

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

VOLUME II OF III
TRANSCRIPT OF PROCEEDINGS
HEARD ON THE
9TH, 10TH, and 11TH DAYS OF MAY, 2006
BEFORE SPENCER T. NISSEN,
ADMINISTRATIVE LAW JUDGE

Reported by: HEATHER SCOTT, CSR-RPR

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PROCEEDINGS OF MAY 10, 2006

1
2
3 THE COURT: The hearing will be in order, and
4 you may resume the stand, Mr. Cernero.

5 But I don't see him.

6 MS. DIXON: He had to take an errand.

7 THE COURT: Yeah, he'll be back.

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

10 THE COURT: You may resume the stand,
11 Mr. Cernero.

12 MS. DIXON: Are we on the record?

13 THE COURT: Yes, we'll go on the record.

14 MS. DIXON: Your Honor, before the testimony or
15 the cross begins again, could I make a brief
16 statement on the record?

17 THE COURT: Yes, you can.

18 MS. DIXON: I'll let you get settled down.

19 THE COURT: You may make your statement,
20 Ms. Dixon.

21 MS. DIXON: Okay. Your Honor, in the interest
22 of saving time and not objecting -- continuing to
23 object to Respondent's cross, in the event that Your
24 Honor continues to allow them to pursue the line of
25 questioning that goes into enforcement and compliance

1 history regarding prior cases of EPA, and as well as
2 actions in Indian county (sic), we could like to just
3 make a standing objection and not to continue to
4 object while Respondent is questioning the witnesses.

5 THE COURT: That's perfectly satisfactory and
6 understood that you have a continuing objection to
7 that line of testimony.

8 MS. DIXON: And we want to make sure that it's
9 on the record that our -- our objection is based upon
10 immaterial, irrelevancy, and little to no probative
11 value, as well as regarding Titan Wheel Corporation
12 of Iowa, where the EAB held that the ALJ did not err
13 in excluding evidence sought to be admitted by the
14 Respondent to other penalty assessment proceedings by
15 both EPA and the state of Missouri.

16 So that's the first thing. And then the second
17 thing, Your Honor, I needed some clarity about -- I
18 know Mr. Kellogg said yesterday because of new
19 developments in the case they wanted to take a
20 different approach to crossing our witness.

21 And I didn't quite understand, and my co-counsel
22 and I were talking about it, so we were wondering
23 could we get some clarity about the approach that he
24 wanted to take.

25 THE COURT: Mr. Kellogg, do you wish to address

1 that?

2 MR. KELLOGG: Certainly, Your Honor. Since we
3 stipulated to the -- or accepted the violations
4 yesterday, that altered our entire strategy, and so
5 we had to reformat our notebooks and our order of
6 questioning for the witnesses.

7 And as a result of that, it was a little
8 disjointed yesterday. Last night, I was able to go
9 through and reformat all of our information so it
10 matches not only the order that we wish to pursue,
11 but the correct rules.

12 If you recall, Your Honor, yesterday, there was
13 some confusion over the 2005 version versus the 2004
14 version --

15 THE COURT: Exactly.

16 MR. KELLOGG: -- of the Corporation Commission
17 rules. And I have since resolved that. And I think
18 my portion of the examination of this witness will
19 take no more than a half hour or so.

20 And then I'll ask Mr. Shipley to resume on the
21 effects of the policy of EPA's enforcement and its
22 implications.

23 My focus will be on the technical elements of
24 the violations towards mitigation of the penalties.

25 MS. DIXON: And EPA wants to just make sure that

1 we are on record that we object to the tactical
2 approach of crossing the witness, Your Honor. We
3 feel it is unreasonable, and it is undue delay.

4 We are -- these are seasoned trial attorneys,
5 and the fact that they stipulated to the liability at
6 the last moment at the ninth hour, should not have
7 any bearing on how this court should proceed.

8 THE COURT: Well, your -- your statement is
9 noted, but you may proceed, Mr. Kellogg.

10 MR. KELLOGG: Thank you, Your Honor.

11 *****

12 CROSS EXAMINATION (CONT'D.)

13 BY MR. KELLOGG:

14 Q Good morning, Mr. Cernero.

15 A Good morning.

16 Q I see that you made it through last night's bombast
17 in a fine fashion.

18 A Yes.

19 Q Rather a loud night, wasn't it?

20 A Yes. I'm still hurting.

21 Q Yes. Well, that's EPA's welcome to our state, I
22 guess. I would like to resume in -- in pretty much the
23 same fashion that we talked yesterday, only much more
24 organized on my part. And I apologize for not being
25 organized yesterday.

1 I'd like you to turn, sir, to Count 10 of the
2 complaint. That would be Goodwin's One Stop in
3 Hartshorne. And I believe that count deals with one
4 cracked spill bucket on one of the tanks; is that correct?

5 A I would not say cracked. I would say a gaping hole.

6 Q Okay, a gaping hole.

7 A Uh-huh.

8 Q And I would like you to look at EPA Exhibit 30. That
9 would be --

10 A I don't have the exhibit.

11 MS. BEAVER: The Complaint.

12 THE WITNESS: Oh, I got it.

13 MR. KELLOGG: Oh, no, no, no. EPA Exhibit 30 is
14 the OCC rules.

15 MS. BEAVER: The OCC regs.

16 THE WITNESS: Okay, I got that. The '94 (sic)
17 rules? Okay, I have got that.

18 Q (By Mr. Kellogg:) Okay. And if I could help a
19 little bit, page 24, sir.

20 A Okay.

21 Q And is Rule 25-2-39 --

22 A Uh-huh.

23 Q -- the right rule?

24 A I found it. Did you....

25 Q "Spill and Overflow Protection."

1 A Right, "Spill and Overfill Protection."

2 Q Okay. And I believe paragraph (f)(1) is the one that
3 addresses preventing release of a product; is that
4 correct?

5 A Yes.

6 Q Okay. Now, if you would, sir, turn to page 70 of
7 that same rule; that would be Appendix S. And we see
8 there is a citation to Rule 2-39.1, right? But I don't
9 see anything that references 2-39(f)(1), do you?

10 A No.

11 Q Okay. But 2-39.1 is about accepting delivery into a
12 tank that does not have spill protection, right?

13 A Correct.

14 Q And the OCC's penalty for that is how much, sir?

15 A According to this, \$1,000.

16 Q Correct. And that's for one that does not have spill
17 protection, correct?

18 A Yes.

19 Q Okay. And but -- but a lesser included offense might
20 be a dirty -- or a spill bucket with a gaping hole. And
21 we can -- there's not a particular listing for that.

22 A No, there's no listing for that.

23 Q All right. Do you know, sir, what the capacity is of
24 the normal spill bucket that meets EPA's standards?

25 A The -- the standard in the industry; although EPA

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does not designate what that is --

Q All right.

A -- is five -- about five gallons.

Q About five gallons?

A (Nods head.)

Q Okay. And I think yesterday didn't you say that a transfer hose from the tank when they fill them holds about 25 gallons or so?

A If it was a complete, full hose, assuming it was about a 15-foot length, my understanding is about 15 gallons.

Q Fifteen gallons?

A Yeah, if it's full.

Q All right. And so a spill bucket that meets industry standards can't hold the entire contents of a transfer hose, can it?

A No, and it really is not supposed to.

Q Not supposed to?

A It's supposed to hold -- assuming there's excess after the hose has been emptied.

