 for a minor deviation from the requirement and a minor potential for harm to \$1,500 for a major deviation from the requirement and a major potential for harm. The gravity-based component equals the matrix value plus or minus the violator-specific adjustments, times the environmental sensitivity multiplier, times the days of noncompliance multiplier (Tr. 72; Guidance at 8). As a guide to determining the appropriate gravity level, a list of selected violations of the Federal UST requirements and the associated deviation from the requirements and potential for harm has been developed (Guidance, Appendix A, Matrix Values for Selected Violations of Federal Underground Storage Tank Regulations). Subpart B is entitled "UST Systems: Design, Construction, Installation, and Notification." This list is based on the performance standards for new UST systems in 40 C.F.R. § 280.20. An example of a violation from the list is installation of an improperly designed and constructed metal tank that fails to meet corrosion protection standards. The unit of violation is indicated to be per tank, the deviation from the requirement is major, the potential for harm is moderate and the matrix value is specified as \$750.
14. Violator-specific adjustments to the matrix values are based on the violator's cooperation, degree of willfulness or negligence, history of noncompliance, and other unique factors (factors not in the top three categories, an example of which may be an act of God) (Tr. 73, 78; Guidance at 8, 11). The Guidance provides that prior to settlement negotiations, enforcement personnel have the discretion to use any relevant information to adjust the matrix value upwards or downwards (Guidance at 10). The Guidance allows adjustments of up to a 50% increase or a 25% decrease, except for History of Noncompliance, which provides for an up to 50% increase only.
15. Mr. Cernero testified that repairs or modifications [subsequent to discovery of the violation] were not factored into the penalty calculation because correcting the violation is something that should have been done in the first place (Tr. 88, 89). He pointed out

that under the penalty policy [Guidance] some leeway might be given in reducing the penalty for cooperation if the violator was doing something over and beyond what the regulations required. The degree of Willfulness or Negligence considers such factors as the control the violator had over the events constituting the violation, whether the events constituting the violation were foreseeable, whether the violator made good faith efforts to comply and/or took reasonable precautions against the events constituting the violation, and whether the violator knew or should have known of the hazards associated with the conduct (Guidance at 11, 12).

16. The History of Noncompliance is covered in Section 3.2.3 and provides, *inter alia*, that previous violations of any environmental regulation are usually considered clear evidence that the violator was not deterred by previous interaction with enforcement staff and enforcement actions (Guidance at 12). Unless the current violation was caused by factors entirely out of the control of the violator, prior violations should be taken as an indication that the matrix value should be adjusted upwards. Factors considered here include the number and seriousness of the previous violations, the time period over which the previous violations occurred, the similarity of the previous violations and the violator's response to the previous violations with respect to correction of the problem (*Id.*).
17. "Other Unique Factors" are covered in Section 3.2.4 and provide for an adjustment for unanticipated factors that may arise on a case-by-case basis. As in other adjustment factors, the adjustment may be upwards as much as 50% and downwards as much as 25% (Guidance at 13).
18. The Environmental Sensitivity Multiplier ("ESM") takes into account the adverse environmental effects that a release caused by a violation may have had given the sensitivity of the local area (Guidance, Section 3.3 at 13). The ESM is distinguished from the potential-for-harm factor which takes into account the probability that a release or other harmful action would occur because of the violation (*Id.*). Instead, the ESM addressed here looks at the actual or potential impact that such a release, once it did occur, would have on the local environment and public health. The ESM will be either low, moderate or high depending on factors such as the amount of petroleum or hazardous substance actually or potentially released, toxicity of petroleum or hazardous substance released, potential hazards represented by the release or potential release, actual or potential human or environmental receptors including the likelihood that a release may contaminate a nearby stream or river, number of drinking water wells potentially affected, proximity to sensitive areas such as wetlands, proximity to sensitive populations such as children in schools, etc. A low environmental sensitivity is given an ESM of 1.0, a moderate environmental sensitivity is given an ESM of 1.5 and a high environmental sensitivity is given an ESM of 2.0 (Guidance at 14).
19. The Days of Noncompliance Multiplier ("DNM") is an adjustment to the matrix value which takes into account the days of noncompliance (Guidance, Section 3.4 at 14, 15). This multiplier is determined from a table which indicates that days of noncompliance from 0-90 have a DNM of 1.0, days of noncompliance from 91-180 have a DNM of 1.5,

days of noncompliance from 181-270 have a DNM of 2.0, days of noncompliance from 271-365 have a DSM of 2.5 and for each additional 6 months or fraction thereof 0.5 is added to the multiplier (*Id.*).

20. Count 1 alleged that Respondent failed to install spill prevention devices for three new tanks at Citgo Quik Mart, McAlester, Oklahoma<sup>7</sup> as required by OAC 165:25-2-39(a) and 40 C.F.R. § 280(c)(1).<sup>8</sup> The 12,000 gallon capacity tanks are used for unleaded and premium [gasoline] and for diesel and were installed on October 1, 1990. The tanks are located to the north of the station building and were installed in a north-south configuration.<sup>9</sup> Although each of the tanks had fill ports on the north and south ends, only the south fill ports were equipped with spill prevention devices ("spill buckets") designed to prevent releases to the environment when the transfer hose is detached from the fill pipe. The Complaint alleges and Mr. Allford testified that spill buckets were never installed on the north side [fill ports prior to the EPA inspection] (Tr. 645).
21. Explaining how he calculated the penalty for Count 1, failure to provide Spill Prevention for new tanks, Mr. Cernero testified that the economic benefit component was based only on delay because installation of the spill buckets was an expense which could not be avoided (Tr. 90). Therefore, avoided costs were zero. He estimated the cost of installing the spill buckets as \$1,000 per UST and used a discount rate of 7.8 percent, an inflation rate of 3 percent, a marginal tax rate of 38.9 percent and a delay period of some 1,600 days to arrive at an economic benefit for delayed costs of \$137.98 per tank or a total of \$413.94 (Tr. 93, 94).
22. Turning to the gravity portion of the penalty for Count 1, failure to have spill prevention devices, Mr. Cernero testified that this was a major deviation from the requirements and there was a major potential for harm. He asserted that spill buckets were a major component of the UST program, that here there were no spill buckets at all and that the potential for harm was also major, because contamination could occur over time, "spill after spill after spill" (Tr. 94). This testimony is misleading and is not accepted for several reasons. The record shows that there were spill buckets on the south fill ports of the three tanks at issue, that the south fill ports were the only ports used in delivering product to the tanks, and that it was impractical to deliver product to the tanks via the north fill ports, and there is no evidence that any deliveries were ever made through the north ports. Mr. Cernero's determination that the potential for harm was "major" was apparently based on his "spill after spill after spill scenario." However, there is simply no evidence of any spill occurring at this station. Therefore Mr. Cernero's determination that the failure to have spill buckets on the north ports of the tanks at issue was a major deviation from the requirements is not accepted. Instead, the deviation from the requirements under the circumstances present here is moderate, and the potential for

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<sup>7</sup> The tanks are referred to as new because installation was commenced after December 22, 1988 (40 C.F.R. § 280.12).<sup>8</sup>

OAC 165:25-2-39(a) provides that underground storage tanks must have spill and overfill protection on the tanks.

Site Sketch, RX 71. The Site Drawing attached to the UST Inspection Checklist prepared by Mr. Cernero (CX-1) shows the tanks parallel rather than perpendicular to the station building.

harm is minor, resulting in a penalty from the matrix of \$100. As to violator-specific adjustments, he applied a factor he referred to as "neutral", meaning that there was no increase or decrease in the matrix based penalty. Contending that he was trying to be lenient, he used an environmental sensitivity multiplier factor of 1. Concerning the days of noncompliance, he stated that the tanks were installed in 1990 and that the earliest date of compliance could have been the date he conducted his inspection.<sup>10</sup> He explained, however, that because of the statute of limitations, the Agency could not claim penalties more than five years back, meaning that the days of noncompliance for penalty computation purposes started on September 30, 2000. According to Mr. Cernero, this resulted in 1,600 days of noncompliance and a noncompliance multiplier of six. He stated that there were three tanks and that the penalty was based on per tank per day of violation. The proposed penalty for Count 1 was thus calculated as 3 times \$1,500, (the gravity-based penalty for a major violation having a major potential for harm from the matrix), plus 0 for violator specific adjustments, times 1 for the environmental sensitivity multiplier, times 6 (the days of noncompliance multiplier), which equals \$27,000. This figure plus the economic benefit of \$413.94 equals the proposed penalty for Count 1 of \$27,413.94 (Tr. 96; Complaint, Attachment A, Penalty Calculations). The penalty as recalculated, assigning a moderate deviation from the requirements and a minor potential for harm, is still substantial: \$100 from the matrix, times 3 (the number of tanks), times 6 (the days of noncompliance multiplier), which equals \$1800, plus \$413.94 (economic benefit), which equals \$2,213.94.

