UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

RESPONDENT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND BRIEF IN SUPPORT

INTRODUCTION

Throughout the administrative hearing held for this matter in McAlester from May 9 through May 11, 2006 (the "Hearing"), the U.S. Environmental Protection Agency (hereinafter, the "EPA") parroted the theme that the Respondent herein, Ram, Inc. (hereinafter, "Ram") had brazenly flouted applicable underground storage tank ("UST") regulations in the management of USTs at its facilities and that Ram should be made to take responsibility for that conduct through the imposition of an administrative penalty several degrees in magnitude greater than that imposed upon any other comparable regulated party.[1] What is most clear from the facts presented at that Hearing, however, is that it was the *EPA* which flouted *its* responsibilities under both the spirit and the express provisions of the UST program, and that its arrogance in so doing resulted in the fundamentally unfair and unreasonable targeting of an individual business entity for enforcement in a manner wholly inconsistent with the UST program as it had been administered by not only the State of Oklahoma but also by the EPA itself.

[1] For the convenience of the Court, Respondent provides citations to the record with the following shorthand: Complainant's Exhibits will be noted as [*CX-number, page*]; Respondent's Exhibits will be noted as [*RX-number, page*]; and references to testimony in the three-volume transcript will be noted as [*TR-volume, page, line(s)*]. EPA's assertion is first referenced at [*TR-1, page 14, line 19*].

The EPA has delegated responsibility for the operation and enforcement of the underground storage tank ("UST") program to the State of Oklahoma. Year after year the State of Oklahoma has received commendations from the EPA for its administration of that program. Ram has operated its facilities within that Oklahoma structure, albeit not always in perfect compliance, but always with a good faith intent to comply and always with the support and corresponding good faith intent of the Oklahoma Corporation Commission to assist in that compliance. The EPA's imposition of an administrative penalty, shocking in both magnitude and derivation, arose out of an overly complex UST program and an antiquated and inappropriate penalty policy. Even more troubling is the fact that the EPA's misuse of its "oversight" authority over the Oklahoma UST program does not in fact "level the playing field," as it is intended to do, but instead results in favorable treatment for only certain portions of the regulated community.

Ram does not deny that in some instances its management of USTs at its facilities resulted in technical violations of the Oklahoma UST program. The evidence now shows, however, that the administrative penalty assessed by the EPA for those violations is itself a substantive violation of applicable regulatory, statutory, and Constitutional law.

PROPOSED FINDINGS OF FACT

The Underground Storage Tank Regulatory Program

1. The UST program was added to RCRA on November 8, 1984 (see, 42 USCA § 6991). Congress required the EPA to promulgate regulations for release detection, prevention and correction applicable to the owners and operators of USTs [see, 42 USCA § 6991b(a)].
2. EPA promulgated its UST regulations on September 23, 1988 [*CX-13, page 1*].

3. The Preamble to these UST regulations observes that small businesses are not accustomed to dealing with complex, regulatory requirements [*TR-2, page 327*], and that the UST regulations must accordingly be kept simple, understandable and easily implemented by the owner/operator [*TR-2, page 328, line 10*].

4. Nevertheless, the UST regulations are somewhat complex for a layman, and the regulated community must engage, often at significant expense, expert consultants and technicians to provide assistance in complying with those regulations [*TR-3, page 502, line 21*]. Not only are the specific requirements of the program often difficult to interpret or predict (such as whether the proper leak detection protocols changed if the system was upgraded or modified [*TR-2, page 450, lines 18-22 and TR-3, page 590 line 17*]; or whether the holding of extra product from delivery trucks constitutes an "emergency" use of a tank [*TR-3, page 614, lines 16-25*]) an incredible amount of paperwork is involved [*TR-3, page 541, line 2*].

5. Ironically, the profit margin in the retail gasoline sales business is small, with the retailers and distributors splitting only 3 or 4 pennies per gallon of gasoline sold [*TR-3, page 519, line 10*].

Delegation of the UST Program to the State of Oklahoma

6. In its consideration of the statutory provisions governing a UST program, Congress stated that the UST program must be designed to be implemented at the state and local levels [*TR-2, page 328, line 4*]and [*RX-49, page 2*]. Given the large number of USTs in the nation, a program is most effective when carried out at the state level [*TR-2, page 329, line 18*] and [*RX-49, page 7*]. The more effective approach is for EPA to give guidance to the states. This concept is reflected in the essence of the UST memorandum of agreement (the "MOA") [*RX-52*], executed between EPA Region VI and the Oklahoma Corporation

Commission (the "OCC") [*TR-2, page 330, line 8*]. Congress intended that it be the EPA which establishes UST criteria and that it be the state and local governments which carry out the program [*TR-2, page 333, line 4*].

7. EPA authorized the Oklahoma Corporation Commission's (the "OCC") UST program on August 12, 1992. Indeed, in this matter the EPA expressly states in its Administrative Complaint that it is enforcing the OCC Underground Storage Tank Regulations, OAC 165:25 [*CX-7, page 2*]. The EPA-approved OCC rules included Appendix N, Field Citation Fines. *See*, 61 Fed.Reg. Pages 1220 to 1223 (January 18, 1996).[2]

8. The EPA acknowledges that Appendix S to the OCC rules is also part of the EPA-approved OCC regulations [*TR-1, page 20, line 21*].