Q Okay. And now, turn back, if you would, to page 24. Actually, I believe it's on, actually, the top of page 25

A Okay.

Q And that rule, (f)(1), doesn't it say hold product until the hose is detached from the fill pipe? Is that

1 not correct, sir?

2 A Yes. Says "spill prevention equipment that will
3 prevent releases of product to the environment when the
4 transfer hose is detached from the fill pipe."

5 Q Okay.

6 A "For example, a spill bucket or a drain system."

7 Q Okay. And don't those hoses work by gravity?

8 A Most of the time, yes.

9 Q All right. And so they were just -- normally, they
10 would just drain into the tank.

11 A Normally, yes.

12 Q Okay.

13 A That's what they are supposed to do.

14 Q Okay. Now, you charged this violation for one day,
15 and that does seem somewhat lenient. But you've also
16 listed it as a major-major, right?

17 A Yes.

18 Q Do you need to refer -- okay. And you also listed
19 Quik Mart, which your Complaint alleged were no spill
20 buckets at all on three ports, and that was a major-major.

21 A Yes.

22 Q All right. Can you tell me what -- what a
23 minor-minor violation might be?

24 A No.

25 Q All right.

1 A I'd have to look at a case-by-case basis.

2 Q And I'd like for you to look, sir, at EPA's Exhibit
3 31. That's the photograph of --

4 A I don't have that in front of me.

5 THE COURT: Do you have that, Mr. Cernero?

6 THE WITNESS: Not -- not in front of me. I --
7 I'm -- I know it's --

8 THE COURT: I have got -- you can use my copy.

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

11 Q (By Mr. Kellogg:) Do you have Government Exhibit 31,
12 sir?

13 A Yes, I do.

14 Q And if I recall your testimony yesterday, you thought
15 there might be some dribble shown in that photograph that
16 could be gasoline, but you weren't sure. Do you recall
17 that?

18 A Yes.

19 Q And it also looks to me like there's some sort of a
20 powder or sand or floor sweep or something scattered
21 around on the concrete.

22 A Yes.

23 Q And do you know what that material was?

24 A It was probably powder for sticking the -- or --
25 sometimes they use that to -- to get a good measurement on

1 the stick.

2 Q Okay. Or it could have been used as something to
3 clean up the dribbles?

4 A It could be.

5 Q Okay. Thank you.

6 A I don't think it would, because it's not even on
7 the -- where the -- the soiled area is, though. I mean I
8 don't -- I don't that's -- I don't know what it is,
9 really. I --

10 Q Yeah.

11 A I wouldn't --

12 Q That soiled area, though, is concrete, is it not?

13 A Yes.

14 Q That's not native soil, it's concrete.

15 A No. I mean -- I'm sorry, the -- the -- looks like
16 diesel or gasoline that's sitting on the concrete. The
17 powder is not on top of that. That -- I would assume if
18 they are using that as an absorbent, that's -- that would
19 be on top of that.

20 Q I'm mistaken it was on top? Thank you, that's all I
21 have of that exhibit.

22 A Okay.

23 Q Now, I'd like to move on to Count 12, sir.

24 A All right.

25 Q This is Goodwin's. Failed to take daily stick

1 readings for three tanks, if I remember it correctly.

2 A Correct.

3 Q And if you would, turn to EPA Exhibit 30; that's the
4 Corporation Commission regulations.

5 A All right.

6 Q Let's look at page 31.

7 A Okay.

8 Q And the regulation is 3-5.1.

9 A Okay.

10 Q Tank tightness -- or "General Release Detection
11 Methods and Devices."

12 And then on the following page, 32, do you see
13 Regulation 3-5.2, "Tank System Tightness Testing with
14 Inventory Control."

15 A Yes.

16 Q Okay. And these would be the applicable rules
17 charged in the Complaint; is that right?

18 A I'm not really sure. On this one, we said according
19 to -- it was 25-2-53.

20 Q Fifty-three?

21 A One. Oh, I'm sorry, wait. You're in -- I'm sorry,
22 what count -- did you say it was 12?

23 Q We're in Count 12, Goodwin's.

24 A Count 12 has to do with cathodic protection. Is that
25 not -- did I get the wrong one?

1 Q Failed to -- failed to take daily stick readings.
2 Let's see, your penalty would be on EPA Exhibit 19,
3 page 11.

4 A I may have the -- I may have the wrong Complaint.
5 Because I have got one that says "draft" on here. That's
6 the wrong one.

7 MS. BEAVER: Can I --

8 MR. KELLOGG: Certainly.

9 MS. BEAVER: Your Honor, could I give him a copy
10 of the Complaint?

11 THE COURT: Yes.

12 THE WITNESS: This is --

13 THE COURT: And do you have another copy? Last
14 night you had given me a copy of those --

15 MS. BEAVER: The OCC regs?

16 THE COURT: -- the night before. The OCC rules,
17 I would like a copy.

18 MS. BEAVER: Of the OCC rules?

19 THE COURT: Yes.

20 MS. BEAVER: Okay.

21 THE COURT: The ones that you said were
22 applicable.

23 MS. BEAVER: Right. They are in our Exhibit
24 Number 30.

25 THE COURT: Oh.

1 MS. BEAVER: That we provided.

2 THE COURT: Okay.

3 MS. BEAVER: Government's Exhibit 30.

4 THE COURT: Okay.

5 MS. BEAVER: Right.

6 THE COURT: Proceed.

7 MS. BEAVER: But Mr. Cernero doesn't have
8 that -- those two folders.

9 THE WITNESS: Okay. This one says "draft."
10 That's the wrong one.

11 Okay. I'm sorry. You're right. That's --

12 Q (By Mr. Kellogg:) Okay.

13 A -- 25-3 -- or 25-3-5.1, yeah.

14 Q 5.1?

15 A Yes.

16 Q All right. And turn, if you would, sir, to page 71
17 in Appendix S.

18 A All right.

19 Q And is that rule cited there on page 71?

20 A Yes, it is. "Failure to provide adequate release" --
21 or -- no, I'm sorry. No, no, no.

22 Q Yes.

23 A That's it, yeah. "Failure to provide adequate
24 release detection for storage tank systems." It says,
25 "first offense, \$500. Second offense" --