23. Under questioning as to why he treated these tanks as having no spill buckets at all when in fact they did have spill buckets [at the south ports], Mr. Cernero acknowledged that as long as they dropped the fuel at the south end there would be no spill (Tr. 96). He seemed oblivious of the fact that this was the situation here, as there is no evidence of a fill ever being made through the north ports and certainly no evidence of a spill. He maintained, however, that there was nothing to prohibit an owner or truck driver from making an erroneous drop and then having a spill. Accordingly, he asserted that if [a tank] had two fill ports, it should have two spill buckets (*Id.*). Asked whether the fact the south ports had spill buckets would minimize the possibility of a mistaken fill to the north ports, Mr. Cernero replied no, explaining that, if they (Ram) wanted these ports to be closed and not to be used as fill ports, they should have used permanent caps or caps that were different than regular caps (Tr. 97, 98). Although he recognized that one of the caps on the north port (tank unidentified) had a padlock (Photo, RX 3), he testified that this was not unusual because people [owners or operators] did not want their gasoline stolen. He stated that there was no sign indicating "do not fill" or any other indication from which a driver could determine not to deliver to those ports. He hypothesized that there could be a situation where for some reason, such as traffic or parked cars, a driver could not get to the south ports and was forced to use the [north ports]. He opined that the potential for some truck driver to inadvertently use the north ports was pretty high (*Id.*). This testimony fails to recognize that the north fill ports on the tanks were not

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February 16, 2005 (Tr. 95). Because, as noted finding 25, *infra*, spill buckets were installed on the north fill ports in January 2006, Mr. Cernero's claim of leniency in penalty calculation has some credence as to the determination of the days of noncompliance for Count 1.



color coded, so that a driver would have to inquire [of station personnel] as to the product to be put in a tank making it highly unlikely that a fill would be made through the north ports. Moreover, Mr. Mike Majors, an environmental consultant for Ram, noted that OAC Rule 2-39, while requiring that USTs must have spill and overfill protection, did not specify that every port have spill protection. He opined that because the Ram tanks referred to in Count 1 had spill and overfill protection, they complied with the rule (Tr. 442). Read literally, OAC 2-39 requires spill and overfill protection on the tanks rather than the fill ports (*infra* note 12). He pointed out that OAC inspection reports, dated 7-15-05 and 7-02-04, did not indicate violations of the spill and overfill protection rule but instead indicated that spill and overfill protection were in place (Tr. 440-41; RXs 5 and 6, respectively).

24. Mr. Allford testified that they did not intend to and in fact did not use the north ports for delivering product to the three 12,000- gallon tanks at Citgo Quik Mart at issue in Count 1 (Tr. 656). He explained that for the past 16 years, trucks delivering product had turned off Carl Albert Parkway pulling under the canopy next to the building to the east (Tr. 646). He stated that the unloading ports were on the right side of the truck -- product is unloaded from the tank truck usually by gravity and at unloading, the truck is parked directly over the USTs -- and that because of the length of the truck, the landscaping and the corner layout, it was virtually impossible to come in at an angle where you could unload from the right side [into the north ports] (*Id.*). He testified that "...so we haven't done that" (Tr. 646). He illustrated the configuration of the tanks with a site sketch (Tr. 644-45; RX 71). He acknowledged that it was not impossible to use the north ports for unloading large trucks, but insisted it was not practical or feasible to do so (Tr. 644, 656). Mr. Majors confirmed that it was not practical to use the north ports to deliver product to the tanks at Citgo Quik Mart, because the north ports were located in two of the primary driveways to the facility and, in order to get a semi-truck in that location, you would have to block or restrict access to the driveway, limiting access to the pumps or store (Tr. 443). He testified that the north ports were not tagged or color coded so that a driver would not know what product to put in which tank. He stated that, when asked, Twilah [Monroe] said that the [north] fill ports had not been used during the life of the tanks, i.e., since [installation in] 1990 (Tr. 439).

25. Ram installed spill buckets on the north ports of the tanks referred to in finding 24 in January 2006. Ram purchased the spill containment devices, referred to as "spill containment manways," separately and the manways were installed by SSR (Service Station Repair, Inc) (Invoice, RX 4). Mr. Allford remembered the cost of the installation was \$1,600 or \$1,800 (Tr. 642). He further testified that Mr. John Roberts of the OCC was at the site almost every day during the tank installation [in 1990] observing the installation, giving recommendations and advice (*Id.*). According to Mr. Allford, Ram installed spill buckets on the south ports where they were instructed to do so and Mr. Roberts stated that spill buckets were not necessary on the north ports.<sup>11</sup> Asked whether Ram could have [permanently] capped the north ports, Mr. Allford replied that was

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Tr. 642, 645. Although Mr. Roberts was present in the court room during the hearing, he was not called as a witness.

where the submersible [transfer] pumps ("STPs") were located.<sup>12</sup> He further stated that the north ports were used for removing water and other product from the tanks and that he did not want to permanently cap them.

26. Count 2 alleges a failure to provide adequate spill prevention for six USTs at Citgo Quik Mart as required by OAC 165:25-2-39(f)(1), 40 C.F.R. § 280.20(c)(1).<sup>13</sup> The Complaint goes on to allege that at the time of an inspection on February 16, 2005, it was observed that all six of Respondent's USTs contained spill containment buckets (spill containment devices) that were full of debris and/or product, such that the capacity of the spill buckets was reduced and the buckets were not capable of containing product from the transfer hose should product be released after the transfer hose was detached (Complaint ¶ 19). Count 2 is based on Mr. Cernero's observation during the mentioned inspection that the spill buckets were filled with product and/or debris (CX 1; Tr.100). At the hearing, he testified that the spill buckets were filled with either fuel or debris such that the capacity was reduced and there was not sufficient capacity. He pointed out that the standard spill bucket would hold about five gallons to contain a spill he described as "usually anywhere from three to five gallons, three or four gallons" (Tr. 101-02). He explained that the spill buckets were not intended to have the capacity of the transfer hose which he indicated was about 15 feet in length and held approximately 15 gallons.<sup>14</sup>

27. Explaining his penalty calculation for Count 2, Mr. Cernero testified that the economic benefit was zero (Tr. 100, 104). He regarded the gravity as a major deviation from the requirement and a major potential for harm because of the potential for a spill (Tr.100-01). He insisted that the [spill buckets] must have sufficient capacity [to contain a spill]. Elaborating on this assertion, he stated that the capacity was "considerably or significantly reduced" and that, if the hose were released too soon, there would not be enough capacity to hold the minimal [product] that is usually in the hose even after the flow of fuel to the hose is shut-off. He opined that this would result in product on the concrete, causing contamination and some fire hazard (Tr. 101-03). He testified that the spill buckets were almost completely full and estimated they [each] would hold about an additional one gallon (*Id.*). He stated that in his 17 years experience doing inspections he had never seen spill buckets filled to this capacity before and that there was "[j]ust trash in there" (Tr. 105). In further testimony, Mr. Cernero was less positive, stating that he believed the OCC inspector noticed it [the condition of the spill buckets] too, and that in

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Tr. 656. The UST Checklist (CTX 1) indicates that each of the three tanks at issue in Count 1 had two STPs and two fill ports but that only the north STPs were used to transfer product to dispensers at the islands.

The regulation (CTX-30), OAC 165:25-2-39, Spill and overfill protection, provides in pertinent part:

(a) Underground storage tanks must have spill and overfill protection on the tanks.

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(f) Except as otherwise provided in (g) of this section, in order to prevent spilling and overfilling associated with product transfer to the underground storage tank system, the following prevention equipment must be used:

(1) Spill prevention equipment that will prevent release of product to the environment when the transfer hose is detached from the fill pipe (for example, a spill bucket or a drain system).

A "standard spill bucket" has a capacity of approximately five gallons, but its actual capacity in a particular instance is left to the judgment of the owner or operator (UST Technical Requirements (53 FR 37082 (September 23, 1988); CTX-13 at 85).

his (Cernero's) opinion they both agreed that it was significant enough "to say it was a violation" (*Id.*). Mr. Mike Majors, a consultant for Ram, testified that he reviewed release detection data supplied by Ram, from which he concluded Ram [Citgo Quik Mart] had received product on the day of the EPA inspection (Tr. 445-46). He opined that product in the spill buckets could have resulted from those deliveries. Explaining further the penalty calculation for Count 2, Mr. Cernero stated that the penalty from the matrix was \$1,500, that no violator specific adjustments [were applicable], that the environmental sensitivity factor was 1 and that the violation was regarded as one-day (Tr. 102). Thus, the penalty from the matrix of \$1,500 multiplied by 6, the number of tanks, equals the proposed penalty of \$9,000 for Count 2 (Tr. 104). Although the record is clear that the standard capacity of a spill bucket is approximately five gallons (*supra* note 14; Majors, Tr. 446), Mr. Cernero's determination that the reduced capacity of the spill buckets shown here is a major deviation from the requirements having a major potential for harm fails to recognize that the actual capacity of a spill bucket in a given instance is left to the judgment of the owner or operator (*Id.*). Therefore, a cogent argument might be fashioned that, in the absence of evidence of a spill, no violation has been shown. Respondent has, however, stipulated to liability on all counts, contesting only the amount of the penalty (Tr. 56, 251). It is concluded that the judgment question of the capacity of the spill buckets places this violation in the category of a moderate deviation from the requirement having a minor potential for harm. The penalty from the matrix is therefore \$100 and, given that there were six tanks at issue, the penalty for Count 2 is \$600.

28. Count 3 alleges Respondent failed to conduct monthly release detection monitoring of a tank during temporary closure at Citgo Quik Mart. This count is based on a 12,000-gallon diesel tank shown on the Site Drawing as south of the three 12,000-gallon tanks at issue in Count 1 and described as being located on the "west side" [of the Station Building] (CX 1; Complaint, ¶ 24). The Complaint alleges that Respondent's representative (subsequently identified as Twilah Monroe, Tr. 614) stated at the time of the inspection that this tank was not being used (*Id.* ¶ 23). However, Ms. Monroe subsequently testified that that this tank was also used as an emergency tank, i.e., if a tanker truck had more product than the USTs could hold, the excess would be placed in that tank. The use described by Ms. Monroe does not qualify the tank as an "emergency backup tank" under the regulation and the tank would still be subject to the UST rule, if it contained a regulated substance.<sup>15</sup>
29. Under the regulation, OAC 165-25-3-62(a), when a tank is temporarily taken out of service, the owner or operator must, *inter alia*: (1) Continue the operation of corrosion protection as required by this Chapter; (2) Continue release detection as required by this Chapter; (3) Comply with the requirements of this Chapter concerning release reporting and corrective action; and (4) Notify the Commission of a change in service on the prescribed form. Release detection is not required as long as the underground storage tank system is empty (OAC 165-25-3-62(b)). Under the regulation, OAC 165-25-3-62

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Cernero, Tr. 409-10. "De Minimis" exclusions from the UST rule include "(3) those [tanks] that serve as emergency backup tanks, hold regulated substances for only a short period of time, and are expeditiously emptied after use." (UST Technical Requirements, note 13 *supra*, at 38). Mr. Cernero described a "short period of time" as a reasonable period of time meaning that the product is removed [from the tank] within a few days (Tr. 409).