9. The fines set forth in Appendix S are not generally assessed by the OCC at the first inspection. Rather, upon inspection of a UST facility, OCC notifies the regulated party of any identified violations, provides compliance advice, and extends to the regulatory party a period of time, often 30 to 60 days, to bring its operations into compliance [*TR-2, page 435, beginning at line 21*].

10. The 2003 GAO report evaluating the UST program noted that EPA suggests that the states should inspect all tanks every 3 years, but more than half of the states do not [*RX-50, page 1*]. Oklahoma inspects all its tanks at least once a year [*TR-2, page 295, line 23*] and [*RX-53, page 3*].

11. John Roberts, an OCC inspector assigned to inspect facilities in the area in which Ram operated, stated at hearing that upon identifying problems and/or violations at Ram

[2] EPA witnesses testified that they didn't "accept" the OCC appendix for penalties [*TR-1, page213, line 25 and page 241, line 3*]. However, the federal register shows that EPA did accept Appendix N Field Citation Fines. The "Field Citation Fines" appendix is now Appendix S [*CX-30, page 70*].

facilities, he gave Ram opportunities to correct those problems and/or violations within a certain period of time. Mr. Roberts would reinspect the Ram facility after that period had passed to confirm that compliance had been reached [*TR-2, page 435, beginning at line 1*].

12. Richard Heck, a former OCC field inspector and also a supervisor of the OCC field inspectors, testified that although a violation could not be waived by an OCC inspector, OCC inspectors did have the enforcement discretion to set a term within which a violation must be corrected [*TR-3, page 507-508, page 520, line 24* and *page 524, line 22*].

13. Mr. Heck testified that during his term of employment it was OCC's practice, and, based upon his experience since leaving the OCC, it continues to be OCC's practice, to inspect, identify discrepancies and set a return date to confirm compliance had been achieved [*TR-3, page 508, line 22*]. It was not common for the OCC to inspect and immediately assess a fine. Rather, OCC inspectors would normally return to verify whether corrections are made [*TR-3, page 509, lines 9 & 17* and *page 511, line 8*].

14. Mr. Mike Majors, a UST consultant engaged by Ram assist it with regard to the EPA's administrative complaint and with regard to Ram's ongoing compliance with UST regulations, states from his review of the OCC records regarding Ram, the pattern between the OCC and the Ram facilities was that "Mr. Roberts has given the – has given Ram the ability to correct the programs that he's identified during his inspections. And all of the notices of violations that I have seen have been corrected inside the time table set forth by Mr. Roberts" [*TR-2, page 435, lines 9-19*].

15. Greg Pasha is the EPA liaison or coordinator with Oklahoma OCC [*TR-1, page 28, line 21*] and has been for four years [*TR-1, page 29, line 1*]. Greg Pasha communicates with OCC

about rules changes and compliance inspections and he is the EPA representative who performs annual reviews of the Oklahoma UST program [*TR-1, page 29, line 4*].

16. In determining that a state has adequate enforcement authority and mechanisms, the EPA has merely defined the minimum authority a state must have within its UST program [*TR-2, page 333, line 21*]. States need not enforce or impose penalty levels or a penalty structure identical to that of the EPA's to secure delegation of the UST program [*TR-2, page 337, line 5*]. States may impose lower fines [*TR-2, page 337, line 19*].

17. When Mr. Pasha has conducted inspections at facilities in Oklahoma, he has not, at least in the past five years, imposed penalties upon violators through the use of an administrative order. Rather, Mr. Pasha has utilized only the EPA's field citation to notify the regulated community of violations.

18. Based upon this history, the regulated community in Oklahoma, including but not limited to Ram, anticipates and has the expectation that these practices will continue, absent some notice otherwise, into the future. Further, the regulated community in Oklahoma, including but not limited to Ram, anticipates and expects that conforming their compliance efforts to those practices will ensure their continued compliance with the UST program as it is enforced in the State of Oklahoma.

19. Exhibit [*RX-52*], signed April 8, 1992, is the current operative agreement between EPA and the OCC for the UST program [*TR-1, page 29, line 20 & TR-2, page 291, line 19*]. On page 11, the signature page of that agreement, it is specifically stated that, "The State agrees to develop an appropriate enforcement response against all persons in violation of underground storage tank standards (including notification requirements), compliance

schedules, and all other program requirements, including violations detected by State compliance inspections."

20. The EPA and the OCC are required to review the MOA jointly at least once a year, and they are to conduct an end-of-year review in which they discuss any necessary changes to the MOA and adequacy of enforcement [*TR-2, page 292, line 9*] and [*RX-52, page 3*].