1 Q No. The first offense is how much, sir?

2 A Oh, I'm sorry. It's \$250.

3 Q All right. Thank you.

4 A The second offense, 500; the third offense, 1,000.

5 Q All right. And just out of curiosity, do you know
6 which offense this is?

7 A Well, for this particular count, it would probably be
8 the first offense.

9 Q The first offense? Thank you.

10 And now if you would look to your Exhibit 19, page
11 11. That's your calculation of the penalty.

12 A Okay. What's in the order, so -- okay. (Sic.)

13 Q And EPA -- or OCC's charge was 250. And how much was
14 your penalty, sir?

15 A Well, our penalty was for 13,500. That was for all
16 three tanks, I believe.

17 Q Okay. Thank you.

18 A Uh-huh.

19 Q And did you count this for one year and one day?

20 A Let's see. I counted it for one year; for count 12
21 was one year.

22 Q Not one year and one day?

23 A Well, it was actually one year, one day. But it does
24 show 365 here. The multiplier indicates it was 366.

25 Q Yeah.

1 A Okay.

2 Q So the one year and one day adds a little bit more to
3 the multiplier, right?

4 A Uh-huh.

5 Q Okay. Now, I take it you do not have one of these
6 black notebooks, sir?

7 A No.

8 Q This Respondent's exhibits?

9 A No, I don't.

10 MR. KELLOGG: This is for the witness. May I
11 approach?

12 THE COURT: Yes.

13 MR. KELLOGG: I'm handing the witness the black
14 notebook of Respondent's exhibits, Your Honor.

15 THE WITNESS: Okay.

16 Q (By Mr. Kellogg:) I'd like for you to turn to
17 Respondent's Exhibit 29, sir.

18 A Okay. All right.

19 Q And that is an inspection by the Corporation
20 Commission done on February 27th of 2004, right?

21 A Yes.

22 Q And does that indicate whether this facility passed
23 for this particular violation?

24 A Yeah, it shows that there's no violations.

25 Q Shows no violation.

1 A Uh-huh.

2 Q And February 27 is less than a year from the time of
3 your inspection; isn't that correct?

4 A Yes.

5 Q All right.

6 A But a lot can happen in a year.

7 COURT REPORTER: I'm sorry?

8 THE WITNESS: I said a lot can happen in a year.

9 Q (By Mr. Kellogg:) Of course. But your penalty was
10 for one year and one day, right?

11 A Correct.

12 Q And this also is a major-major?

13 A Yes.

14 Q What if someone opted not to take a stick reading one
15 night? Say there were heavy thunderstorms and tornadoes
16 in the air. Would it be a violation to not get the stick
17 test done that day?

18 A It would be a violation, but that would probably be
19 considered in the penalty. It would -- it would be a
20 violation for failure to stick a tank every day that they
21 are in operation, according to the regulations.

22 Q So no day could be missed?

23 A If you are saying strictly, technically, is it a
24 violation? Yes, it is a violation.

25 Q Well, look if you would, sir, to Respondent's

1 Exhibit 2, and I want you to turn to Attachment Number 4,
2 which is towards the end. And that would be a document
3 entitled -- from the EPA -- "Doing Inventory Control Right
4 for Underground Storage Tanks." Can you find that
5 exhibit, sir?

6 A You said Attachment 4 and 2? Okay.

7 Q Attachment 4 to Exhibit 2. Not all of Exhibit 2 has
8 been stipulated to, but Attachment 4 has.

9 A Okay. What page on that "Doing Inventory" --

10 Q I'm sorry, the pages aren't numbered, but if you go
11 towards the back of that, you'll see inventory control --
12 "Doing Inventory Control Right."

13 A Yes, I've -- I've got that -- that pamphlet.

14 Q Ah.

15 A Okay. "Doing Inventory Right." Right, I've got
16 that.

17 Q Thank you. And are you familiar with this --

18 A Yeah.

19 Q -- document, sir?

20 A Yes, I am.

21 Q All right. And that's EPA's information that they
22 give to the public on how to do inventory control.

23 A Right.

24 Q Is that correct?

25 A That's correct.

1 Q If you would, sir, look at the -- at that document,
2 look at the top of page 6.

3 A Okay.

4 Q The very first line. Would you read that sentence,
5 please.

6 A Says, "you must measure the tank every day that fuel
7 is added or removed."

8 Q All right.

9 A "You may take measurements using a stick gauge or a
10 mechanical or electronic tank level monitor."

11 Q So a store wouldn't necessarily have to take a stick
12 reading 365 days a year --

13 A No.

14 Q -- if they didn't add fuel or sell fuel.

15 A Right. It's every day -- and -- every day that you
16 are in operation, which means you either take fuel out or
17 put fuel in.

18 Q Well --

19 A If you are closed on weekends, no, you do not have to
20 take stick readings.

21 Q If a gas station is combined with a grocery store and
22 no gasoline is sold but groceries are sold, do they have
23 to take a stick reading?

24 A No. Only if they sell product of fuel.

25 Q Thank you. Now, I would like you to look back to the

1 Oklahoma's Corporation Commission regulations; that's EPA
2 Exhibit 30. Page 31, if you would, sir.

3 A Okay.

4 Q Yesterday, you testified about that SIR method of
5 release detection. You mentioned the term SIR.

6 A I don't remember, but go ahead.

7 Q Are you familiar with SIR?

8 A Oh, yes. Yes. Yes.

9 Q Tell me what that is, please.

10 A It -- it stands for -- SIR stands for Statistical
11 Inventory Reconciliation System.

12 Q All right.

13 A Or SIR. There's no "system" at the end; I'm sorry.
14 It's Statistical Inventory Reconciliation.

15 Q Okay. And that's an approved method of release
16 detection, is it not?

17 A Depending on who the manufacture -- who the supplier
18 is. Not all -- I mean I'm just saying you have to look to
19 see who the -- who the supplier is to make the
20 determination whether it meets the criteria. But
21 generally speaking, yes, it's an approved method.

22 Q Okay. And on page 31 of the rules is the Corporation
23 Commission's criteria for general release detection method
24 devices, correct?

25 A Yes.

1 Q And can you tell me where SIR is listed in there,
2 sir?

3 A I don't know -- I don't -- I don't know if they have
4 SIR listed in their rules; of course, EPA doesn't either.

5 Q It's not even listed in the EPA rules?

6 A No, but it's under "other methods." EPA has a
7 criteria for other methods. In their infinite wisdom,
8 they decided that maybe sometime in the future, there may
9 be methods that are not listed, so they came up with a
10 criteria that said if you meet a .2-gallon-per-hour
11 release and you can meet the 95 percent probably --
12 probability of a -- of a -- of a leak with only five
13 percent probability of false alarm, then you can --
14 you're -- that method can be approved, as long as it's
15 just as protective of the -- of the environment as the
16 other methods.

17 Q Okay. Very good. So the regulated community, a
18 store owner or operator, could not look to the regulations
19 and discover the criteria for an SIR?

20 A No, not in EPA's rules. And apparently at -- I
21 didn't look at this thoroughly, but I don't see --

22 Q It's not in there.

23 A It's not in there?

24 Q No.

25 A Okay.

- 1 Q Now, let me ask you, in -- at the top of page 32 is
2 "Tank System Tightness Testing with Inventory Control."
3 Do you see that, sir?
- 4 A Yes.
- 5 Q And that is somewhat similar to SIR, isn't it, at
6 least as far as the data that's collected?
- 7 A SIR -- the data that you collect for SIR and the data
8 that you collect for inventory control is basically the
9 same.
- 10 Q Basically the same? The store operator does the same
11 work.
- 12 A Correct.
- 13 Q All right. Except it doesn't have to do with SIR,
14 the annual tank tightness test, right?
- 15 A Yes, SIR does not require the tightness test to be
16 conducted.
- 17 Q Okay.
- 18 A Because it's -- it's being analyzed by experts and
19 also by computerization that looks at trends.
- 20 Q Okay. By the way, do you have to be nurse -- NACE
21 certified to take a stick reading?
- 22 A No. That has nothing to do with corrosion.
- 23 Q All right.
- 24 A No.
- 25 Q And -- and -- and so anybody can take a stick test?

1 A Yeah, if they know how to read to an eighth of an
2 inch they can, yes.

3 Q Well, do you test people to see if they know how to
4 read it?

5 A I don't test them. But I mean you have to have
6 enough -- enough brain power to be able to read a stick,
7 you're right.

8 Q Very good.

9 A That's all you have to do.

10 Q Thank you.

11 A There's no qualifications.

12 Q Okay. We are -- we are near the end. I would like
13 to move on to Count 14. This would be Monroe's at
14 Eufaula. If I remember right, this was failed to do
15 monthly release detection on one temporary closed tank.

