UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
RAM, INC.	)	
	)	**Docket No. SWDA-06-2005-5301**
	)	
RESPONDENT	)	

RESPONDENT'S MEMORANDUM IN REPLY
TO COMPLAINANT'S POST-HEARING BRIEF

Respondent Ram, Inc. ("Ram") respectfully submits this Memorandum in reply to the Complainant's post-hearing brief, urging the Court to adopt Ram's proposed findings of fact and conclusions of law instead of those proposed by the Complainant, EPA Region 6 ("Region").

A. Introduction

The Region sent an inspector into Oklahoma on February 16 and 17, 2005 to visit only five UST facilities, all of which were owned by Ram. Ram itself operates two of those facilities, two others are operated by third parties, and the fifth had been closed for a number of years and has since been sold. Six months after its inspections, and without ever having contacted Ram in the interim to inquire about its compliance status, the Region issued a complaint and compliance order seeking a penalty of $279,752.00 alleging 20 counts of violations. At the beginning of the hearing on May 9, 2006, the Region dropped six of the counts and now seeks an administrative penalty of $175,062.75. Ram stipulated to liability for the remaining violations but contested the appropriateness of the proposed penalties.

B. Summary of Argument

First, many of the Region's proposed findings of fact are simply not supported in the record. Second, Ram's affirmative defenses do challenge the legality of the Region's inspections. Third, the Region did not enforce the Oklahoma program nor did it apply the

Oklahoma rules it approved as part of that program. Contrary to the spirit, if not the letter, of the UST program, the Region instead enforced its own interpretation of the UST program, resulting in a proposed penalty which is both wholly unanticipated and wholly unfair. Fourth, there are many reasons not to apply the UST penalty policy as proposed by the Region.

C. Argument

Part One, Proposed Findings of Fact

First, the Region's proposed findings of fact numbers 9 through 15, 17, 21, 24, 30, 31 and 34 are simply not supported in the record.

Ram denies that the Region's proposed penalty is consistent with 40 CFR Part 22 but agrees that the Region has thus far followed the appropriate process (Finding No. 9). Ram denies, pursuant to its own proposed findings of fact, that the proposed penalty conforms to EPA guidance, was properly derived, considers the "statutory consideration," or that it is reasonable and conservative (Findings Nos. 10 through 14). Ram denies that it has not met its burden of proving its affirmative defenses (Finding No. 15), which will be further addressed in Part Two, below.

Ram denies that the spill buckets at the Citgo Thrif-T-Mart were "not capable of containing product" (Finding No. 17). The Region's inspector testified that the buckets could have held an additional gallon of product [*TR-1, page 103, line 23*]. The buckets were in fact holding product on the day of the inspection [*CX-24 and 25*], and records show that product was delivered that day which could explain why product was in the buckets [*TR-2, page 445, lines 8 thru 21*].

Ram denies that the corrosion protection system at the Citgo Thrif-T-Mart had failed to operate continuously since March 19, 2004 (Finding No. 21) and documentation and testimony presented at the hearing supports this denial. The Oklahoma Corporation Commission ("OCC")

inspected the system one month before the Region inspected and found it to be working, at 5 amps [*RX-18*]. Ram's expert, Mike Majors, testified that 5 amps indicated correct operation, and the next check of the system was therefore not due for another 60 days, which would have been *after* the Region's inspection [*TR-2, pages 452 and 453*].

Ram denies that product would necessarily escape from the cracked spill bucket at Goodwin's upon disconnecting a transfer hose (Finding No. 24). The damage was at the top of the spill bucket and the spill bucket was in fact holding product at the time [*CX-27*]. A photo taken by Mike Majors also showed it to be holding product after the Region's inspection [*RX-28*] and [*TR-2, page 448, line 9*].

Ram was unable to produce documentation that a structural integrity test was performed at Monroe's and Longtown. Other evidence suggests that because the tanks were subsequently found to have integrity, because they were found not to have leaked, and because they were installed under NACE-certified supervision, then such tests were likely done, and Ram could rely upon its certified consultant to ensure that such tests were done, contrary to the Region's Finding Nos. 30 and 31. *See*, Ram's proposed findings of fact numbers 264 through 288.

Lastly, as to the Region's proposed finding number 34. Ram agrees that it is subject to the federal UST laws, but believes the Region's application of the program and resulting penalty are improper.

Part Two, Affirmative Defenses

The Region suggests that Ram has not raised the legality of the inspections, or met its burden in presenting its affirmative defenses. Actually, Ram does not complain that the inspections were illegal, but, rather, that the Region did not follow the reasoning for an administrative warrant and because Ram was singled-out for inspection then Ram was not

treated under the Field Citation program as other UST owners had been treated. This enlarged the penalty by two orders of magnitude, which is shocking to the conscience (Ram's affirmative defense number 10).