21. The OCC UST program has received favorable reviews by the EPA over the past 3 years. The EPA in fact stated in 2004 that: "OCC's compliance inspection program is one of the most pre-active programs in the nation. OCC's annual inspections, which often occur more frequently where possible, far exceed the criteria being considered by Congress for a compliance inspection every three years. We note, also, that OCC is presently preparing an owner/operator training program, which is another requirement being considered by Congress. ... EPA believes that OCC's compliance program is beneficial to owner/operators in that it helps to ensure that operators in Oklahoma are compliant with Federal rules and regulations. ... OCC continues to keep their inspectors well trained and well equipped in their efforts to have an exceptional field presence. OCC also continues to train operators in the operation of equipment to achieve compliance. OCC does a great job in staying in touch with the regulated community." Excerpts are from [*RX-53, page 3*].

22. Through that MOA, the OCC is delegated primary responsibility for enforcement of UST program [*TR-2, page 293, line 1*]. It is Mr. Pasha's understanding that the MOA states that the EPA "shall implement the Oklahoma regulations within the state regarding the Underground Storage Tanks" [*TR-1, page 30, lines 5-7*].

23. Mr. Cernero testified that the EPA "gave the program to the state to run it as an everyday event," and that "the state would run the program in lieu of EPA, and that we [EPA] would

adopt their rules and regulations into our federal register so that there would be, basically one rule that the regulated community had to follow, which is, really the purpose of the Memorandum of Agreement" [*TR-2, page 293, lines 6-13*].

24. The EPA's November 4, 2005 evaluation of the OCC program noted that from 4,772 inspections, 1,408 release detection violations were found and 1,154 release prevention violations were found and a total of $500 in penalties was collected [*RX-54, page 2*]. EPA then noted that the OCC "continues to keep their inspectors well trained and well equipped in their efforts to have an exceptional field presence. PSTD [the OCC] also continues to train operators in the operation of equipment to achieve compliance. PSTD does a great job in staying in touch with the regulated community." [*RX-54, page 3*].

25. John Cernero is the EPA inspector who conducted the inspections of the Ram facilities which resulted in the proposed penalty. Mr. Cernero has no knowledge that EPA ever told the OCC their UST program enforcement is operated at a substandard level [*TR-2, page 294, line 8*]. Since Mr. Cernero's inspection, he hasn't notified OCC that their UST inspection and enforcement program is substandard [*TR-1, page 232, line 22*].

26. The EPA has made no finding that the OCC is unable to act under its UST program [*TR-2, page 295, line 19*] as specified at the bottom of page 2 of the EPA/OCC MOA [*RX-52*].

27. There is no evidence that direct implementation of the UST program in Oklahoma by EPA would be appropriate [*TR-2, page 295, line 23*].

28. EPA has not claimed that the OCC failed to take appropriate enforcement action with regard to Ram [*TR-2, page 308, line 15*]. OCC records show Ram was in compliance so there was no need for the State to take enforcement action [*TR-2, page 308, line 20*].

29. The OCC can deal with matters that the EPA normally cannot [*TR-2, page 309, line 18*].

30. The EPA has not made a determination that the OCC's enforcement of its UST program is inadequate. Mr. Cernero has no indication that Oklahoma does not supply adequate enforcement [*TR-2, page 333, line 20*]. Mr. Cernero believes Oklahoma runs an adequate program [*TR-2, page 337, line 11*].

31. The state provides outreach to the regulated community to assist in compliance [*TR-2, page 385, line 8*].

32. States have the ability to come back to a facility and work with them, whereas the EPA does not [*TR-2, page 388, line 4*].

33. In effect, the OCC provides compliance assistance in Oklahoma [*TR-3 page 615, lines 3-14 & page 617, line 20*].

34. The EPA, on the other hand, provides compliance assistance only in Indian Country [*TR-2, page 325, line 7*].

35. Based upon the EPA's conduct with regard to this matter, the EPA's exercise of its oversight authority and enforcement policies as it pertains to non-Indian UST facilities in Oklahoma differs from that exercised by the EPA with regard to Indian UST facilities. [*RX-59 & RX-68*].

36. Therefore, it is the OCC that "levels the playing field" and not the EPA.

UST Penalty Guidance

37. It is the EPA's burden to demonstrate that the penalty proposed against Ram is appropriate [*TR-1, page 12, line 23*]; and 40 CFR 22.24.

38. The penalty "guidance" relied upon by EPA inspector John Cernero in calculating the proposed penalty against Ram is dated November 14, 1990, two years after the UST rules first took effect [*CX-12*].

39. Mr. Cernero testified that it is the purpose of the penalty policy to determine "what a fair penalty would be" [*TR-1, page 67, line 19*]. Mr. Cernero is already prejudiced into thinking that following the penalty policy will achieve fairness.

40. The economic benefit component of a penalty is the amount an owner/operator may have gained because of noncompliance [*TR-1, page 67, lines 4-25*]. "So what we try to do is level the playing field by at least assessing an economic benefit" [*TR-1, page 68, line 16*]. There are two elements of economic benefit. One element is "avoided costs" such as missing the costs of conducting an annual test. The second element is "delayed costs" such as interest earned on monies saved by not purchasing a corrosion protection system until later [*TR-1, page 69, lines 7 & 19*].