16 A Yes.

17 Q EPA Exhibit 30, the Oklahoma Corporation Commission
18 regulations -- in fact, to help speed this up, turn to
19 page 47, please.

20 A Okay.

21 Q And would Rule 25-3-62(b) --

22 A All right.

23 Q -- be the proper violation that was charged here?

24 A I think I said -- quoted 63 -- 25-3-62(a)(2). That's
25 what I put in the Complaint.

1 Q (A) (2)?

2 A (A) (2)?

3 Q Very good. That's 3-62, right?

4 And now, turn to page 72 in Appendix S. And in the
5 top third of the page, you see 3-63 listed there, correct?
6 Or is it 3-62?

7 A It's 62 and 63.

8 Q Okay. And the OCC penalty is how much?

9 A \$250.

10 Q And look to your Exhibit 19, page 12.

11 A This one is 14. Okay.

12 Q Your penalty, sir, was how much?

13 A Of course I fail to see the relevancy here, but it's
14 \$1,500.

15 Q All right. And weren't there four tanks at Monroe's?

16 A Yes, there was four tanks at Monroe.

17 Q And how many of those had more than an inch of
18 product?

19 A Just one.

20 Q Just one? And this was also a major-major, right?

21 A Yes.

22 Q All right. Thank you.

23 Count 15, if you would, sir, still Monroe's. Failed
24 to operate the CP system for that one tank that's not
25 quite empty.

1 A No, no. It wasn't for just one tank.

2 Q Okay.

3 A It's for all four tanks.

4 Q All four tanks?

5 A Yes.

6 Q Okay. But only one had product in it?

7 A Yes, but that had -- that had nothing to do with
8 maintaining corrosion protection.

9 Q Okay.

10 A You must maintain corrosion protection for tanks in
11 temporary closure, because the assumption is that sometime
12 in the future, you may put product in it, and you don't
13 want any of the -- even though the tanks may be completely
14 dry, you still want corrosion protection.

15 Q Of course.

16 A Okay.

17 Q But if those tanks were actually removed in the
18 future, then that possibility wouldn't arise, would it?

19 A That's true, but the owner is the one that made the
20 determination that they were going to temporarily close
21 those tanks.

22 Q Okay. So this rule -- this is -- back to Exhibit 30
23 again, I guess, page 47.

24 A Okay.

25 Q Is that the correct -- we're still in a temporary

1 removal from service. This would be the paragraph (b), I
2 guess.

3 A Okay.

4 Q You have to do release detection? No, corrosion
5 protection.

6 A Yes. You still may have to -- you still have to
7 maintain corrosion protection for tanks --

8 Q That's (a) (1)?

9 A No, I got -- lost my place. You said in 25-3-62; is
10 that the one?

11 Q (A) (1).

12 A (A) (1). "Continue to operate and maintain corrosion
13 protection as required by this chapter."

14 Yes, you must maintain your corrosion protection for
15 all tanks in temporary closure whether they have product
16 in them or don't have product in them.

17 Q Very good.

18 A Okay.

19 Q Of course, if the tank is empty, there's not going to
20 be a leak, unless the product is someday put back in
21 there, correct?

22 A That's correct.

23 Q All right. Now, turn back to Appendix S, the same
24 page, 72.

25 A Okay.

1 Q And the Oklahoma Corporation Commission penalty for
2 this violation, sir, was how much? That would be --

3 A \$500.

4 Q \$500?

5 A Yes.

6 Q And your Exhibit 19; that's page 13.

7 A Okay.

8 Q Your penalty, sir, was how much?

9 A That was Count 15, you said?

10 Q Count 15.

11 A It's \$16,500.

12 Q By the way, how many CP systems were there installed
13 at Monroe's?

14 A There was one system.

15 Q One system? Now --

16 A That protects all four tanks. But there has to be
17 protection on all four tanks.

18 Q Oh, I understand.

19 A It's an impressed current, yeah.

20 Q But there's only one system?

21 A Well, yeah, one system.

22 Q Thank you. And the last count, 16, is really about
23 the same. I mean we are dealing with roughly the same
24 regulation, I think.

25 Count 16 is failed to test the CP system every three

1 years.

2 A Well, the first six --

3 Q Different rule.

4 A It's testing the cathodic protection within six
5 months after installation, then every three years
6 thereafter.

7 Q Okay. And the OCC penalty for that, do you find that
8 on the chart?

9 A Let me see here. I'm not really sure where that's
10 located on -- I guess that's the same one, is that what
11 you are saying? It's 60 -- 25-3-62?

12 Q Seems like it to me.

13 A Okay.

14 Q But I'm not sure, either.

15 A Okay.

16 Q But in any event, the -- even that paragraph is \$500.
17 Let's look to your penalty. That would be page 14 of
18 your Exhibit 19.

19 A Okay. For Count 16?

20 Q Count 16.

21 A It was 18,347.

22 Q And 11 cents.

23 A And 11 cents, right.

24 Q Isn't the real violation here simply that they failed
25 to pull the tank several years ago?

1 A No. No, we don't --

2 Q That's not the real violation?

3 A That's not the violation. We don't require them to
4 pull the tanks if they keep it in temporary closure.

5 Q That's, in effect, what happened. If they would have
6 pulled the tanks several years ago, this wouldn't be a
7 count.

8 A That's right.

9 Q Okay. Now, I apologize, I would like to briefly go
10 back to Count 4. That's the Citgo Quik Mart just up the
11 road here in McAlester. And the Count 4 was, again, the
12 monthly release detection monitoring. Your EPA Exhibit
13 Number 19, page 6.

14 A Count 4? Okay. "Failure to Conduct Monthly Release
15 Detection Monitoring for Tanks." Okay.

16 Q All right. Are you looking at page 6 of your
17 exhibit?

18 A Well, I'm -- I'm looking at the Complaint.

19 Q Okay.

20 A And I don't know -- it's not page 6; it's page 9 in
21 mine, but --

22 Q I -- I'd like you to look at your determination of
23 penalty, and that's EPA Exhibit 19.

24 A Okay. Look at the calculations?

25 Q I'm sorry.

1 MS. BEAVER: Your Honor, again, Mr. Cernero does
2 not have the binder that you guys have, that you and
3 the Respondent have.

4 MR. KELLOGG: Ah, I am so sorry.

5 THE WITNESS: Uh-huh.

6 MR. KELLOGG: I don't --

7 MS. BEAVER: He has the Complaint.

8 THE WITNESS: I'm just actually looking at the
9 Complaint itself, that's all. It's the same thing,
10 but I'm just looking at different numbers.

11 MR. KELLOGG: Your Honor, may I hand him my
12 copy?

13 THE COURT: Yes.

14 Q (By Mr. Kellogg:) This is Government Trial Exhibits,
15 Exhibits Numbers 14 to 30.

16 A Okay.

17 Q And I have opened it to page 6 --

18 A Okay.

19 Q -- of Government Exhibit 19.

20 A All right. Oh, I'm sorry. Okay.

21 Q And you're familiar with that, are you not?

22 A Yes.

23 Q That was your penalty calculations.

24 A Yes. Yes, it was.

25 Q Look at the top paragraph. I have highlighted

1 something in yellow there about a capital expenditure of
2 \$5,000 to install ATG. Do you see that?

3 A Yes.

4 Q And tell -- can you tell the Court what an ATG is?

5 A ATG is -- well, it stands for Automatic Tank Gauging.
6 It is a method of release detection that's allowable under
7 our rules.

