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[24] (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[25]), 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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24 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.*).

25 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[26] (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).[27]

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[26] 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).

[27] 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).[28] 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).[29] 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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[28] Here, Twylah Monroe testified that the pumps were removed for Count 16.

[29] 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 is 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)[30]). 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)).[31] 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 (*Mayes* 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.[32] 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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Mayes 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. *Mayes* 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 6991e, 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).[33] 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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[33] 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 that 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.[34]

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[34] 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.[35] 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 12th day of July, 2008.

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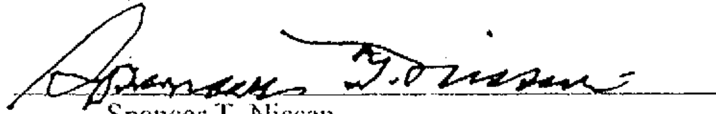
35 Unless this decision is appealed to the EAB in accordance with Rule 22.30 (40 CFR Part 22), or unless the EAB elects to review the same sua sponte as therein provided, the decision will become the final order of the EAB in accordance with Rule 22.27(c).

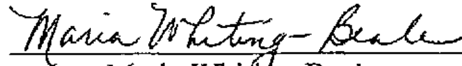


Spencer T. Nissen
Administrative Law Judge

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:

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Regional Hearing Clerk
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Dallas, TX 75202-2733

Copy by Pouch Mail to:

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