41. The economic benefit in the UST program is usually quite low [*TR-1, page 71, line 11*]. This may be how the Field Citation fits in, by covering the economic benefit.

42. The gravity-based component of a penalty is based on two elements, the degree of deviation from the regulation and the potential for harm [*TR-1, page 71, line 20*]. The gravity component is determined from a matrix reflecting these two elements, with assessments ranging from "minor" to "major" for each of these two elements.

43. Other factors utilized in determining the penalty include violator specific adjustments such as an environmental sensitivity multiplier, the degree of cooperation or non-cooperation with the enforcement agency, the history of non-compliance, and the number of days of non-compliance [*TR-1, pages 72 & 73*]. Mr. Cernero acknowledges that there is also an element which reflects circumstances akin to a *force majeure*, such as when a storm knocks out a piece of equipment which is nobody's fault. A *discount* to the penalty may be given for that [*TR-1, page 78, lines 14-21*].

44. Reading from the penalty policy, for a "violator" to get credit for cooperative behavior it must go beyond what is required in the regulations, such as a establishing an environmental auditing program to check compliance at other UST facilities [*TR-1, page 206, line 17*].

45. The calculation of the days of noncompliance is important because it is the resulting multiplier which causes the penalties to be quite high [*TR-1, page 81, line 6*].

46. The UST regulations came out in December 1988 and the UST penalty policy in 1990 [*TR-1, page 171, line 5*]. Except to add an "inflation factor" to account for the change in value of money [*TR-1, page 90, line 22*], the penalty provisions have not been changed to reflect either actual operational practices or any other deficiencies of the program such as those found by the GAO.

47. Gasoline was a lot cheaper in 1990 than it is today [*TR-1, page 172, line 7*]; which implies that the retailers will be more careful to avoid losses of product today as compared to when the program was new, so the penalty assumptions may no longer be accurate.

48. Mr. Cernero testified that the only enforcement tools the EPA has in the case of a violation are to issue a Field Citation or to assess a penalty with an Administrative Order [*TR-1, page 86, line 20*]. He does not use a Field Citation if there is a leak, or many violations at a facility, or a huge history of noncompliance. The Field Citation is used at the discretion of the inspector, and the goal is to try to get compliance within 30 to 60 days [*TR-1, page 84, lines 9-21*]. Whether to use a field citation as opposed to an administrative order is in the hands of the field inspector and the enforcement officer. They can use a Field Citation on the spot or when they get back to the office [*TR-1, page 85, line 1*]. Typically, the EPA will use Field Citation when there is not a big history of noncompliance. A Field

Citation may not be appropriate if the situation involves something more serious, like the need to pull the tanks [*TR-1, page 86, line 1*].

49. EPA has the authority to enforce against owners and/or operators, but not the contractors who are required to do the actual work on USTs [*TR-1, page 83, line 1*].

50. Greg Pasha testified that although extenuating circumstances do not relieve Ram of its responsibility to comply [*TR-1, page 17, line 7*], such circumstances nevertheless constitute mitigating factors to be included in the calculation of the penalties associated with that non-compliance.

51. The EPA provides no mechanism by which a respondent can determine whether the penalty imposed against it and any resulting settlement are consistent with the final penalty imposed or settlement reached in similar circumstances with other regulated parties. Similarly, the EPA provides no mechanism by which a respondent may learn how "mitigating" factors were considered in the calculation of a penalty or settlement [*TR-1, page 12, line 12*]. Therefore the true fairness of the penalty policy cannot be tested.

Selection of Ram for Inspection

52. The EPA made seven inspections in Oklahoma in 2004 [*TR-1, page 40, line 1*].

53. Greg Pasha was familiar with Ram from a November 2004 inspection in McAlester at Ram's Citgo Quick Lube – a facility not involved in the present matter [*TR-1, page 30, line 25 and page 44, line 24*]. At that time, Mr. Pasha gave the on-site Ram manager a Field Citation. No administrative order followed from this inspection although violations had been identified [*TR-1, page 30, line 19*].

54. More than half of the UST facilities inspected for 2004 had violations. All of these violations were fined through the field citations system, just as a field citation had been

issued for Ram's Citgo Quick Lube [*TR-1, page 41, lines 1-6*]. The Citgo Quick Lube did not receive the largest of these field citation penalties [*TR-1, page 42, line 6*].

55. Greg Pasha testified that violations such as those he had seen at the McAlester Citgo Quick Lube facility, here, problems with a cathodic protection system, were of "major" concern [*TR-1, page 33, line 3*]. In such a case, however, the EPA still chose to utilize the field citation system of enforcement.

56. Mr. Pasha received a call from John Roberts in December of 2004 regarding how to report an AST spill which had occurred at a Ram facility not included in the instant proceedings. Mr. Pasha stated "...that also raised concerns within our section, the UST section, concerning the operation of other facilities owned and operated by Ram Corporation" [*TR-1, page 32, lines 22 & 32*].