8 Q Okay.

9 A And under OCC's. It essentially has probes that are
10 inside a tank that takes level readings, tests the tanks,
11 and then it electronically translates that information to
12 a computer that's usually inside the building.

13 Q All right. And is that the only method that's
14 approvable?

15 A No, there are other methods.

16 Q But you're -- you calculated your penalty on a
17 \$5,000 capital investment cost, correct?

18 A Correct, for the -- for the economic component, yes.

19 Q All right. Does SIR have a capital investment cost?

20 A No, it doesn't, but it does have --

21 Q Thank you. Now, if there's no capital expense,
22 how -- your penalty calculation is in error, is it not?

23 A I'm not saying it's in error. I had to make certain
24 assumptions to come up with an economic benefit.

25 Q All right.

1 A If they use monitoring wells, there would have been a
2 capital expenditure. SIR, you're correct, there is no
3 capital expenditure, but there is a contract expense that
4 you normally pay for a contractor to take that information
5 that you have. Whether it's \$5,000, \$3,000, you are
6 right, I am -- I am taking information and trying to
7 calculate an economic benefit.

8 Q Very good. Thank you. By the way, this Quik Mart,
9 if -- if you remember correctly, wasn't there an issue
10 about whether it was upgraded in 1998, the tanks?

11 A I think the issue on -- on Quik Mart was that those
12 tanks were installed in 1990.

13 Q All right.

14 A I forget what month it was, but it was installed in
15 1990. Therefore, those tanks are considered to be new
16 tanks, which require all spill overfill prevention,
17 cathodic protection, and of course, leak detection is
18 required when it goes in the ground.

19 Therefore, that tank cannot be, quote, upgraded as a
20 tank that was installed on or prior to December 22nd,
21 1988. That -- tanks that were installed on or prior to
22 December 22nd, '88, are considered existing tanks.

23 Existing tanks are the only ones that have to be
24 upgraded. If they don't have the spill and overfill and
25 corrosion protection that's required -- that was required

1 as of December 22nd, 1998 -- in other words, all existing
2 tanks, when the rules came out, were given 10 years to
3 upgrade to a certain point. If they were not upgraded in
4 1998, then they either had -- they had to be removed.

5 But there was a ruling in our -- when the rules came
6 out, they also addressed new tanks, and they said
7 anything -- any tank that's installed after this rule
8 comes out, you must have all the bells and whistles on
9 this tank when it goes in, and it's considered a new tank.

10 If a tank in 1990 was installed that did not have
11 corrosion protection, it was a definite violation.
12 Basically, if you're -- you can't put a bare steel tank in
13 the ground after -- actually, after December 20 -- or
14 after May, I think, of 1986, because there was an interim
15 rule that came out before the rules were even actually
16 adopted that said no more bare steel tanks in the ground.

17 But to make a long story short, if a tank was
18 installed in 1990, it had to be -- it had to meet all the
19 New Tank Standards.

20 Q All right. Do you know if this tank at -- the tanks
21 at the Quik Mart have corrosion protection installed?

22 A My understanding, they did.

23 Q And that was in the form of sacrificial anodes,
24 correct?

25 A I really don't have that information in front of me.

1 Well --

2 Q Can you find it?

3 A Yes, I think I can. Okay. According to my
4 information I received from the OCC, those tanks were
5 installed in 19 -- October 1st of 1990.

6 They were STIP-3 tanks, which mean -- stands for
7 Steel Tank Institute Protected three ways. Essentially,
8 those tanks were the approved steel tanks that had
9 factory-installed cathodic protection when they went in
10 the ground.

11 Q All right.

12 A Now, I understand it also now has a CP system on it.

13 Q And that CP system --

14 A An impressed current, right.

15 Q -- is impressed current, right?

16 A Yes.

17 Q And that impressed current isn't -- isn't required,
18 is it?

19 A No, it's not required, if your -- if your tanks are
20 up to standard. If the STIP tanks are functioning
21 properly, then you don't have to do anything.

22 Q All right. Now, let's look at the -- the EPA's
23 rules. This is Exhibit 30. I'm sorry, the Corporation
24 Commission rules.

25 A Okay.

1 Q That's that same notebook you have behind you. All
2 right. Look to the definitions, if you would, sir.

3 A Okay.

4 Q And tell me if you see anything that defines what a
5 modification or an upgrade is.

6 A I would assume they don't have anything in their
7 rules, because OCC took out all the upgrade requirements
8 with their new -- with their later regulations.

9 Apparently, they assumed that everybody is upgraded
10 and there's no longer a need to have that in their
11 regulations, so they took out all the information about
12 upgrading in the rules and regulations.

13 Q Okay.

14 A As of what date, I'm really not sure. But this one
15 does not have the upgraded rules and regulations.

16 Q Okay. Have you, yourself, ever been unclear about
17 the difference between a modification and an upgrade?

18 A Not -- well, I have rarely come across that. I mean
19 in this particular case, it's clearly not an up -- it's
20 not an upgrade, it's a repair.

21 Q Well, you remember speaking with my co-counsel and
22 these people in Dallas one day many months ago, do you
23 not?

24 MS. DIXON: Objection, Your Honor. He's going
25 into settlement discussions.

1 THE COURT: Well, all -- all discussions and
2 offers at -- all discussions at settlement
3 conferences or so on aren't necessarily
4 objectionable; it's only specific ones. And so I'll
5 overrule the objection.

6 You may proceed, Mr. Kellogg.

7 MR. KELLOGG: Thank you, Your Honor. And I will
8 not ask about anything specific as to settlement.

9 Q (By Mr. Kellogg:) Do you recall mentioning that --
10 that there was some confusion about the difference between
11 an upgrade and a --

12 A I don't recall that, but I mean looking at the --

13 Q Is it possible it happened and you just forgot?

14 A Possible.

15 Q All right.

16 A But the evidence here is that that is not an upgraded
17 tank, because it has -- if it was, then it was in
18 violation when the tank went in the ground.

19 Q From your perspective?

20 A Well --

21 Q It's --

22 A It is -- it is not unusual for tanks, STIP-3 tanks
23 that were installed early '88, or after '88, '90, have to
24 be upgraded -- you say upgraded, but it's not upgraded;
25 it's actually repaired to make sure that they have enough

1 current to protect them from corrosion.

2 Q But if you install a CP system on a tank that doesn't
3 require it, that's not a repair, is it?

4 A Well, what you are saying here, the STIP-3 tanks,
5 when they went in the ground, should have been protective
6 of corrosion.

7 If the STIP-3 tank has failed to meet the minimum
8 requirements for corrosion protection, there is no reason
9 why -- we would require that you -- that you -- that you
10 either add anodes or go through an impressed current.

11 This happens many times where the STIP-3 tanks no
12 longer produce enough current to show that it's meeting
13 corrosion protection, which is why we require our test
14 every three years of all -- of all corrosion protection
15 systems.

16 This tank is not an upgraded tank; it is a tank that
17 was installed under New Tank Standards. Later on, the
18 corrosion protection system failed, and then there was a
19 system added to supplement that corrosion protection
20 system.

21 Q Granted --

22 A That is my opinion, and for whatever it's worth.

23 Q Your opinion --

24 A Uh-huh.

25 Q -- that's a good one, and I appreciate your

1 explanation.

2 A Okay.

3 Q You can imagine, though, that this would be confusing
4 to some members of the regulated community, like a store
5 operator.