Part Three, the Region Wrongfully Ignored the Oklahoma Program

The Region asserts at page 36 of its *Brief* that it never incorporated Oklahoma's inspection, penalty and field citation rules (OAC 25 subchapter 9) when it approved the Oklahoma program, and therefore there is no basis for applying state policy. However, a review of 40 CFR 282.86, and its underlying 61 Fed. Reg. 1220-1223 discloses that "Appendix N, Field Citation Fines" was indeed incorporated by reference. That Appendix is now known as Appendix S. The Region states that it brought this action to enforce the OCC rules, not the EPA rules. Oklahoma's Appendix N (now S) is part of those rules and the Region is bound thereby.

Even if the Region is not *required* to apply Oklahoma's fines as listed in the Oklahoma rules, the Region *should* have done so because it has approved the program, has praised the program and has permitted the program to proceed as it has for 12 years. As a result, the instant Complaint deviates from that program in a way that is greatly inconsistent with the normal UST practice in Oklahoma and is therefore unfair to the regulated community, including Ram.

Part Four, Compelling Reasons to Ignore the UST Penalty Policy

When trying to explain away the inconsistencies between conclusions reached by the OCC inspector and by the Region inspector regarding Ram's compliance status, the Region amazingly points out that "these are inspectors, not machines ..." and enforcement and interpretation of the UST program may vary from inspector to inspector. The Region's application of the penalty policy in this case granted flexibility to itself but not to the regulated community. However,

Just because the Region's inspector failed to contact the UST owner and ask about compliance during the six months he was drafting the administrative order, alone, is probably not a good reason to depart from the penalty guidance.

Just because the economic benefit in the UST program is quite low, alone, is probably not a good reason to depart from the penalty guidance.

Just because this is the first RCRA 9006 administrative order filed in Oklahoma, alone, is probably not a good reason to depart from the penalty guidance.

Because the Region alleged violations of state regulations and then ignored the state's penalty procedures and the state's specific penalty-setting regulation (Appendix S), then this alone is sufficient reason to depart from the penalty guidance.

Collectively these factors provide a compelling reason to deviate from the penalty policy. Especially where Ram had for years not been marked in violation by the state inspectors. Especially where Ram was singled-out for inspection without apparent good cause. Especially where that selection process somehow precluded the Region from using the field citation option that had been used in the past. Especially where the penalty guidance would "unlevel the playing field" between Ram and the other USTs which had previously received field citations.[3] And most especially where it would treat Ram disparately from all of the Indian USTs which are not located on Indian reservations and which thereby directly compete with Ram.

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[3] The Region's reliance on Titan Wheel Corporation of Iowa RCRA (3008) Appeal No. 01-3, is misplaced. Titan, a large quantity hazardous waste generator regulated by the EPA in Iowa, which is not an authorized state, contested EPA's penalty as excessive compared to penalties assessed by the neighboring State of Missouri. The ALJ reasoned that even if there were wide variations between state and federal penalties, they would not be relevant. "[O]nly 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." *Titan* at 10 E.A.D. 532. In the case at bar, Ram is looking at the Region's own actions.

D. Conclusion

When a formula produces an absurd result, it is time to revise or discard that formula. A penalty in this matter of more than a few hundred dollars or at most a few thousand dollars is absurd. The UST penalty policy should be revised, and its use against Ram in this case should be discarded as arbitrary, capricious and an abuse of discretion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the __ day of August, 2006, I placed true and correct copies of the foregoing in the U.S. mail addressed to the following:

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UNITED STATES ENVIRONMENTAL APPEALS BOARD BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
RAM, INC.	)	**Docket No. SWDA-06-2006-5301**
	)	
	)	

NOTICE OF APPEAL AND BRIEF IN SUPPORT OF APPEAL

Respondent, Ram, Inc, ("Ram") respectfully submits this Notice of Appeal and Brief in Support of same concerning the July 12, 2008 Initial Decision ("ID") in this matter by the Honorable Spencer T. Nissen, ("Nissen") Administrative Law Judge. The ID was received in the office of the undersigned on July 21st, 2008. The hearing before Nissen was held May 9, 10, and 11th, 2006. Ram is the owner of five gasoline convenience stores and only operates three of them.

The record before Nissen showed that this matter is an example of a powerful governmental agency deciding to punish a businessman by issuing an economic death sentence, in spite of the fact that Ram was only shown to have failed on paperwork errors or omissions. There was no evidence of spillage of any gasoline at any of the five service stations investigated. There was no damage to the environment, nor any credible threat of such damage.