57. In that AST spill, approximately *150* gallons spilled from an AST bulk plant. Ram received a penalty order for this spill, seeking a penalty of approximately $11,000.00 penalty [*TR-3, page 640, lines 1 & 23*]. The AST spill was ultimately settled for approximately $6,900 [*TR-1, page 34, line 20; and TR-3, page 641, line 9*]. The AST spill was enforced under the Clean Water Act, not RCRA [*TR-1, page 35, line 2*].

58. The EPA does not allege that any spills have occurred as a result of the violations alleged in the administrative complaint herein; nevertheless, the penalty proposed at the beginning of this process was over $279,000.

59. Greg Pasha and Willie Kelly of EPA Region 6 and Butch Jeffers of OCC selected Pittsburg County for EPA's 2005 "oversight" inspections [*TR-1, page 37, lines 15-22*]. Butch Jeffers of the OCC had suggested Pittsburgh County as a good place to go look [*TR-1, page 39, line 16*].

60. Although more than half of the facilities inspected by the EPA in 2004 had violations noted by Mr. Pasha, the EPA listed only Ram-owned or operated facilities in its plans to conduct oversight inspections in February of 2005 [*TR-1, page 173, line 12*].

61. Although Greg Pasha had intended to conduct these inspections, as he had in past years, something came up and Mr. Cernero, who usually handled UST oversight for Arkansas, was asked to go instead [*TR-1, page 172, lines 16-20*]. Mr. Cernero is not typically involved with enforcement oversight in Oklahoma [*TR-2, page 287, lines 15-17*].

62. Mr. Cernero, with Mr. Roberts in accompaniment, inspected five Ram owned or operated facilities in Oklahoma on February 16 and 17, 2005.

EPA Enforcement Against Ram Generally

63. Prior to conducting those inspections, Mr. Cernero did not request nor did he review any documents pertaining to the OCC's enforcement of the UST program as it pertained to these five Ram facilities [*TR-1, page 174, line 8; page 175, line 1*].

64. Both prior to and during his visit to Oklahoma, Mr. Cernero never discussed substantive matters pertaining to his inspection with Roberts. Instead, it appears that Mr. Roberts was brought along merely as a "guide" to assist Mr. Cernero in locating the targeted facilities. Although Mr. Cernero identified what were ultimately twenty alleged violations at these facilities, Mr. Roberts and Mr. Cernero never discussed the OCC's history of inspections of these facilities. Mr. Roberts never advised Cernero that he had told Ram anything that was inconsistent with his written inspection reports [*TR-2, page 310, line 11*].

65. Mr. Cernero believes that the respondent's compliance with the EPA's version of enforcement, and not OCC's version of enforcement, was relevant for purposes of

determining whether or not a facility had a "history of noncompliance" [*TR-2, page 315, line 21*].

66. Mr. Cernero does not typically check for leaks or spills at USTs when he inspects them [*TR-1, page 211, line 17*].

67. Mr. Cernero testified that the purpose of inspections at Ram was to determine compliance, and to determine whether an enforcement action was necessary. He drafted the complaint after he got back to the office and looked at the violations he had identified [*TR-1, page 64, lines 2-13*].

68. Mr. Cernero believed that John Roberts' previous inspections were irrelevant [*TR-2, page 311, line 4*], but he acknowledged that perhaps he should have at least reviewed Ram's history with the OCC. "Now, unfortunately, in this situation, you know, maybe I should have. Maybe I should have asked him, 'give me all your records, let me see what you found before,' and scrutinized that" [*TR-2, page 317, lines 14-22*].

69. Mr. Cernero decided to use an administrative order instead of a field citation after he got back to his office because a field citation had been issued against Ram at another Ram facility and because the Ram facilities he had inspected had had numerous violations [*TR-2, page 373, line 14*].

70. No other 2005 EPA inspections of USTs, or any Oklahoma inspections, resulted in a fine of more than $5,000 [*TR-1, page 48, lines 4-15*]. Ram is the first Oklahoma case which resulted in a federal UST administrative order [*TR-1, page 49, line 4*].

71. Mr. Cernero believes that it is completely up to him whether he uses a field citation or an administrative order to secure compliance [*TR-2, page 382, line 9*].

72. During the February Inspection, Mr. Cernero did not discuss with any Ram personnel the potential for any penalties or the potential magnitude of any penalties [*TR-3, page 577, line 15*]. Mr. Cernero decided to use an administrative order instead of a field citation after he got back to his office [*TR-2, page 373, line 14*].

73. The OCC's competence in administering the UST program was not a factor in Mr. Cernero's consideration because Mr. Cernero did his inspection based on his own expertise and interpretation of the EPA's UST regulations, and his calculation of penalties was similarly based upon his own expertise and interpretation of the EPA's UST regulations [*TR-2, page 417, line 7*].

74. Mr. Cernero did not believe Ram was a mom and pop company [*TR-2, page 374, line 9*].

75. Mr. Cernero testified that Ram has the wherewithal to maintain proper compliance [*TR-2, page 374, line 14*]. Mr. Cernero acknowledged that the individual who owns the Farris Fuels facilities listed in Exhibit RX-68 probably doesn't sweep the floors and pump the gas, either [*TR-2, page 380, line 1*].