6 A It -- it's possible, yeah. I mean that is --

7 Q All right.

8 A -- I assume that they would -- they may think it's an
9 upgrade. Actually, it's a repair.

10 Q My last question for you is have you ever, yourself,
11 lost or misplaced some document or record that you needed?

12 A Of course.

13 MR. KELLOGG: All right. Your Honor,
14 Mr. Shipley has some more questions about the
15 policies involved here today. That's all that I have
16 about the technical aspects. Thank you.

17 THE COURT: Okay. We'll take a brief recess,
18 five minutes.

19 THE WITNESS: Okay.

20 *****

21 (A break was taken, after which the following
22 continued:)

23 THE COURT: The hearing will be in order.

24 And you may proceed, Mr. Shipley.

25

CROSS EXAMINATION

BY MR. SHIPLEY:

1 Q Good morning, Mr. Cernero.

2 A Good morning.

3 Q How are you? The topic of EPA coming in to Oklahoma
4 for this inspection, I believe, was touched upon by
5 Mr. Pashia. And you were here for his testimony, were you
6 not?
7

8 A Yes.

9 Q All right. What I remember, and correct me if I'm
10 wrong, is that Mr. Pashia indicated that during fiscal
11 year '05, that the visit by you in November of the
12 calendar year '04 was the only enforcement visit to the
13 state of Oklahoma by EPA?
14

15 A I didn't -- I wasn't there for the '04 --

16 Q All right.

17 A -- inspection, that was -- only Greg was there. I
18 was not -- I did not become involved with this case until
19 February.
20

21 Q I'm sorry.

22 A To do the inspections.

23 Q Forgive me.

24 A Okay.

25 Q The -- during -- during the period of January '05

1 through the end of fiscal year '05, which would have ended
2 September 30 --

3 A Right.

4 Q -- '05, were there any other visits by EPA for
5 enforcement needs for UST program, other than your visit
6 to RAM?

7 A I don't -- I don't have the records in front of me.
8 Are you saying is that the only inspections I have done?

9 Q No, no.

10 A Okay.

11 Q I'm sorry. I'm asking about UST enforcement by EPA
12 Region 6 in Oklahoma. From January 1 of '05, to
13 September 30, '05, were there any other facilities
14 inspected, other than those owned by RAM?

15 A I -- I have not -- I have not personally done any --
16 any other enforcement in Oklahoma in that year, other than
17 RAM, because I'm not involved in Oklahoma.

18 Now, whether Greg -- Mr. Greg Pashia has, I -- I
19 really don't know. I -- I'd have to go back and look at
20 our records and find out what inspect -- I know he was
21 doing inspections in Oklahoma, but I was not. So I don't
22 have an answer for you, really.

23 Q Is it fair to say that you are not aware of any other
24 instances where EPA enforcement personnel came into
25 Oklahoma during that period of January 1, '05, to

1 September 30, '05 --

2 A No, I'm saying --

3 Q -- other than the RAM?

4 A No, I'm saying I don't -- I haven't. But I don't
5 know if Greg has done compliance inspections with field
6 citations.

7 I know he has not done an order, but he has not --
8 I'm not sure whether he's done field citations or whether
9 he's done inspections.

10 I know he has done inspections on tribal lands and
11 that type of thing, but I'm not really sure about what
12 his -- how many inspections he's done from, you said,
13 January of '05 to September 30th, '05.

14 I am sure he has done inspections, I just can't say
15 for sure. I mean I can't say if -- what they were.

16 Q All right. Your -- the answer to my question of are
17 you aware of any other enforcement actions by EPA Region 6
18 in Oklahoma during that time period is no, correct?

19 A No, I don't know, because I don't know what Greg's
20 done.

21 Q All right.

22 A Okay.

23 Q That's all I needed to get --

24 A Yeah.

25 Q -- clear. Thank you.

1 If you would, turn to -- in the book that you have
2 before you that has the Respondent's exhibits, turn,
3 please, to Respondent's Exhibit 52, which is the
4 Memorandum of Agreement --

5 A Okay.

6 Q -- for Underground Storage Tanks between the State of
7 Oklahoma and EPA Region 6.

8 A Okay. I got it.

9 Q Thank you, sir. All righty. The -- before we walked
10 through this on direct, you testified -- I'll wait till
11 this truck passes.

12 On direct, you testified that you were familiar
13 because you've had personal experience with much higher
14 fines than that which has been levied against RAM.

15 And my notes show that you said that you had personal
16 involvement with one case where the fine -- and I gather
17 it had to do with UST -- was as high as \$375,000; is that
18 correct?

19 A That was the settle amount -- settle -- settled
20 amount, yes.

21 Q Okay. But that was not in Oklahoma, was it?

22 A Some of the facilities were in Texas. I believe some
23 of them were in Arkansas. I don't believe any of them was
24 in Oklahoma.

25 Q All right. Are you aware of any -- any fine, under

1 the UST program in the state of Oklahoma, during the
2 fiscal year 2001, 2002, 2003, 2004, or 2005, that exceeds
3 \$10,000?

4 A The only one I could remember would be Tinker Air
5 Force Base, but I'm not sure if that was before 2001 or
6 after 2001. And it was -- I think it was settled for
7 50 -- 50 -- \$51,000, I believe.

8 Q Right. And the records, I believe, show that that
9 was filed in 1998.

10 A Okay. It was before 2001.

11 Q So the answer to my question -- are you aware any
12 fine under the UST program in the state of Oklahoma during
13 fiscal years 2001, 2002, 2003, 2004, or 2005 which exceed
14 \$10,000 -- is no?

15 A No. That's correct.

16 Q All right. There is this agreement between EPA
17 Region 6 and the State of Oklahoma, which we just turned
18 to here, Respondent's Exhibit 52. Are you generally
19 familiar with this document?

20 A Generally speaking. It's a Memorandum of Agreement
21 between EPA and the state. It's part of the state program
22 authorization process that has to be done so that we can
23 delegate the program to the state.

24 Q And the date on this document, on the last page,
25 is -- one signature is in March, the other in early

1 April 1992, between Region 6 and the State of Oklahoma,
2 Oklahoma, Oklahoma Corporation Commission, correct?

3 A Yes. I believe, though, this has been recently
4 revised and updated. I don't want to say that for sure,
5 but I think Greg was working on some kind of a new -- an
6 updated, revised MOA with OCC. But that's not -- that's
7 not official, as far as I know.

8 Q Is it your belief that there is a modification of
9 this document, 52, that has been agreed to and signed --

10 A No.

11 Q -- between the state --

12 A No. As I say, it's not official yet.

13 Q Okay. Thank you.

14 A It's not been agreed to, as far as I know.

15 Q So up to this moment, the document that we have as
16 Respondent's 52 is the operative document describing the
17 relationship between EPA Region 6 and the Oklahoma
18 Corporation Commission for Underground Storage Tanks?

19 A Yes.

20 Q Thank you, sir. All right. In this document, on the
21 second page, the first little paragraph, it says, "the
22 parties shall review this MOA" -- Memorandum of
23 Agreement --

24 A You said -- I'm -- excuse me. Let me get -- make
25 sure. You said the second page?

1 Q Yes, sir.

2 A All right. And which paragraph?

3 Q The first full paragraph --

4 A Okay.

5 Q -- beginning --

6 A Okay. Sorry.

7 Q -- "the parties shall review this MOA jointly at
8 least once a year."

9 A Yes.

10 Q Are you aware of whether or not the parties have done
11 that since 1992 on an annual basis?

12 A I would assume they have, because we do an
13 end-of-year review with our states in which we do discuss
14 proposed changes to the MOA.