(b), a tank is empty when using commonly employed practices no more than one inch of residue remains in the tank. Mr. Cernero testified, however, that when he and Mr. Roberts stuck the tank, there were eight or nine inches of product within the tank (Tr. 106-07). He therefore concluded that Ram was required to do some type of release detection.

30. Explaining his penalty calculation for Count 3, Mr. Cernero stated that, although there would be some labor for monitoring the tank, he considered that the economic benefit was insignificant and not worth calculating (Tr. 106). He emphasized, however, that this was a major deviation from the requirements and a major potential for harm and thus he used the matrix figure of \$1,500 (Tr. 107). He testified that the deviation from the requirement was major because as long as there was product in the tank, monitoring was required every 30 days.<sup>16</sup> He stated that without monitoring, you would not know that a release had occurred (Tr. 107-08). He regarded the potential for harm as major because a tank with eight inches of product was not being monitored. Regarding the period of noncompliance, he testified that Ram was not in compliance at the time of his inspection and that because Ram was only required to keep monitoring data for 12 months and they apparently had no such data, he considered that the period of violation should be one year and a day (Tr. 109). He testified that the days of noncompliance from March 1, 2000 to May 24, 2004 or 1,545 days shown in the penalty calculation (Complaint at 46) was a typo, an error "due to cut and pasting", and that the days of noncompliance should have been one year, plus one day, that is, from February 16, '04, to February 16, '05, or 366 days (Tr. 109). Under the Guidance, this resulted in a days of noncompliance multiplier of 3 which he used in the penalty calculation, resulting in a proposed penalty for Count 3 of \$4,500 (Tr. 110). Although the extent of deviation from the requirement is major in that monitoring was not being conducted on the premise that the tank was empty when in fact, it contained eight inches of product, Mr. Cernero's determination that the potential for harm was major is rejected because of the small amount of product remaining in the tank<sup>17</sup> as opposed to it being full or some major fraction thereof. The potential for harm is therefore minor with a matrix value of \$200. Given the days of noncompliance multiplier, this results in a penalty for Count 3 of \$600 rather than \$4,500.

31. Asked whether he was aware that the diesel tank at Citgo Quik Mart referred to in Count 3 and also the tanks at Monroe's Service Station (Counts 14, 15, and 16) contained product, Mr. Allford replied that the drivers were instructed to remove the product (Tr. 647). He related, however, that when the hose is put down [in the tank] to extract the product, there is an extreme amount of pressure (suction) which sometimes causes the [flexible] hoses to curl up and thus product flow from the pump would discontinue, leading the drivers to believe they were out of product (*Id.*). He explained that this

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OAC 165.25-3-5, General Monitoring requirements, provides that tanks must be monitored at least every 30 days for releases using one of the methods or combination of methods listed in this Chapter, except that:

Using information from page 9 of "Doing Inventory Control Right" (RX 2, Attach 4), it appears that an eighth-inch of product represents approximately 13 gallons, capacity of tank not stated. Therefore, an inch of product represents approximately 104 gallons and eight inches of product would convert into approximately 832 gallons. Compare Twilah Monroe who indicated that nine inches of product would equal 65 to 70 gallons (Tr. 600). However, she was referring to the 1,000-gallon premium tank at Monroe's Service Station (Count 14).

problem was addressed by affixing the hose to a measuring stick which would hold the hose in place (Tr. 648). Mr. Allford testified that "we" thought all of the product at Eufaula [Monroe's] had been removed, but only 60 to 65 gallons [remained]. Referring to the other tank [the diesel tank at Citgo Quik Mart], he stated "we weren't aware of it" [that it was not empty] (Tr. 648). He acknowledged that the fact the mentioned tank and the tanks at Monroe's contained product was a mistake. (*Id.*)

32. Count 4 alleges that Respondent failed to conduct monthly release detection monitoring for five tanks at Citgo Quik Mart as required by OAC 165:25-3-5 (*supra*, note 12). The Complaint goes on to allege that because all of these USTs were installed on October 1, 1990, the systems were required to be equipped with corrosion protection and spill and prevention equipment upon installation as required by OAC 165:25-2-31 through 165:25-2-42 (*Id.* ¶¶ 30, 31). Mr. Cernero testified that [at the time of his inspection] Ram was using the Inventory Control and Tank Tightness Testing method [of release detection] which was not allowed because the tanks were "put in" during 1990 (Tr. 111). He pointed out that this method was only allowed for 10 years [after installation or a tank is upgraded, whichever is later] and that they, Ram, were beyond the deadline for coming up with a monthly monitoring system (OAC 165:25-3-5). Upgrading was not allowed because these were considered "new tanks", being installed after December 22, 1988 (*supra*, note 6), and had to have all the "bells and whistles" when they went into the ground (Tr. 113). He testified that the economic benefit component was evaluated for avoided costs and delayed costs and that "[o]nly the avoided [delayed] costs was (sic) considered in this count."<sup>18</sup> He stated that Automatic Tank Gauging (ATG) was the common method used to conduct monthly release detection and he estimated the capital expenditure for installing ATG equipment at \$5,000 (Tr. 110-11). Using this figure, he calculated an economic benefit for delayed costs of \$145.89 per UST or a total for five tanks of \$729.45. The sum of \$145.89 per UST was calculated using a discount rate of 7.8 percent with 3 percent inflation rate, and a [marginal] tax rate of 38.9 percent.
33. Mr. Cernero considered that both the deviation from the requirements and the potential for harm for Count 4 were major, resulting in a \$1,500 penalty from the matrix (Tr. 111-12). In considering the potential for harm, he made no allowance or recognition of the fact that Inventory Control and Tank Tightness Testing were employed by Ram as a method of release detection. He pointed out that under that method it was only necessary to test the tanks once every five years and he emphasized that Inventory Control and Tank Tightness Testing were never meant to be a permanent method of monthly monitoring (Tr. 114-15). Mr. Cernero's conclusion that the deviation is major is rejected because Ram was conducting a method of release detection, even if it was the incorrect method. A major deviation finding is appropriate in cases where no release detection at all is being conducted. In this case, a moderate deviation resulting in a \$1,000 penalty from the matrix will be applied. Again, Mr. Cernero made no violator specific

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Tr. 110. Mr. Cernero obviously meant "delayed" costs because the cost of ATG or similar equipment could not be avoided, if compliance were to be achieved. Although he again used "avoided costs" instead of "delayed costs" in further testimony concerning his penalty calculation for Count 4 (Tr. 111), it should be noted that no avoided costs are included in the economic benefit component of the penalty calculation (Complaint, Attachment A at 46, 47; Determination of Penalty, CTX-19 at 6).

adjustments, he applied an environmental sensitivity multiplier ("ESM") of 1, he considered that the length of the violation was one year and one day and applied a days of noncompliance multiplier of 3, which equals \$3,000. This figure times five, the number of tanks, equals \$15,000, so the penalty for Count 4, adding the economic benefit of \$729.45, is \$15,729.45. (Tr. 117).

34. As indicated above, the five tanks at Citgo Quik Mart were installed on October 1, 1990, were thus considered "new tanks" and were required to be equipped with corrosion protection and spill and overfill protection equipment upon installation (OAC 165:25-2-31 through 165:25-2-42; 40 CFR § 280.20). Mr. Cernero testified that it was his understanding that the five tanks at Citgo Quik Mart had corrosion protection in the form of "sacrificial anodes" when the tanks were installed.<sup>19</sup> He explained that these were STI-P3 tanks meaning Steel Tank Institute tanks protected three ways and that the approved steel tanks had factory installed cathodic protection when they went in the ground.<sup>20</sup> He stated that although the tanks had an impressed current system, it was not required and that "if your tanks are up to standard and functioning properly, then you don't have to do anything" (*Id.*). Mr. Majors testified that the tanks had a cathodic protection facility when they were installed and that, although not required, Ram at its discretion installed an impressed current cathodic protection system at the facility apparently in August of 1996 (Tr. 450; Visual Inspections, Inc. ("VI") invoice, dated February 15, 1997, RX 12). Visual Inspections repaired the corrosion control system at Goodwin's One Stop in October of 1998 (VI invoice, dated October 23, 1998, RX 13). Making some assumptions, Mr. Majors stated that Ram considered installation of the impressed cathodic protection system to be an upgrade rather than a modification and thus the time for using inventory control as a method of leak detection was extended for an additional ten years (Tr. 450-51). Asked whether he considered this position to be unreasonable, he replied in the negative.

35. Complainant has withdrawn Counts 5 and 6.

36. Count 7 alleges that Ram failed to operate cathodic protection system continuously at Citgo Thrif-T-Mart, McAlester, OK. The Complaint goes on to allege that in accordance with OAC 165:25-2-52 (40 C.F.R. § 280.31(a)), corrosion protection systems must be operated and maintained in accordance with the manufacturer's instructions and specifications to provide continuous corrosion protection to metal components of the storage tank system that are routinely in contact with the ground (Complaint, ¶ 48). Based on Mr. Cernero's inspection conducted on February 16, 2005, Complainant determined that the cathodic protection system (impressed current system) was not in operation (rectifier was off at the time of inspection and could not remain on after the

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Tr. 280. Chapter 25 of the Oklahoma Corporation Commission regulations (Section 165:25-1-11) contains definitions and "Sacrificial anode" is defined as meaning "a device used to reduce or prevent corrosion of a metal in an electrolyte by galvanic coupling to a more anodic metal" (CTX 30 at 12).