76. Ram is classified with EPA as a small business with 80 to 85 employees. It is the nature of the industry that employee turnover is high. Ram has an employee turnover of about four or five employees per store per year. That is, Ram can have a store full of new employees every three months [*TR-3, page 621, lines 4 & 17*].

77. Ram owns 9 or 10 UST facilities and also is a distributor [*TR-3, page 651, line 5*]. Ram owns all five of the UST facilities in the present matter, but three of these facilities were operated by third parties under the terms of marketing agreements – Thrift-T-Mart, Goodwin's, and Monroe's (when it was open) [*TR-3, page 623, lines 1 & 14*]. Both before and after the EPA inspection, these marketing agreements clearly highlighted the third-

parties' responsibility to conform their practices to applicable regulations [see, e.g., *RX-48, page 2,* the 1998 marketing agreement for Goodwin's at Hartshorne, wherein paragraph C states in part that the marketer agrees, "To conduct all operations hereunder in strict compliance with all applicable laws, ordinances, and regulations of all governmental authorities; In this regard, it is specifically agreed and understood Marketer shall maintain accurate records as requested by Distributor that are necessary and sufficient to comply with all state and federal regulations pertaining to fuel delivery, storage and containment of all petroleum fuel products..."].

78. Mr. Cernero's use of an administrative order instead of a field citation had nothing to do with the OCC [*TR-2, page 378, line 12*].

79. Mr. Cernero did not take any mitigating circumstances into consideration when calculating the penalty. The penalty was calculated before the administrative complaint had even been filed [*TR-1, page 207, line 17* thru *page 208, line 9*].

EPA Enforcement Database

80. [*RX-67*] is EPA's description of the Enforcement and Compliance History Online ("ECHO") system. Through this website, EPA stated its commitment to public access to environmental information. The EPA worked with the states to develop the content of the site and to ensure the data reported there was accurate [*TR-2, page 358, line 10*].

81. Another purpose of EPA's ECHO database [*RX-58 thru 60*] is to advise the public of potential responses by EPA if they violate EPA UST regulations [*TR-2, page 344, line 11*].

EPA Indian UST Enforcement in Region 6

82. The EPA has inspected Indian-owned USTs in Region 6, including Oklahoma, and has found violations, but instead of taking enforcement actions and enforcing penalties against those facilities, the EPA has offered compliance assistance [*TR-1, pages 49-52*].

83. The EPA inspects Indian-owned USTs regularly [*TR-1, page 51, line 7*].

84. The EPA has found Indian-owned USTs that were not in compliance [*TR-1, page 51, line 17*].

85. The 2003 GAO Report noted that while 89% of the state-regulated tanks had been upgraded, only 70% of EPA-regulated tribal tanks had been upgraded [*RX-50, page 3*].

86. Mr. Pasha is familiar with EPA inspections of Indian USTs in Oklahoma, and to his knowledge no fines have been levied against Indian-owned facilities that have had violations [*TR-1, page 49, lines 15-24*].

87. The EPA policy does not allow the use of field citations at Indian-owned USTs [*TR-1, page 51, line 22*].

88. There are no EPA administrative orders against Indian USTs "at this time" [*TR-1, page 52, line 1*].

89. The Tohatchi Chevron station was penalized $600 for failure to provide adequate line leak detector system, failure to have an annual line tightness test on pressurized piping and failure to install adequate overfill equipment [*TR-2, page 349, line 4*].

90. The Alamo Navajo School Board was fined $1050 for failure to provide release detection for tanks, failure to provide adequate line leak detector for piping, and failure to use spill prevention system [*TR-2, page 349, line 18*].

91. The Pinehill Fina Market was fined $450 for failure to use spill prevention [*TR-2, page 350, line 3*].

92. The Thoreau High School was fined $600 for failure to maintain release detection records failure to provide adequate line leak detector system, and failure to conduct annual line tightness tests [*TR-2, page 351, line 8*].

93. The Newcomb Bus Barn was fined $300 for failure to maintain release detection records and failure to provide adequate line leak detector system [*TR-2, page 351, line 21*].

94. Siprock Trading Company was fined $150 for failure to maintain records of release detection and failure to show how they will provide cathodic protection (this facility was not cited for this violation) [*TR-2, page 352, line 5*].

95. Mr. Cernero recognizes that the EPA's enforcement goal is to level the playing field for UST operators. Mr. Cernero acknowledged that although there are tribal facilities which compete with Ram, EPA's enforcement of the UST program with regard to tribes is different from the relationship it has with operators such as Ram [*TR-2, page 324*].

96. Mr. Cernero stated: "whether it's good, bad, or indifferent, that is just the way it is. Hopefully, that will be, you know, something that will be taken care of in the future." "...hopefully, somewhere down the road, we will move into the enforcement realm where we would only – not only do the compliance assistance, but we'll also do the enforcement against tribal entities." [*TR-2, page 325, line 3*].