15 I know in Arkansas, which I work, we have reviewed --
16 reviewed them, looked at them. It doesn't say we have to
17 change them every year, it just says we have to at least
18 jointly look at it and decide whether we want to modify it
19 or not.

20 And in fact, as an example, in Arkansas, we did
21 modify it several years ago, because there were some
22 changes in the names and some minor modifications we had
23 to make. And we did both jointly decided to change it.
24 Not significantly, but we did change it.

25 Q All right. Thank you, sir. The -- the essence of

1 this document, as I understand, is that this document, in
2 the spring of 1992, delegated the primary responsibility
3 for enforcement of the UST program from the EPA to the
4 Oklahoma Corporation Commission; is that your
5 understanding?

6 A Yeah. Essentially, generally speaking, it gave the
7 program to the state to run it as an everyday event. EPA
8 would -- or the state would run the program in lieu of
9 EPA, and that we would adopt their rules and regulations
10 into our federal register so that there would be,
11 basically, one rule that the regulated community had to
12 follow, which is, really, the purpose of the Memorandum of
13 Agreement.

14 Q So that there would be one set of regulations?

15 A Correct.

16 Q But that seems to be inconsistent with what we have
17 been going through this morning and a bunch of yesterday
18 afternoon, isn't it?

19 A Well, one thing we do have to ensure is that the
20 state is no less stringent than EPA. If there are any --
21 if there are any supposedly gaps, that we would have to
22 ensure that the state met their minimum standards.

23 Q Is there any doubt in your mind, yours personally or
24 the EPA Region 6, as far as you know, that Oklahoma
25 Corporation Commission doesn't meet that standard that you

1 just described?

2 A I really can't answer that, because I'm not that
3 familiar with their entire program.

4 Q Let me put it this way: To your knowledge, has the
5 EPA Region 6 ever advised the Oklahoma Corporation
6 Commission that their UST program enforcement is being
7 operated at a substandard level?

8 A Not to my knowledge, no.

9 Q All right. If we look at the policy statement, which
10 is on the second page in the first paragraph, third line,
11 it says, "the State will assume primary responsibility for
12 implementing the Subtitle 1 Underground Storage Tank
13 Program, within its boundaries."

14 A I'm -- I'm trying to look at the paragraph. Is it
15 the same paragraph that you were just talking about?

16 Q I'm sorry. On the second page --

17 A Okay.

18 Q -- below Roman Numeral 2.

19 A Okay.

20 Q "Policy Statement." Three lines into that, it says,
21 "Upon award of final approval by EPA, the State will
22 assume primary responsibility for implementing the
23 Subtitle 1 Underground Storage Tank Program within its
24 boundaries."

25 And there further in the document, EPA sets out three

1 specific points where the Oklahoma Corporation
2 Commission's program wasn't up to the appropriate
3 standards.

4 My question is to you, as far as you know, those
5 point -- those points of substandard program description,
6 as spelled out in the spring of 1992, were subsequently
7 brought up to standard, and EPA has now passed on the full
8 primary responsibility as this program -- as this policy
9 has taken it -- sets out, correct?

10 A Yes.

11 Q All righty. As that paragraph goes on to say, it
12 says, "EPA retains its responsibility to ensure full and
13 faithful execution of the requirements of Subtitle 1 of
14 RCRA, including direct implementation in the event the
15 State is unable to act."

16 To your knowledge, has the State of Oklahoma, by its
17 Corporation Commission, ever been found by EPA to be
18 unable to act, as this language spells out?

19 A Not to my knowledge.

20 Q All righty. So there is no -- to your knowledge, no
21 event where direct implementation of the UST program by
22 EPA in Oklahoma would be appropriate, correct?

23 A Correct.

24 Q All righty. We go to the next page, paragraph --
25 page 3. And the first full paragraph begins, "EPA assumes

1 a management role upon granting final approval to the
2 State." Do you see that, sir?

3 A Yes. Yes, I do.

4 Q At -- the last sentence in that paragraph tells us
5 how EPA will accomplish its management role. It says,
6 "Management will be accomplished by EPA through written
7 reporting requirements, compliance and enforcement
8 overview, and annual review of the State's program."

9 To your knowledge, is that an accurate statement of
10 the responsibilities of the EPA Region 6 and Oklahoma with
11 regard to the UST program?

12 A Yes.

13 Q All righty.

14 THE COURT: Excuse me, Mister --
15 Mr. Swisher (sic). Most of these Memorandums of
16 Understanding or Memorandums of Agreement have
17 language in them at some point that says these do not
18 grant any rights -- rights to third parties,
19 something to that effect. Is there such language in
20 this MOA?

21 MR. SHIPLEY: No, sir. And the point here,
22 Judge, is that EPA's role in the implementation of
23 the UST program is specifically delineated in this
24 document.

25 And what we hope to be able to demonstrate by

1 the testimony and the documents here, is that this is
2 an extraordinary action, and we believe we know the
3 reason why this extraordinary action has been taken.

4 When we can show that to you, I believe that you
5 will see why, for the first time in five years, there
6 is a fine levied of \$278,000, 27.8 times higher than
7 any other fine in the state on this program. This is
8 a unique action. And --

9 MS. DIXON: But --

10 MR. SHIPLEY: -- we need to have this Court
11 understand, and I believe it will come out in his
12 testimony, as to why EPA has done what they have done
13 here, sir.

14 MS. DIXON: Your Honor, if I could just respond.
15 He misquoted the penalty.

16 THE COURT: Yes, you may.

17 MS. DIXON: The penalty is actually 179, but
18 with regards to the Memorandum of Understanding,
19 there is broad language in here that makes sure that
20 EPA always has the right to take an enforcement
21 action in the event that we deem it necessary.

22 Specifically on page 1 of the Memorandum of
23 Agreement, it states, "nothing in this MOA shall be
24 construed to contravene any provision of 40 CFR Parts
25 280 and 281."

1 Additionally, on page 9: "Nothing in this MOA
2 shall restrict EPA's right to inspect any Underground
3 Storage Tank facility or bring enforcement action
4 against any person believed to be in violation of the
5 approved State Underground Storage Tank Program."

6 In regards to counsel's statement that he knows
7 why EPA took the enforcement action against the
8 Respondent, Your Honor, I mean he -- he will
9 enlighten me as well as everyone else in here,
10 because it is my understanding we simply did an
11 inspection. And if there were no violations, Your
12 Honor, we would have walked away.

13 THE COURT: Okay. Thank you. Well, I'll allow
14 you to proceed, Mr. Swisher (sic), but as again,
15 expedite it.

16 MR. SHIPLEY: I will -- I will speed this up,
17 Your Honor, and edit some of the -- the testimony and
18 some of the language here, and I appreciate your
19 allowing me to go forward.

20 Q (By Mr. Shipley:) The -- part of the data -- pardon
21 me. Part of the terms of this agreement indicate that the
22 state agrees to allow EPA access to all its files and
23 other information whenever requested by EPA Region 6.

24 And it is my understanding of your testimony that you
25 did not look at the inspection and compliance reports that

1 OCC had done on RAM prior to your enforcement inspection
2 in February of '05; is that correct?

3 A That's correct. There was no -- there was no need
4 for me to look at the state's inspection report. This was
5 strictly an independent inspection that we conducted,
6 along with our state counterpart.