Tr. 281. Section 165:25-1-11 of the Oklahoma Corporation Commission regulations defines "Cathodic protection" as a "technique designed to prevent the corrosion of a metal surface by making that surface the cathode of an electrochemical cell. For example, protection can be accomplished with an impressed current or galvanic anode system" (CTX-30 at 8, 9).

power was switched on) (Complaint, ¶ 49; Inspection Checklist, CX 1). The Inspection Checklist states, *inter alia*, that the [CP System] was tested on March 19, 2004, that the CP System was off at time of the inspection and that the "CP System shuts off must have overload" (CX 1 at 14). Mr. Cernero testified that when he turned the box on at the time of his inspection current flowed for maybe 20 seconds and then shut off, indicating there was some kind of short or malfunction (Tr. 121). He stated that "we" tried to turn the system on at least twice and were never able to get the reading up to 850 millivolts, indicating that there were some major problems with this piece of equipment (Tr. 122).

37. In determining the proposed penalty of \$11,250 for Count 7, Mr. Cernero testified that the economic benefit was insignificant as the only thing they probably saved was some electricity (Tr. 118). He stated that the only issue here was the gravity base and he considered cathodic [corrosion] protection as a major component of the UST program, asserting that if corrosion protection is not provided for steel tanks, corrosion will occur and cause leaks (Tr. 119). He asserted that a metal tank, not protected from corrosion, would continue to corrode, particularly if it is an older tank (Tr. 120). He emphasized that [without corrosion protection] "[c]orrosion will not be stopped" (Tr. 121). Mr. Cernero explained that there were three major components of the UST program: release detection, spill and overflow protection, and corrosion protection (Tr. 120). He therefore determined that the deviation from the requirement was major (*Id.*). He considered that there was a high potential for a release and that the potential for harm was also major, resulting in a \$1,500 penalty from the matrix. He testified that he calculated the proposed penalty of \$11,250 [for the three tanks] by "zeroing out" the economic benefit component, allowing no violator specific adjustments, applying an environmentally sensitive multiplier of 1, and applying a days of noncompliance multiplier of 2.5 based on his determination that there were 331 days of noncompliance, that is, from March 19, 2004, the date of a report reflecting that the Cathodic Protection System was working properly, to February 16, 2005, the date of the EPA inspection (Tr. 126-27; Complaint, Attachment A at 49). As noted *infra*, however, the only components of the UST system subject to corrosion involved in Count 7 are the pump manifolds.

38. The report that the Cathodic Protection system at Citgo Thrif-T-Mart was working properly, referred to above, is dated March 19, 2004, and was conducted by Underground Service Company (RX 23). The first page of the report has a block checked "yes" in response to the question of "Is the Cathodic Protection system working properly?" Mr. Cernero, however, focused on the second page of the report which shows test readings and states after "Remarks," *inter alia*, that "UL [unleaded] pump-(SuB) [submersible]. Readings are low-cannot adjust. [illegible] 1 5lb anode would correct the problem."<sup>21</sup> He pointed out that the readings said to be low were at location number 16 on the report which was an unleaded submersible pump (Tr. 123). The readings were below 850 millivolts or .85 volts. In further testimony, he explained that the component was called the "pump manifold", which is the portion of the pump visible from the surface. He

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<sup>21</sup> Although Mr. Richard Heck, the owner of Underground Service Company and the person conducting the March 19, 2004 test of the Cathodic Protection system was a witness at the hearing, he was not asked to clarify his report.

noted that the pump manifold routinely contains product and that because it was in contact with the soil, it should be protected from corrosion and observed that apparently, the voltage being generated by the anode in that particular area was insufficient (Tr. 123-24). Asked to reconcile this conclusion with the fact the report indicates the Cathodic Protection system was working properly, he replied that it was missed or [the person conducting the test] did not realize that it had failed (Tr. 125). He emphasized that there was no evidence of a repair. However, there is an OCC Compliance Inspection report dated January 11, 2005 which states that the rectifier of the cathodic protection was inspected by the OCC and was found to be running at 5 amps (RX 18). Mike Majors testified that this indicates correct operation of the cathodic protection system. He also noted that the cathodic protection system was required to be checked every 60 days, which explained why Ram had not identified a problem with it between the January 11, 2005 inspection by OCC when it was found to be working properly and EPA's inspection on February 16, 2005 (Tr. 453). Therefore there are only 36 days of noncompliance, which makes the days of noncompliance multiplier 1.0.

39. Among documents delivered to Mr. Cernero at the time of his visit to the Ram offices on February 17, 2005, was an invoice from Tank Liners, Inc., dated May 23, 1997, which indicated that at least two of the three tanks at issue in Count 7 had been lined on that date (Tr. 541-42; RX 70). The third tank, referred to by counsel as the second tank (Tr. 550), a STI-P3 tank of 4,000-gallon capacity, was apparently purchased and installed in May of 1997.<sup>22</sup> Mr. Cernero acknowledged that STI-P3 tanks and lined tanks did not need cathodic protection (Tr. 544-45). He pointed out, however, that metal components such as manifolds and piping did require corrosion protection (Tr. 546). Acknowledging that the piping here was PVC plastic, he emphasized that the requirement is that any metal component which routinely contains product and is in contact with the soil must be cathodically protected. He testified that his concern was with the pump manifolds which were in contact with the soil (Tr. 546-47, 548-49). He emphasized that all of the product that comes out of the tank goes through the pump manifold and maintained, implausibly, that a leak in the pump manifold was just as critical as a leak in the piping. In further testimony, he opined that installing a cathodic protection on an STI-P3 tank could throw the system "out of whack" (Tr. 550-51). Notwithstanding the conclusion that only the pump manifolds required cathodic protection, Mr. Cernero insisted that no change in his penalty calculation was warranted (Tr. 550-51). However, I find that Mr. Cernero greatly overstates the potential for harm on this count, given that by his own admission, the STI-P3 tanks and lined tanks did not need cathodic protection. Therefore, the matrix value should be a moderate-moderate value of \$500. The penalty calculation is therefore three tanks times \$500, multiplied by an ESM of 1, multiplied by the days of noncompliance multiplier of 1, plus an economic benefit of 0. The recalculated penalty for Count 7 is \$1,500.

40. Count 8 alleges that Ram failed to "Test Automatic Leak Detectors Annually" for three tanks at Citgo Thrif-T-Mart. Mr. Cernero described an Automatic Line Leak Detector as

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STI-P3 Tanks stand for "Steel Tank Institute Specification for STI-P3 System of External Corrosion Protection of Underground Storage Tanks" (40 C.F.R. § 280.20(a)(2)). See also Cernero (Tr. 281).



an electronic mechanism that prevents a catastrophic leak from a pressured line if it should break or be [subject to] a massive leak (Tr. 127). He testified that the Automatic Line Leak Detector was very important and that it be checked annually to avoid a catastrophic leak (Tr. 128-29). He regarded the potential for harm and the extent of deviation from the requirements as major, resulting in a \$1,500 penalty from the matrix. In this instance, the economic benefit component was evaluated for avoided costs and delayed costs, but only avoided costs were considered (Tr. 127). He stated that he assumed that conducting the test would cost approximately \$100 per UST for each year and using a discount rate of 7.8 percent, an inflation rate of three percent, a tax rate of 38.9 percent and 57 days of avoidance, he determined an avoided cost of \$38.60 per detector for a total for the three tanks of \$115.80 (Compl.'s Post-Hearing Brief p. 17).<sup>23</sup> It is noted, however, that the Complaint (¶ 61) alleges and Mr. Cernero testified (Tr. 242) that the tests were actually conducted on January 10, 2005, which is 57 rather than 94 days from the November 14, 2004 anniversary date of the last Leak Detector Test. Accordingly, the days of non-compliance multiplier for Count 8 is 1.

41. Count 9 alleges that Ram failed to test pressure lines containing regulated substances annually at Citgo Thrif-T-Mart as required by OAC 165:25-3-6(3) (A) (1) (40 CFR 280.41(b)(1) (ii)). The complaint alleges that an annual pressure line test was conducted on November 14, 2003, making the anniversary date for the next test November 14, 2004. However, the next test was actually conducted on January 10, 2005 (Complaint ¶ 64). As indicated in the preceding finding, this is 57 rather than 94 days beyond the November 14 anniversary date for the test. Nevertheless, Mr. Cernero assumed for penalty calculation purposes that the test was conducted on the date of his inspection, February 16, 2005, resulting in 94 days of noncompliance, a Noncompliance Multiplier of 1.5, and a proposed penalty for Count 9 of \$6,041. As we have seen for Count 8, the correct Noncompliance Multiplier for a 57-day delay is 1. Both the Automatic Leak Detector and the pressurized lines, when tested, passed.
42. Ram employed a firm, Underground Service Company, to perform Automatic Leak Detector and Line Tightness testing at its facilities including Citgo-Thrif-T-Mart in McAlester, OK (Tr. 507, 511-12; RX 26). Mr. Richard Heck, the owner of Underground Service Company, conducted those tests from approximately 2001 to the year of the hearing. He performed Line Leak Detector and Line Tightness or pressure testing on November 14, 2003. The tests are required to be performed annually, but when he returned in November 2004, he found the water table was so high -- water was over the top of the tank[s] -- that he could not remove leak detectors to do the line test without allowing water into the tanks (Tr. 513-14). He returned to Citgo Thif-T-Mart in December and found that the same condition existed, i.e., the high water table precluded conducting the tests. Asked if he brought a pump on either of his visits to the facility, he replied in the negative, asserting that you are not supposed to pump water from a tank pit