97. In CX-32, a transmittal letter for the EPA's Indian penalty guidance, EPA first states that the "EPA remains committed to working with tribal facilities to enhance human health and the environmental protection" [*TR-2, page 427, line 3*]. And yet, as is described above, the

EPA does not issue field citations, issue administrative orders, or similarly penalize Indian-owned UST facilities [*TR-1, page 51, lines 17 & 22; and page 52, line 1*].

EPA Non-Indian UST Enforcement in Oklahoma

98. The EPA has inspected non-Indian USTs in Oklahoma, but instead of offering compliance assistance like it does in Indian Country and like the OCC does in Oklahoma, the EPA has taken enforcement and collected penalties for non-compliance.

99. The EPA has cited USTs in Oklahoma for violations such as those identified at Ram, but instead of serving a compliance order, the EPA has issued field citations with penalties approximately 100 times lower than the penalties EPA now seeks to impose against Ram [*RX-68*].

100. Ram is the first UST case penalized by an EPA administrative order in Oklahoma [*TR-1, page 49, line 4*].

101. With the exception of the Ram penalty, the largest penalty the EPA has sought against a private, non-Indian UST was $3,600 [*RX-68 & RX-60, page 14*].

102. The largest combined penalty the EPA has sought against an owner of *more than one* private, non-Indian UST was $10,200. These penalties involved five separate USTs all owned by Kathy Camp [*RX-68 and TR-3, pages 633 & 634*].[3]

103. The only EPA UST fine in Oklahoma in an amount over $10,000 was against government-owned Tinker AFB [*TR-2, page 290, line 4*].

104. In 2002, the EPA issued 43 field citations during 111 inspections in Region VI. Penalties averaged $1,094 per facility and the total of all penalties assessed was $47,050 *RX-57;* [*TR-2, page 343, line 10*].

[3] Kathy Camp owned the first five USTs on page 2 of RX-68. Farris Fuels is named in 10 USTs on page 1 of [*RX-68*], for a total penalty of $5,850.

105. It is the EPA's contention that the settlements listed on *RX-68* were based on each individual case and therefore such agreed-upon penalties cannot be used to measure the appropriateness of penalties or settlements at other USTs. However, with only two minor exceptions,[4] the amount of the 36 penalties initially sought and ultimately settled by the EPA against private, non-Indian USTs are exactly the same [*RX-60*].[5]

106. Ron Allford, owner of Ram, testified that when he received the EPA penalty order, he was astonished by the amount of the fine [*TR-3, page 631, line 3*]. Mr. Allford expects to be treated the same as every other regulated party, including the imposition of fines, if warranted, [*TR-3, page 632, line 20*], but believes that in this circumstance he has not been treated the same [*TR-3, page 633, line 13*]; [*RX-68*].

Competition Among Indian and Non-Indian USTs

107. Ron Allford graduated from TU with a major in marketing [*TR-3, page 650, line 8*]. Mr. Allford testified that the petroleum marketing industry (retail gasoline sales) is extremely competitive [*TR-3, page 634, line 24*]. Because of this competitiveness, the profit margin in the retail gasoline sales business is small, with the retailers and distributors splitting only 3 or 4 pennies per gallon sold [*TR-3, page 519, line 10*].

108. In Oklahoma, Ram and other petroleum marketers compete with Indian-owned retail gasoline stations. In addition to the disparate treatment Indian-owned facilities receive

[4] One penalty was against the federal government, Tinker AFB, where EPA initially sought $96,703 and ultimately assessed $54,500 [*RX-60, page 3*]; the other was against Martha Walls in Tishomingo, where EPA initially sought $1,200 and assessed $900 [*RX-60, page 24*].

[5] Six actions have no entries in the "Total Federal Penalty Assessed" column, presumably because they had not been resolved by May 2, 2006 when the printouts were made: QuickShop in Holdenville (sought $3,600); James' Service Station in Holdenville (sought $750); Gary's Service Station in Wewoka (sought $2,100); QuickWay in Wetumka (sought $1,650); The Village in Holdenville (sought $2,100); Tote A Poke in McCurtain (sought $300); and Ram (sought $279,752).

from the EPA with regard to UST regulations, Indians do not have to comply with Oklahoma's Fair Trade Law in pricing their gasoline sales [*TR-3, page 636, lines 1 & 13*].

109. A Choctaw-owned station, the Choctaw Travel Center, is located approximately 1½ miles south of the Thrif-T-Mart in McAlester [*TR-3, page 635, lines 3 & 17*].

110. Since the opening of that station, Thrif-T-Mart has lost about 25% of its fuel business and 25-30% of its inside sales to the Choctaw facility.

111. In many cases, the Choctaw facility is the first to lower its gasoline prices.

112. There are many Indian UST facilities in Oklahoma and they serve the general public, not just tribal members. Tribal USTs are in direct competition with Ram. [*TR-3, page 637, lines 1, 9 & 18*].

Ram, Inc.

113. The OCC inspects each Ram UST at least once each year [*TR-3, page 616, line 21*]. Ram corrects any non-compliance matters that are identified in those inspections [*TR-2, page 435, line 15; and TR-3, page 615, line 6*].