7 What had gone on previously really was not part of
8 the decision in doing these -- I mean as far as my
9 inspection was concerned, I wanted to do a complete,
10 independent inspection of these facilities to see if there
11 was violations, and there were. And that's the reason why
12 we're here.

13 You say that this is a unique situation for Oklahoma;
14 however, in the state of Arkansas, we have done numerous
15 enforcement actions, and it's a delegated state. We have
16 done several in Texas. Actually, I think it's just
17 Oklahoma has just been lucky that we haven't done as many
18 complaints in the state of Oklahoma.

19 Q There's another answer for that, and that would be
20 that Oklahoma is running a fine program and doesn't
21 require your assistance. Would that be a possible answer
22 to the situation you just described?

23 A I will say this, that Oklahoma is one of the few
24 states that inspects their facilities at least once a
25 year. And the reason for that is because the Oklahoma

1 Corporation Commission also inspects the metering of all
2 gasoline pumps.

3 So it's a very good program, because not only is
4 the -- inspected at -- looks at the metering to make sure
5 it's accurate, they also do compliance inspection of the
6 Underground Storage Tanks (sic).

7 It -- it gives us a little better feeling if an
8 inspector is out there each year, but it has no relevancy
9 to the fact that we haven't done anything in five years.

10 It wasn't -- it just happened to be we haven't done
11 as much action in -- in Oklahoma as we did in Arkansas.

12 I think it's a reason -- one is since I am not only
13 the program officer in Arkansas, I'm also the enforcement
14 officer, so it got more attention. We have -- we are --
15 we have done orders in Texas, Arkansas. We've done the
16 Tinker in Oklahoma.

17 I agree we haven't done many in Oklahoma, but that's
18 neither here nor there. This is a regional office, it's
19 not a state office. We don't really say, well, we have to
20 do so many in this state and so many in that state, it's
21 just where -- where the necessity to do a complaint pops
22 up.

23 Q Thank you.

24 A Uh-huh.

25 Q And part of this, the story here is that you, when

1 you had decided to inspect RAM, notified someone at the
2 OCC that you were -- that EPA was going to come do that
3 inspection, correct?

4 A Actually, my -- my involvement is the fact that Greg
5 was going to do all these inspections. And because of his
6 schedule -- and I don't remember the exact details -- he
7 was not able to do them, and basically my supervisor said,
8 "well, you will do them," which I did.

9 And, of course, I contacted the OCC and let them know
10 that we were going to do our inspections and we would like
11 to have them go along with us to do these inspections,
12 to -- it's an exchange -- it's a good policy for us,
13 because it's an exchange of good information; we learn
14 from them, they learn from us. We get to see how they do
15 their compliance inspection, they get to see how we do.
16 It's a good exchange of inspector knowledge.

17 Q Who did you call at the OCC to advise them that you
18 were going to Oklahoma to do an UST inspection?

19 A Actually, I think it was Greg Pashia first contacted
20 John. And then I -- in order to work out the logistics of
21 when I was coming, where I was going to be, I contacted
22 Mr. Roberts.

23 Q Okay. It's your understanding that Mr. Pashia called
24 Mr. Roberts?

25 A I'm assuming he did. I know he contacted OCC to make

1 all these arrangements. Because I -- like I said, I had
2 no involvement in this until it came to the point where I
3 had to actually do the inspections.

4 Q And then your -- when did that happen?

5 A I'm trying to think. It's -- since I did the
6 inspections in February, I think -- it was probably
7 several weeks before that where we tried to figure out who
8 was going to do the inspection -- or Greg couldn't do the
9 inspections and I could, and where I was going to go.

10 My -- my involvement is I wanted to be able to do the
11 inspections within a close prox -- proximity of each other
12 so that I would not have to spend more than a day or two
13 out in the field. Because with my workload, I had to -- I
14 had to get back to the office, also.

15 Q The MOA requires that EPA give at least 10 days'
16 notice to the Corporation Commission before an inspection
17 within Oklahoma, correct?

18 A I -- I don't know about that rule. I know that we
19 cooperate very well with our state counterparts. And
20 apparently, if there was a 10-day requirement, either it
21 was waived by both sides, or there was more than 10 days.
22 I'm assuming there was more than 10 days' notification.

23 Q Well, let me just simply -- simply direct you to
24 page 10, the first paragraph that begins, "Underground
25 Storage Tank facility."

1 The first sentence, which begins on the third line,
2 says, "before conducting an inspection of a facility, the
3 Regional Administrator will give the State at least 10
4 days' notice of the intent to inspect." Do you see that?

5 A Uh-huh. Yes, I see that.

6 Q Okay.

7 A But like I said, I'm not -- I'm not involved in the
8 preliminary discussions with OCC and EPA. I would assume
9 that this -- this was already discussed much -- at least
10 within that 10-day period.

11 Q All right. But there is no record of that, is there,
12 sir?

13 A I don't know if there is any record or not. Like I
14 said, I -- I am not the Oklahoma program officer, I had no
15 involvement, other than to do the inspections. I'm the
16 wrong witness for this.

17 Q I believe we had asked for all of the EPA records
18 regarding this inspection, and there is no copy of such
19 record. Without a contact, according to the MOA, your
20 entry into Oklahoma would be unlawful, sir.

21 A I -- I would not say that. I think there had to be a
22 lot of verbal. EPA just doesn't come in and say, "we're
23 going to do inspections in your state, whether you like it
24 or not."

25 It has been a cooperation between all of our states.

1 We have never come into a state, at least in the UST
2 program, without cooperation with the state. There was no
3 need to do that.

4 Q All right. But we just need to take your word for
5 it, unlike your willingness to take the word that tests
6 have been done if we can't find a record, even though a
7 month and a half after we should have tested we get it
8 tested, and it holds the pressure, which tells us for sure
9 that it would have passed if it had been inspected on -- I
10 know we don't have the record, but you don't have the
11 record --

12 A I said I don't have the record. Greg has the record.
13 If there's a record, he was had the record (sic) of the
14 communications.

15 Q Okay. Nonetheless --

16 A I'm not saying there is no record, I'm just saying I
17 am not aware --

18 Q All right.

19 A -- of the communications that occurred between OCC
20 and the state -- and EPA.

21 Q I understand.

22 MS. DIXON: Your Honor --

23 Q (By Mr. Shipley:) Let's skip down to --

24 MS. DIXON: -- we would have to object at this
25 point. There's no requirement in the MOA that the

1 record has to be in writing. The record can be made
2 verbally.

3 THE WITNESS: And normally, that's what we do,
4 is we call them up and say, "we want to do
5 inspections," or they want -- they want some
6 assistance or whatever, you know.

7 Q (By Mr. Shipley:) I -- I don't -- I don't intend to
8 suggest that it has to be, I simply am pointing out here
9 that there is no specific testimony available, much less a
10 record of a telephone call, that is -- that is required
11 for your lawful entry into the state of Oklahoma for UST
12 inspection.

13 MS. DIXON: And I --

14 A Well, and I -- and I -- I will have to add this,
15 though; I will say that the state was well aware that we
16 were going to do an inspection, because we had asked them
17 for the registration forms and the information to conduct
18 an inspection.

19 Q (By Mr. Shipley:) I'm simply asking --

20 A So --

21 Q -- when you did that.

22 A I don't have my records in front of me, but they did
23 submit us the information about the facilities.

24 Q I'm -- I'm willing to move on.

25 MS. DIXON: I -- I just want to disagree for the