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<sup>23</sup> Mr. Cernero had previously calculated the economic benefit component based upon 94 days of avoidance, November 14, 2004 to February 16, 2005. The evidence presented showed that the respective test for Counts 8 and 9 was performed on January 10, 2005, which would reduce the days of avoidance to 57. This reduces the economic benefit component from Counts 8 and 9. This adjustment was not made part of the record during the hearing but was addressed by Complainant in the Post-Hearing Brief.

onto the ground (Tr. 522). He testified that the use of buckets or barrels would not be practical. Mr. Heck returned on January 10, 2005, at which point the water levels had subsided and he was able to complete the tests (Tr. 515, RX 24). Based on these facts, it is the opinion of this tribunal that Counts 8 and 9 qualify for a violator-specific adjustment. The penalty guidance allows for a 25% decrease to the matrix value based on the violator's (1) degree of cooperation or non-cooperation; (2) degree of willfulness or negligence; (3) history of noncompliance; and (4) other unique factors. These factors ensure that penalties are assessed in a fair and consistent manner that takes into account case-specific differences. In the case at hand, the degree of willfulness or negligence adjustment is appropriate, as it takes into account how much control the violator had over events constituting the violation, such as whether the violation could have been prevented or was beyond the owner/operator's control, as in the case of a natural disaster. (C 12). This is applicable here because Ram had no control over the large amount of rainfall that caused the water table to rise so high that the Mr. Heck could not perform the required tests. Complainant contends that Respondent could have removed the water and performed the tests. However, Mr. Heck testified that he could not pump the water onto the ground to remove it from the tank. He also testified that he could not pump the water out of a tank pit into a bucket as suggested by Complainant, because there was so much water, "we are talking barrels, we are not talking buckets" (Tr. 522). Ram certainly made a good faith effort to have the lines tested in a timely fashion. Mr. Heck returned once a month until he was able to perform the tests. Therefore, for Count 8, the gravity based penalty from the matrix is \$1,500, multiplied by 3 for the number of tanks, reduced by 25%, multiplied by 1 for the ESM, multiplied by 1 for the days of noncompliance multiplier, is \$3,375, plus the economic benefit of \$115.80 [\$38.60 times three tanks], equals a recalculated penalty of \$3,490.80 for Count 8. Similarly, for Count 9, \$1,500 multiplied by the number of tanks (3), minus 25%, multiplied by 1 for the ESM, multiplied by 1 for the noncompliance multiplier, plus the economic benefit of \$38.60, yields a penalty of \$3,490.80.

43. Count 10 involves the alleged failure to provide adequate spill prevention for one tank at Goodwin's One Stop. Mr. Cernero observed that one of the spill buckets, had not just a crack, but a gap in the wall of the bucket (Tr. 133). He stated that, if there were a spill, it could result in [a release] and contamination [of the environment]. In calculating the penalty for what he described as a spill bucket not being adequate enough, according to the regulations, he testified that he felt it was a major potential for harm and a major deviation from the requirements resulting in a penalty from the matrix of \$1,500. He opined that it was very likely that you could actually have a release from this particular spill bucket. Not knowing the length of time the gap in the spill bucket had existed, he regarded the violation as one-day, resulting in a proposed penalty for Count 10 of 1,500. I find that Mr. Cernero overstates the seriousness of the violation. Given the fact that it was only one bucket with a crack, and there were no spills resulting from the cracked bucket, the potential for harm should be reduced. Therefore, the matrix value should be "moderate-moderate" and the total penalty should be \$500.

44. Complainant has withdrawn Count 11.

45. Count 12 involves the alleged failure to conduct a stick reading as required for inventory control and tank tightness testing for three tanks at Goodwin's One Stop in violation of OAC 165:25-3-5.1. Based on the records review conducted by Cernero on February 17, 2005, Ram utilized the Inventory Control and Tank Tightness Testing method to meet release detection requirements. Based on the records obtained during the February 17, 2005 inspection and a statement made by Ram's representative, it was determined that the inventory volume measurement, detailing the amount of product remaining in the three USTs each operating day, was not measured (*see* CX 7 at 21-24). Mr. Cernero testified that "there was [*sic*] no records produced that showed me that this particular site, this particular facility, was actually sticking the tanks every day; it was more like once a week" (Tr. 138-139).
46. In calculating the penalty, the economic benefit of noncompliance was set at zero because EPA found it to be an insignificant cost (Tr. 137; CX 19 at 11). For the gravity-based component, Cernero found a major potential for harm and a major deviation from the requirements because Ram was not taking stick readings of the tanks every day<sup>24</sup> (Tr. 137-138; CX 19 at 11). Under the regulations, at least 12 months of records are required for the method of release detection, which Ram did not have at the time of the inspection (Tr. 139). Therefore, the days of noncompliance totaled 366 days (*Id.*; CX 19 at 11). There were no adjustments for violator-specific adjustments or environmental sensitivity multiplier (*Id.*). The total penalty for three tanks was assessed at \$13,500 (*Id.*). Ram argues that the days of noncompliance, which Mr. Cernero calculated as one year and one day, should be much lower (*Id.* at ¶ 224; Tr. 262-263). On February 27, 2004 an OCC inspection report showed no violation for stick readings (RX 29; Tr. 263-264<sup>25</sup>), which Ram indicated was completed less than one year before the date of the EPA inspection, thereby reducing the penalty multiplier. In addition, Mr. Cernero admitted under cross-examination that stick readings are only required "when fuel is sold or delivered, not necessarily 365 days/year" (Tr. 266; *see* RX 2, attachment 4 at 6). Mike Majors testified that 85 stick readings were missing out of the 365 days per year (Tr. 459). Respondent supported this testimony with the admission of records detailing the inventory control at Goodwin's One Stop and which includes the stick readings conducted that facility (RX 65). Mr. Cernero did not have this information when he assigned a major-major matrix value. A major deviation is assessed for substantial noncompliance; a moderate deviation occurs when the violator significantly deviates from the requirement of the regulation but to some extent has implemented the requirement as intended. Therefore, because Respondent performed a majority of the stick readings, the extent of deviation from requirement on this count should be moderate. In addition, the penalty is reduced by 25% to account for the Respondent's good faith efforts to comply, as Respondent did

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Ram had in place the Inventory Control and Tank Tightness Testing, which is an allowable method (Tr. 138). However, this method also requires stick readings every day and according to Ms. Twilah Monroe, Ram was not conducting stick readings every day (*id.*).

The February 27, 2004 OCC inspection indicates that the inventory reconciliation passed and the cathodic protection and spill and overfill equipment also passed (RX 29). Assuming that the inventory reconciliation passing indicates proper stick readings and records for those stick readings, then the OCC inspection proves that Ram was in compliance less than a year from the EPA inspection. It seems from this inspection there was no release detected.

take stick readings and conducted inventory control at the facility during the time at issue. Therefore, the penalty as recalculated is the matrix value of \$1,000, multiplied by three tanks, minus 25% for degree of willfulness or negligence, multiplied by 3.0 for the noncompliance multiplier, for a total penalty of \$6,750 for Count 12.

47. Complainant has withdrawn Count 13.

48. Count 14 involves the failure to conduct release detection for tanks in temporary closure at Monroe's Service Station in violation of OAC 165:25-3-62(b). According to OAC 165:25-3-62(a)(2), when an UST is temporarily out of service, release detection is required unless the tank is empty. The 1,000 gallon premium tank held approximately 9 inches of product during the time of the EPA inspection; therefore, release detection was required (*see* CX 7 at 25-26). There is no economic benefit (CX 19 at 12). Under the gravity-based component, EPA found a major potential for harm and a major deviation from the requirements (major-major on the matrix) because there was no type of release detection used. Thus the matrix value was \$1,500 (Tr. 142; CX 19 at 12). EPA found no violator-specific adjustments and no environmental sensitivity multiplier (Tr. 142). The days of noncompliance totaled 366 days<sup>26</sup> (Tr. 142-143). The days of noncompliance multiplier was 3 and the total penalty was assessed at \$4,500 (Tr. 143). Ram argued that the tank had only nine inches of product in it, which translated to approximately 65 to 70 gallons, worth \$250 (Respondent's Post-Hearing Brief at ¶ 243, ¶ 245). Although the extent of deviation from the requirement is major in that monitoring was not being conducted on the premise that the tank was empty when in fact, it contained nine inches of product, Mr. Cernero's determination that the potential for harm was major is rejected because of the small amount of product remaining in the tank as opposed to it being full or some major fraction thereof. The potential for harm is therefore minor, resulting in a penalty for Count 14 of \$600 rather than \$4,500.

49. Count 15 involves the failure to operate the cathodic protection system after four tanks were placed in temporary closure at the Monroe Service Station in violation of OAC 165:25-3-62(a)(1). Only one tank still had product in it (Tr. 144). Based upon the EPA inspection, the cathodic protection system was not in operation and the records indicate that tanks were last used on August 17, 2001 (*see* CX 7 at 26-27). Mr. Cernero testified that it does not matter how long the tanks were temporarily closed, corrosion will occur and the tank must be maintained because it is going to deteriorate (EPA's Post-Hearing Brief at 24; *see* Tr. 144-145). There was no economic benefit for this Count (CX 19 at 13). For the days of noncompliance, Mr. Cernero based his calculation from the day the tanks were taken out of service on August 17, 2001 to the day of inspection on February 16, 2005, totaling 1,279 days, making the multiplier 5.5 (Tr. 146-147; CX 19 at 13).<sup>27</sup>

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Cernero testified that EPA's determination of penalty, found at CX 19 at 12, noted one day of noncompliance for Count 14, which is a typo (Tr. 143). Instead, Cernero argued that the days of noncompliance is for one year because there should be release detection reports for at least 12 months prior to the inspection (Tr. 143). The complaint also stated one day of noncompliance (*see* CX 7 at 26).