The Agency issued a civil penalty of $ 279, 752.00 for UST violations at these five service stations and only at the last minute before trial began on May 9, 2006 did the Agency acknowledge that it had overreached by dismissing many of its claims. Thus the three-day trial went forward with the Agency seeking $ 175, 062.75 in civil penalties from Ram.

The Agency ("EPA") had delegated the UST program to Oklahoma before they had targeted Ram. The targeting of Ram is shown by, inter alia, EPA only inspecting Ram facilities, in all of 2005, in the state of Oklahoma. The Court below failed to prevent EPA from applying its own penalties and policies, rather than the Oklahoma Corporation Commission ("OCC") penalties and policies with respect to Ram. If OCC's program had been applied, $2000.00 would have been more likely the fine assessed, if any.

The magnitude of this fine is shocking. The EPA's actions in this civil penalty action were shown to be arbitrary and capricious.

In an effort to placate EPA, Ram agreed to stipulate to all of the remaining violations at the 3-day trial- they were largely only paperwork violations-if they were violations at all.

In most instances the proof at trial showed that the required work had been performed, but the paper documentation could not be found since so much time had passed.

For instance (and there are several of these described in Nissen's ID), Ram was fined heavily for the inability to produce an integrity test prior to installing a cathodic protection system in 1998 (see ID paragraph 55). The proof did establish that a NACE certified consultant designed and installed that system that and it was proven that a subsequent integrity test was passed. Therefore, Nissen held that it must be presumed that such tank had integrity previously. Nissen held in that instance that EPA's testimony "overstates the gravity of the offense," and he reduced the fine from $19, 595.34 to $3, 945.36.[1]

[1] Ram adopts and makes a part of this Appellate Brief and attaches hereto:

That is just one example of Nissen's finding that EPA's sworn testimony as to the facts and as to the application of EPA's penalty policy was not supported by the facts, Nissen also found EPA's testimony: overstates the deviation and potential for harm" (ID at Paragraph 53); "simply guessing" [that there was a violation] (ID at Paragraph 50); "overstates the seriousness of the violation" (ID at Paragraph 43); "emphasized ...implausibly" [that PVC pipe and pump manifolds were threatened by corrosion] (ID at Paragraph 39), "greatly overstates the potential for harm...by his own admission,...lined tanks did not need cathodic protection" (ID at Paragraph 39), and "testimony is misleading" (ID at Paragraph 22.)

Numerous times Nissen rejected the EPA application of their penalty policy because the record did not support any risk of harm-much less any actual harm to the environment (for example see ID at Paragraph, 27, 30, 33, etc.).

EPA tried to fine Ram $ 27, 413.94 for failing to install spill buckets on two tanks at a service station where those tanks could not be accessed by a fuel truck due to physical limitations. (The only reason for spill buckets is to catch spills from tank truck loading hoses.) Nissen found there was no evidence of any truck deliveries at those two tanks and further that there is "simply no evidence of any spill occurring at this station." (ID at Paragraph 22. Nissen reduced the fine to $2,213.94, which is still amazingly high, and should not be upheld, but should be reduced to zero..

Nissen failed to uphold Ram's assertion that it had been denied substantitive due process by the unjustifiable targeting of Ram, and by the outrageous size of the fines, and by the pattern of EPA's inaccurate factual assertions demonstrating a fundamental

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1) Initial Decision
2) Respondent's Proposed Findings of Fact, Conclusions of Law and Brief in Support
3) Respondent's Memorandum in Reply to Complainants' Post Hearing Brief

zero, the cost of all Ram's attorney fees is more than enough to encourage strict compliance with record keeping in the future.

Additionally, as pointed out in the attachments hereto, Ram is in direct competition with several Native American gasoline service stations, and there is no enforcement by EPA Region 6 against those stations. Due to the U.S. Constitution, the OCC is prevented from enforcing UST rules against those operations. Again, Nissen's failure to prevent Ram from being undercut in the marketplace by even-handed applications of the UST Rules and Regulations is shocking, unfair and violative of Ram's Constitutional rights to fair trial and hearing. Nissen should have required EPA to apply its' approved OCC UST policy, etc. The record below shows there are no other UST penalties for other service stations issued by EPA in the entirety of Region 6 which are even one-tenth the size of those penalties issued to Ram, which demonstrates further that EPA's treatment of Ram is arbitrary and capricious. Ram is not a Fortune 500 company and even those large companies are not treated like Region 6 is trying to treat Ram. Nissen should have over-ruled all of those civil fines on this record.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on this 15 day of August, 2008, I placed true and correct copies of the foregoing in the U.S. Mail, without attachments, which each recipient has already received, due to the volume, addressed to the following:

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