According to Mr. Cernero, from August 17, 2001 to February 16, 2005, Ram was not in compliance because there are no records proving the cathodic protection tests worked according to Count 16 (Tr. 148; findings at 20).

EPA found a moderate-major matrix value with a value of \$750. The potential for harm was not as great because there was no product in the tanks, except for one (Count 14) (Tr. 148-149; CX 19 at 13). EPA found no adjustments for the violator-specific adjustments and the environmental sensitivity multiplier was 1 (Tr. 151; CX 19 at 13). The total proposed penalty was \$16,500 (*Id.*).

50. However, Mr. Cernero testified that he did not know when the cathodic protection system was shut off, only that during the inspection it was not there (Tr. 147). Complainant does not provide an accurate basis for the days of noncompliance. During the direct examination, Complainant's counsel asked Mr. Cernero if it "is the assumption there that they failed to operate the cathodic protection system . . . in August of [2001], when [Ram] took the tank out of service?" (Tr. 147). Mr. Cernero answered the question in the positive and went on to say that "we don't know when the cathodic protection system was shut off. But at the time of the inspection, it was not there." (*Id.*). Mr. Cernero is simply guessing that the cathodic protection system has not been in operation since the tanks were last used. While Ram was unable to produce any records to the contrary, failure to maintain records is not the violation at issue. Mr. Cernero is only able to testify that the cathodic protection systems were not in operation on the day of the inspection. Therefore, the days of noncompliance multiplier should be reduced to 1. However, Ram contended that it addressed the problem by removing the tanks (RX at ¶ 260; Tr. 600).<sup>28</sup> Mr. Cernero testified that the cathodic test is required because "a temporary closed tank assumes that sometime in the future, it's going to be placed or could be placed in operation" and the cathodic protection system "has to be maintained because corrosion will occur" (Tr. 144-145). If there is corrosion, a leak could occur in the future if product is placed in the tank. (Tr. 273). But if the tanks are removed and never used, no harm can occur from the failure to maintain a cathodic protection system on empty tanks. Therefore, in regard to these tanks, the potential for harm should be minor, if not nonexistent. This makes the matrix value \$200. Given the four tanks at issue, the recalculated penalty for Count 15 is \$800.

51. Count 16 involves the failure to test the cathodic protection systems on four USTs to ensure the corrosion protection was adequately operating at Monroe's Service Station in violation of OAC 165:25-2-53(1).<sup>29</sup> Pursuant to the rule, all corrosion protection systems must be tested within six months of installation of the cathodic protection system and then every three years thereafter to determine adequacy. The EPA inspection revealed that Ram failed to provide any evidence of tests of the system before February 16, 2005 (*see* CX 7 at 27-28). The economic benefit evaluated avoided costs only (Tr. 151; CX 19 at 14). EPA assumed that conducting the tests would cost approximately \$100 per UST for each test missed, but after factoring inflation and discount rates, the total was \$86.78 per UST (Tr. 153-154; CX 19 at 14). That number was then multiplied by the number of

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Here, Twijlah Monroe testified that the pumps were removed for Count 16.

The Complaint incorrectly stated the violation as "Failure to Test Cathodic Protection Systems for Metallic Flex Connectors." Mr. Cernero testified that this was a misprint, because the violation had nothing to do with flex connectors but had to do with the actual tanks (Tr. 153).

tanks, here being four, giving a total economic benefit of \$347.12 (CX 19 at 14). For the gravity-based component, a matrix value total of \$750 was used because only one tank had product in it (Tr. 155). Mr. Cernero calculated no violator-specific adjustments and found an environmental sensitivity multiplier of 1 (*Id.*; CX 19 at 14). The days of noncompliance calculation began from September 30, 2000, the actual start date beginning after six months after installation, to February 16, 2005 totaling 1,600 days of noncompliance (Tr. 155; *see* CX 7 at 28) providing a multiplier of 6.0 (CX 19 at 14). The gravity based component totaled \$16,500. Therefore, the penalty was calculated at \$18,347.11 (CX 19 at 14). For the same reasons employed in Count 15, because the tanks were eventually taken out, the potential for harm was minor, reducing the matrix value total to \$200. The penalty for Count 16 is \$200 times four tanks, multiplied by an ESM of 1, multiplied by the days of noncompliance multiplier of 6, plus economic benefit of \$347.12, which equals \$5,147.12.

52. Count 17 involves the failure to conduct a structure integrity test prior to the installation of the cathodic protection system at the Monroe Station in violation of 40 C.F.R. § 280.21(b)(2)(i). The USTs were installed on April 2, 1976 and upgraded prior to December 22, 1998 by installing a cathodic protection system to meet the upgrade deadline. If a tank was 10 years old or older prior to installation of the system, a structural integrity test had to be completed pursuant to 40 C.F.R. § 280.21(b)(2)(i). Since the USTs at Monroe were over 20 years old, an integrity test was required. Ram could not provide documents that the USTs were internally inspected or tested prior to installation of the cathodic protection system (*see* CX 7 at 29-30). Only the delayed costs were considered for the economic benefit since Ram did not conduct an integrity test prior to installing the cathodic protection system (Tr. 161). EPA assumed a cost of \$2,800 to conduct the test, after implementing the rates, which equals \$386.34 per tank. Since there were four tanks, the total economic benefit was \$1,545.36 (*Id.*; CX 19 at 15).
53. Pursuant to the gravity-based component for Count 16, Cernero testified that it was a major deviation from the requirements but a moderate deviation for potential of harm because Ram had leak detection in place and there was a temporary closed tank putting the matrix value at \$750 (Tr. 162-163). EPA found no violator-specific adjustments and the environmental sensitivity multiplier was 1 (Tr. 162; CX 19 at 15). Again, for the days of noncompliance, EPA could only go back five years due to the statute of limitations, thereby giving a multiplier of 6 (Tr. 162-163; *see also* CX 7 at 30). The total gravity-based component was \$18,000 thereby, providing a total proposed penalty of \$19,545.34 (CX 19 at 15). Respondent argued that it was not necessarily true that an integrity test was not completed when the CP system was installed, just that Ram could not provide the documentation proving otherwise (Tr. 176). A NACE certified consultant, Visual Inspectors, installed the CP systems (Tr. 627; Respondent's Post-Hearing Brief at 46). Ram further noted that an NACE corrosion expert must perform an integrity test before designing the CP system (Tr. 480-481; Respondent's Post-Hearing Brief at ¶¶ 269-270). Ram also stated through the testimony of its expert, Majors, that compliance with the regulation could not be achieved if a corrosion expert failed to conduct a tank integrity test (Tr. 482). Again, these are the tanks that were closed

(except for one which had a small amount of product in it) and eventually removed (Tr. 601; Respondent's Post-Hearing Brief at 46). Therefore, given all of these circumstances, I find that Mr. Cernero overstates the deviation and potential for harm. The gravity-based component is a moderate deviation and minor potential for harm, with a matrix value of \$100. This figure is multiplied by four for the number of tanks, multiplied by 1 for the environmental sensitivity, and by 6 for the days of noncompliance multiplier, and added to the \$1,545.36 economic benefit, which results in a penalty of \$3,945.36 for Count 17.

54. Complainant has withdrawn counts 18 and 19.
55. Count 20 involves the failure to conduct an integrity test prior to installing a cathodic protection system pursuant to 40 C.F.R. § 280.21(b)(2)(i) at the Longtown Citgo Station. The USTs were installed in 1978 and upgraded prior to December 22, 1998 by installing a cathodic protection system. Since the USTs were over 20 years old when the cathodic protection system was installed, a structural integrity test was required. During the EPA inspection, Ram could not verify that the USTs were internally inspected prior to installation (*see* CX 7 at 33-34). The penalty calculation is the same as the previous Count, *supra* finding 52 (*see also* Tr. 165). Ram concluded that it was unable to produce documentation of an integrity test, but that its tank system was designed and installed by an NACE certified consultant (*see* Ram's Post-Hearing Brief at ¶ 284; 287). Majors testified that Ram, on its own accord, had an integrity test done based upon Cernero's Inspection Report for Longtown Citgo (CX 1) after the EPA inspection (Tr. 501). Majors noted that the subsequent test does not cure the violation but provided evidence that since Ram's tanks passed this integrity test, it is presumed that they must have had integrity once the CP system was installed because otherwise, the tanks would not have integrity now (Tr. 501-502). Ram performed the test on April 13, 2005 (Tr. 476; RX 69).
56. For Count 20, Mr. Cernero testified that the penalty calculation was the same as that used in Count 17 (Tr. 1656). There were no violator specific adjustments and the environmental sensitivity multiplier was 1. The delayed costs were \$386.34 per tank (CX 7 at 60). The deviation from the requirements was major and the potential for harm was moderate, giving a matrix value of \$750. The multiplier for the days of noncompliance is 6, because Mr. Cernero calculated using 5 years, the full amount allowed under the statute of limitations (Tr. 165). Mr. Cernero calculated the penalty for Count 20 to be \$19,545.34. As explained in Finding 53, I find that this overstates the gravity of the offense. The gravity-based component is a moderate deviation and minor potential for harm, with a matrix value of \$100. The recalculated penalty for Count 20 is \$3,945.36.
57. The total penalty for all counts upon which Respondent is liable is \$49,312.
58. EPA Region 6 and the State of Oklahoma entered into an UST Memorandum of Agreement ("MOA") (Tr. 45) (RX 52). Under the MOA, OCC has primary authority to inspect the USTs and enforce the state and federal laws (Tr. 45). EPA must notify OCC prior to issuance of any type of enforcement action (Tr. 64). Nothing in the MOA

restricts EPA from bringing a complaint or doing an inspection. EPA retained the authority to exercise inspection and enforcement authorities under sections 9005 and 9006 of subtitle I of RCRA, 42 U.S.C. 6991d and 6991e, as well as under other statutory and regulatory provisions. 40 C.F.R. § 282.86.

59. Oklahoma has inspected Indian-owned USTs (Tr. 49-51). The Office of Enforcement and Compliance Assurance has a policy that must be followed in order to issue an administrative order (Tr. 51) and the policy does not permit the use of field citations (Tr. 51). Pursuant to the "Interim Final National Policy Statement for [UST] Program Implementation in Indian Country OSWER Directive 9610.15 October 23, 1995" (RX 55) it states that "[USTs] located in Indian Country generally are not subject to state laws. Because EPA does not authorize tribes to operate the UST program in lieu of EPA, EPA is responsible for the implementation of Subtitle I in Indian Country." (RX 55 at 2).

### **III. Conclusions of Law**

1. Ram is an owner of the five UST facilities, *supra* finding 4, listed under the Complaint as defined by OCC 165:25-1-11 (2004).
2. Ram is the operator of three of its five UST facilities as defined by OCC 165:25-1-11 (2004).
3. Pursuant to Subtitle I of RCRA, EPA has the authority to assess civil penalties for UST violations.
4. According to EPA UST Penalty Guidance, EPA has the authority to issue a penalty not to exceed \$10,000 per tank, per day of violation, pursuant to Section 9006(d) of RCRA, 42 U.S.C. § 6991e(d). Pursuant to the Debt Collection and Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996), and the regulations promulgated thereunder, for violations occurring on and after January 31, 1997, the statutory maximum penalty for each day of violation is \$11,000.
5. The penalty calculation for UST violations in this case is determined by the EPA Penalty Guidance for Violations of UST Regulations, OSWER Directive 9610.12, November 14, 1990 (CX 12).
6. Although the EPA Penalty Guidance for Violations of UST Regulations is followed herein, the penalty calculated by Complainant overstates the gravity of the violation both from the standpoint of harm to the regulatory program and gravity of the misconduct. It is concluded that an appropriate penalty in this case is \$49,312.
7. Respondent's assertions of laches, warrantless search and seizure, and selective enforcement do not operate to reduce the penalty.



8. RCRA does not permit an owner and/or operator to transfer liability of a penalty to a third party.
9. The penalty calculation in this case is not influenced by the OCC penalty policy or by prior EPA cases.

#### IV. Discussion

Congress has given EPA the authority under Section 9006 of RCRA to assess administrative penalties. 42 U.S.C. § 6991e. Pursuant to delegated authority from the Administrator to conduct public hearings and the Consolidated Rules of Practice, an ALJ has broad authority to conduct administrative hearings and assess penalties (40 C.F.R. § 22.4(c)(1)).

Under the Consolidated Rules, Complainant has the “burdens of presentation and persuasion that the relief sought is appropriate. 40 C.F.R. § 22.24. At the hearing, Complainant proposed a revised civil penalty of \$175,062.75 against Respondent for the violations of Section 9006 of the Solid Waste Disposal Act, 42 U.S.C. § 6991e. Complainant argues that it properly applied the RCRA statutory factors and the UST Penalty Policy, it has met its burdens, and the imposition of a penalty of \$175,062.75 is appropriate in this case.

The Presiding Officer has the authority to accept Complainant’s or Respondent’s interpretation of the statutory factors, or determine his own interpretation. The penalty must be determined by the ALJ based upon the evidence on the record and in accordance with the statutory and regulatory criteria (*see* 40 C.F.R. § 22.27(b)<sup>30</sup>). However, the EPA penalty policies “serve as guidelines only and there is no mandate that they be rigidly followed.” *James C. Lin and Lin Cubing, Inc.*, 5 E.A.D. 595, FIFRA Appeal No. 94-2, *slip op.*, at 5 (EAB 1994). Therefore, the ALJ must “consider” the applicable penalty policy, but has the “discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where the circumstances warrant.” *M.A. Bruder & Sons*, RCRA (3008) App. No. 01-04, 2002 EPA App. LEXIS 12, at \*28 (EAB July 10, 2002) (citing *DIC Americas, Inc.*, 6 E.A.D. 184, 189 (EAB 1995)). *See also, Rybond, Inc.*, 6 E.A.D. 614, 639 (EAB 1996) (“Under the circumstances of a given violation, reduction of a penalty assessment may be appropriate even if the penalty has been properly calculated in accordance with [the appropriate] Penalty Policy.”).

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According to 22.27(b), “[i]f the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.”

## A. Affirmative Defenses

Respondent did raise some affirmative defenses in its Answer, but did not address any of them in its Post-Hearing briefs, and therefore, they are not only irrelevant to liability but are abandoned with regard to mitigation of the penalty.

Nevertheless, to the extent that certain defenses raised in the Answer could have some bearing on the assessment of the penalty, they are addressed as follows.

### **1. Doctrine of Laches**

Laches is an “[u]nreasonable delay in pursuing a right or claim – almost always an equitable one – in a way that prejudices the party against whom relief is sought.” (Black’s Law Dictionary). The doctrine of laches “is not an affirmative defense that in general can be raised successfully against the government.” *Tennessee Valley Authority*, 9 E.A.D. 357, 415, n.56 (EAB 2001) (citing *Nevada v. United States*, 463 U.S. 110, 141 (“the Government is not in the position of a private litigant or a private party”)); *see also* *FDIC v. Husey*, 22 F.3d 1472, 1490 (10th Cir. 1994) (the general rule is that the United States is not subject to the defense of **laches**); *Bostwick Irrigation Dist. v. United States*, 900 F.2d 1285, 1291 (8th Cir. 1990) (“We have recognized the long-standing rule that **laches** does not apply in actions brought by the United States.”). Therefore, the doctrine of laches does not operate to reduce the penalty in this case.

### **2. Fourth Amendment Jurisprudence**

RCRA Section 9005 permits EPA to make warrantless searches of USTs and seize any evidence from those searches. *In re Norman C. Mayes*, 12 E.A.D. 54 (EAB 2005); *see* 42 U.S.C. § 6991d). Furthermore, Complainant conducted a legal inspection consistent with the statute by entering the facility at a reasonable time, taking samples, and monitoring or testing the tanks while commenced and completed with reasonable promptness (*see* 42 U.S.C. § 6991d). A neutral inspection took place, as EPA did not review any prior records pertaining to OCC’s enforcement or other inspections (Tr. 312-13; Tr. 174-75). The inspection of Ram was not the only inspection by EPA for fiscal year 2005 (Tr. 47). And as indicated, *supra*, Finding 10, EPA was concerned when its inspections revealed violations at Ram facilities. While the Fourth Amendment to the Constitution indicates that warrantless searches of businesses are unreasonable and therefore, unconstitutional, even in the context of environmental law (*Mayes*, at 28-29 (citing *New York v. Burger*, 482 U.S. 691, 699-700 (1987)); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 311-12 (1978); *Reeves Bros., Inc. v. EPA*, 956 F. Supp. 676, 679 (W.D. Va. 1996)), legislative schemes that permit warrantless administrative searches of regulated industries have been upheld by courts “provided the legislation adequately protects business owners from unreasonable government intrusions by ensuring that inspection time, place, and scope are limited in similar fashion to a warrant.” *Id.* at 29 (citing *Donovan v. Dewey*, 452 U.S. 594, 599-606 (1981)); *see also* *United States v. V-1 Oil Co.*, 63 F.3d 909, 911-13 (9th Cir. 1995);

*V-1 Oil Co. v. Wyoming*, 696 F. Supp. 578, 581-83 (D. Wy. 1988)).<sup>31</sup> Ram gave voluntary consent for the inspection (Respondent's Post-Hearing Brief at 60). A warrantless search with voluntary consent is not a violation of the Fourth Amendment (*Mayer* at 30). Moreover, it is noted that Respondent did not challenge the legality of the inspections in its Answer (CX 18). Not only is the search statutorily permitted, but any argument noted under the MOA is disregarded because the inspections were jointly conducted by both EPA and OCC employees (Findings 9 and 10). Accordingly, Complainant did provide sufficient notice to Respondent prior to its inspection (Tr. 302 – 306).

### 3. Selective Enforcement

If, as the Respondent has hinted here, Ram was a target of an unfair search on the basis of selective enforcement, to establish this defense, the Respondent must show: (1) that Respondent "has been singled out while other similarly situated violators were left untouched," and (2) that the EPA selected Respondent "for prosecution 'invidiously or in bad faith, i.e., based upon such considerations as race, religion, or the desire to prevent the exercise of Constitutional rights.'" *United States Department of the Navy*, Docket No. RCRA-III-9006-062, 2000 EPA ALJ LEXIS 76 (ALJ Nov. 15, 2000) (citing *Newell Recycling Company, Inc.*, 1999 EPA App. LEXIS 28, TSCA App. No. 97-7 (EAB Sept. 13, 1999), *aff'd*, F.3d (5th Cir., Nov. 8, 2000)). Respondent has not alleged that it was selected for prosecution based upon any of these considerations. Moreover, as indicated above, *supra*, Finding 10, Complainant based its reasons for the inspection upon Region 6's annual inspections.

### 4. Third Party Liability

Respondent also argues that it reasonably relied on third parties for compliance with the UST regulations. Pursuant to 42 U.S.C. § 6991b(h)(6)(C) transfer of liability is not permitted.<sup>32</sup> The statute imposes liability on owners and operators of USTs. The owner and/or operator liable for penalties assessed by the EPA may pursue reimbursement in a court with jurisdiction on the basis of any contract with an indemnification clause between the owner and/or operator and the contractor (*see* EPA's Reply to Respondent's Post-Hearing Brief at 11).

## B. Other Arguments of Respondent

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*Mayer* provides three criteria for warrantless searches of pervasively regulated industries, which include: (1) there must be substantial government interest that informs the regulatory scheme pursuant to which the inspection is made; (2) the warrantless inspections must be necessary to further the regulatory scheme; and (3) the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. *Mayer* at 30, fn.18 (citing *New York v. Burger*, 482 U.S. 691, 702-03 (1987)).

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Owner and/or operator of an UST are financially responsible for taking corrective action pursuant to 40 C.F.R. Part 280, Subpart H. "[R]espondent's failure to comply with the Part 280, Subpart H, provisions constitutes a violation of Section 9003 of RCRA." *In the Matter of B&R Oil Company, Inc.*, Docket No. RUST-007-91, 1997 EPA ALJ LEXIS 71, \*12 (ALJ Sept. 4, 1997).

## 1. Oklahoma Corporation Commission Penalty Assessment Policy

In regard to whether Complainant should have applied the OCC penalty policy, Respondent cited to numerous OCC penalty assessments for the same or similar violations. The OCC penalty assessments are invariably significantly lower than those proposed by the EPA in this matter. For example, for Count 1, EPA has proposed a penalty of \$27,413.93. Respondent claims that for a similar violation under Oklahoma State program, a \$1,000 penalty would be assessed (Resp.'s Post-Hearing Brief ¶ 139). For Count 12, EPA has proposed a penalty of \$13,500, while Respondent claims that under the OCC program, a \$600 penalty would be assessed (*Id.* ¶ 236). In fact, Respondent claims that under the OCC program, Ram would not be subject to a penalty at all, but given a warning first (Resp.'s Post-Hearing Brief, p. 58). Respondent argues that the ALJ should depart from the EPA penalty policy to come into line with Oklahoma policy.

RCRA Section 9006(a)(2), 42 U.S.C. § 6991e(a)(2) provides that EPA has the authority to bring a civil action against a respondent where there is a violation of a State program approved under RCRA Section 9004, 42 U.S.C. § 6991c. Specifically, EPA's approval of the Oklahoma State UST program states that:

The Agency retains the authority under sections 9005 and 9006 of subtitle I of RCRA, 42 U.S.C. §§ 6991d and 6991c, and other applicable statutory and regulatory provisions to undertake inspections and enforcement actions in approved states. With respect to such an enforcement action, the Agency will rely on federal sanctions, federal inspection authorities, and federal procedures rather than the state authorized analogs to these provisions. Therefore, the approved Oklahoma enforcement authorities will not be incorporated by reference. Section 282.86 lists those approved Oklahoma authorities that would fall into this category.

61 Fed. Reg. 1220 (Jan. 18, 1996).<sup>33</sup> The MOA between the State of Oklahoma and EPA Region 6 specifically states that "[n]othing in this MOA shall be construed to restrict in any way EPA's authority to fulfill its oversight and enforcement responsibilities under Subtitle I of RCRA." (RX 52 at 1). Furthermore, it states that "[n]othing in this MOA shall restrict EPA's right to inspect any [UST] facility or bring enforcement action against any person believed to be in violation of the approved State [UST] program." (*Id.* at 9-10).

In cases where the EPA initiates an action where there is an authorized state program, it is clear that the EPA must use the RCRA penalty assessment policy. In *Titan Wheel Corp.*, a RCRA case, the respondent argued that the penalties sought in state enforcement actions have been much lower than the penalties proposed for similar violations in cases where EPA enforces RCRA violations, and that EPA's proposed penalty was therefore unreasonable, arbitrary and

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UST State Inspections, penalties, and field citations are not incorporated by reference into the RCRA Subtitle I program (EPA's Post-Hearing Brief at 36).

capricious and an abuse of discretion. When the respondent moved to admit exhibits that illustrated that the EPA assessed more severe penalties than those assessed by Missouri's authorized agency, EPA objected, stating that the exhibits were irrelevant, immaterial, and of little or no probative value to the case. *In the Matter of Titan Wheel Corporation of Iowa*, Docket No. RCRA VII 98-H-003, Order Granting Complainant's Motion to Strike at 3 (ALJ Dec. 13, 2000), *aff'd*, RCRA (3008) Appeal No. 01-3, 2002 EPA App. LEXIS 10 (EAB June 6, 2002). The ALJ rejected the respondent's argument that the EPA's penalty assessments must be consistent with those assessed by a state enforcement agency, reasoning that "even if it could be demonstrated that penalty determinations for similar violations varied widely between state and EPA enforcement actions, such disparities are not relevant. Only wide disparities for similar penalties imposed by a particular enforcement agency can, theoretically, be subject to the claim that a proposed penalty is arbitrary or an abuse of discretion," and even if the respondent's propositions regarding uniformity of penalties were correct, it is equally plausible that in the name of uniformity, the states should be required to adjust their proposed penalties upward to be consistent with those sought by the EPA (*Id.* at 8). On appeal to the United States District Court for the Southern District of Iowa, the court affirmed, rejecting the respondent's argument that "state agencies' penalties must be equivalent to those assessed by the EPA," and recognizing that "the EPA may impose stiffer penalties than the penalties assessed by an authorized state." *Titan Wheel Corp. v. United States EPA*, 291 F. Supp. 2d 899, 913 (S.D. Iowa 2003). See also *In the Matter of U.S. Army Training Center and Fort Jackson*, Docket No. CAA 04-2001-1502, 2003 EPA ALJ LEXIS 187, \*44 (ALJ September 12, 2003). Therefore, Respondent's argument that this tribunal should assess a penalty consistent with the OCC's penalty policy has no merit.

## 2. Prior EPA Cases

Respondent also cited to prior settlements between EPA and various companies in Oklahoma as reasons to lower the proposed penalty. Many of those cases are field citations and not administrative orders. Administrative agency decisions are not rendered invalid on the basis that the sanction is more severe than that imposed in other cases. *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973), *reh'g denied*, 412 U.S. 933 (1973)); see also *Newell Recycling Co., Inc. v. United States Environmental Protection Agency*, 231 F.3d 204, 210 n.5 (5th Cir. 2000); *Cox v. United States Dept. of Agric.*, 925 F.2d 1102, 1107 (8th Cir. 1991)). It is also established that penalty assessments are sufficiently fact- and circumstance-dependent that the outcome of one case cannot determine the resolution of another. *In re Newell Recycling Co., Inc.*, 8 E.A.D. 598, 642 (EAB 1999). Comparing penalties assessed in previous settlements is not useful, as there are many factors that go into a penalty determination in settlement. In addition to the statutory provisions, the EPA considers the risks of litigation, the demands on the Agency's enforcement resources, the size of the business involved, the ability of a company to pay a penalty, whether there is a history of prior violations, and other factors. Therefore, prior settlements between the EPA and other companies are not persuasive or probative in this case.<sup>34</sup>

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Furthermore, the Penalty Policy indicates that the "Office of [UST] (OUST) has been exploring the use of field citations as an alternative means of assessing civil penalties and obtaining compliance with UST requirements. Once the matter of whether field citations will be used in the Federal UST program has been determined, this policy will be revised to reflect how field citations fit into the UST penalty policy." (CX 12 at 17).

## CONCLUSION

Upon consideration of the UST Penalty Policy, the parties' arguments and the evidence, I am not persuaded that Complainant has shown that a penalty of \$175,062.75 is appropriate in this case, nor am I persuaded that Respondent's much lower penalty is appropriate. As stated above in the Findings of Fact, Conclusions of Law and Discussion, the appropriate penalty to assess in this case is \$ 49,312.

## ORDER

It having been determined that Ram, Inc. violated RCRA as alleged in the complaint, a penalty of \$49,312 is assessed against it in accordance with Section 9006 of RCRA.<sup>35</sup> Payment shall be made by submitting a certified or cashier's check in the amount of \$49,312 payable to "Treasurer, United States of America," and mailed to:

U.S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, MO 63197-9000

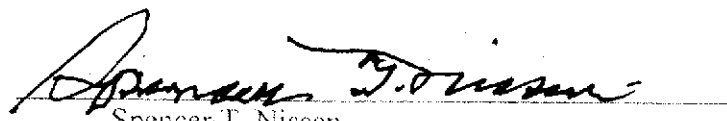
A transmittal letter identifying the subject case and EPA docket number as well as Respondent's name and address, must accompany the check.

If Respondent fails to pay the penalty within the prescribed statutory period after entry of this Order, interest on the penalty may be assessed. *See* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

Dated this 12<sup>th</sup> day of July, 2008.

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Unless this **decision** is appealed to the EAB in accordance with Rule 22.30 (40 CFR Part 22), or unless the EAB elects to review the same sua sponte as therein provided, the **decision** will become the final order of the EAB in accordance with Rule 22.27(c).

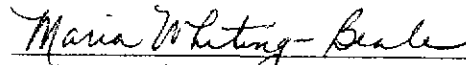
A handwritten signature in black ink, appearing to read "Spencer T. Nissen", written over a horizontal line.

Spencer T. Nissen  
Administrative Law Judge

In the Matter of Ram, Inc., Respondent  
Docket No. SWDA-06-2005-5301

CERTIFICATE OF SERVICE

I certify that a true copy of **Initial Decision**, dated July 12, 2008 was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale  
Staff Assistant

Dated: July 15, 2008

Original and One Copy by Pouch Mail to:

Lorena Vaughn  
Regional Hearing Clerk  
U.S. EPA  
1445 Ross Avenue, Suite 1200  
Dallas, TX 75202-2733

Copy by Pouch Mail to:

Lorraine Dixon, Esquire  
Yerusha Beaver, Esquire  
Assistant Regional Counsel  
U.S. EPA  
1445 Ross Avenue  
Dallas, TX 75202-2733

Copy by Certified Mail Return Receipt to:

Charles W. Shipley, Esquire  
Shipley & Kellogg, P.C.  
1800 S. Baltimore, Suite 901  
Tulsa, OK 74119

Robert D. Kellogg, Esquire  
Shipley & Kellogg, P.C.  
Two Leadership Square  
211 N. Robinson, Suite 1300  
Oklahoma City, OK 73102-7114