114. Ram has one employee who, among other duties, tracks compliance with UST requirements at Ram's facilities. Ram relies upon the OCC for compliance guidance [*TR-3, page 615, line 12 & page 626, line 10*].

115. John Cernero of the EPA inspected five Ram facilities on February 16 and 17, 2005, and subsequently reviewed Ram files at its office [*CX-7, page 3*]. John Roberts is the OCC inspector who normally inspects Ram, and he accompanied Mr. Cernero on his inspections [*TR-1, page 63, line 13 & page 174, line 10*]. Ram owns all five of the facilities inspected, but has marketing agreements for, and is/was therefore not the operator of, the Goodwins, Monroe's and Thrif-T-Mart UST facilities [*TR-3, page 623, lines 1-16*].

116. Mr. Cernero did not offer Ram an opportunity to correct the observed violations before it issued a compliance order on August 19, 2005, seeking $279,752.00 in civil penalties [*CX-7*]. EPA normally considers the opportunity to correct violations when calculating penalties in its field citation program [*TR-1, page 84, line 18*].

117. EPA dismissed counts 5, 6, 11, 13, 18 and 19 [*TR-1, page 14, line 16*]. Ram stipulated to liability for the remaining violations, and challenges only the appropriateness of the penalties [*TR-1, page 12, line 24 & page 56, line 3*].

118. Mr. Cernero did not use multipliers to increase the penalties based upon a "history of non-compliance" [*see CX-19*, "none" in violator specific adjustments]. However, Mr. Cernero claimed that he utilized the administrative compliance order instead of a Field Citation because Ram had a "history of noncompliance." Mr. Cernero testified that because Greg Pasha had found a violation at a different Ram UST, the Citgo QuickLube, and because of the AST leak, Ram had a history of non-compliance that warranted the imposition of an administrative order instead of a field citation at the five *other* facilities he inspected [*TR-1, page 208, line 15*].

119. Mr. Cernero chose not to consider any mitigating factors which could have reduced the final penalty proposed [see, *CX-19*].

120. Ram hired GMR, Inc., a UST consulting firm, and Richard Heck, a former OCC inspector, after the EPA's February inspection [*TR-3, page 578, line 10*], to assist Ram with regard to understanding and correcting the violations alleged. With the assistance of these individuals Ram began addressing items listed in Mr. Cernero's field notes [*TR-3, page 519, line 1*].

121. Mr. Heck has now also been engaged to assist Ram with its UST compliance at *all* of its stores, not just the five cited by EPA [*TR-3, page 519, line 21*].

122. Ram relies on the OCC, and hires professionals, to assist it in complying with the UST regulations [*TR-3, page 662, lines 19 & 24*]. Ram finds OCC inspections to be helpful in securing compliance because the OCC extends compliance assistance [*TR-3, page 615, line 6 and page 617, line 21*].

123. Ram relies on the OCC inspector to identify any new problems. Ram then makes the effort to come into compliance immediately, hiring experts as necessary [*TR-3, page 626, line 10*].

124. When seeking out experts for securing compliance, Ram chose NACE certified companies from a list provided by the OCC [*TR-3, page 627, line 13*].

Citgo QuickMart, McAlester (Counts 1 – 4)

125. EPA seeks a total penalty of $64,143.36 for violations observed at Citgo QuickMart. This includes $27,413.93 for not having spill buckets on three unused fill ports; $9,000 for having debris in spill buckets on six tanks; $4,500 for not having release detection on one temporarily closed tank; and $23,229.43 for using the *wrong method* of monthly release detection monitoring on five tanks [*CX-19, pages 3-6*]. This facility is shown in [*RX-1*].

Count 1: Lack of spill buckets on unused fill ports

126. The three USTs involved in this violation were originally constructed with fill ports at each end of the tank. These USTs were installed at the QuikMart in a north-south orientation. Because of their alignment and proximately to the station building and adjoining streets and driveways, only the southern ports on these tanks were intended to be used, and only these southern ports were in fact used, to refill the tanks. Accordingly, only the southern ports

were installed with spill buckets. The OCC's John Roberts was present when the tanks were installed, observed the installation, made recommendations, and advised Ram that spill buckets were not necessary on the north ports [*TR-3, page 642, lines 17-25*].

127. In the years subsequent to the installation of the tanks, OCC inspections of this facility do not indicate a problem with non-compliance with regard to spill/overfill requirements. [*RX-5, 6 & 7*] and [*TR-1, page 202*]. The OCC inspections were conducted by John Roberts, who also accompanied Mr. Cernero on his inspections [*TR-1, page 203, line 3*]. Even *after* the EPA inspection in February 2005, the OCC inspected this facility and once again did not find a violation in spill/overfill protection [*TR-2, page 441, line 8*].

128. Mr. Cernero testified that the violation relating to spill buckets had existed since the original installation of the tanks. Because the statute of limitations limits days of non-compliance to 1,600, the resulting multiplier is was 6. Mr. Cernero testified that "so that's one of the reasons why the penalty is quite high" [*TR-1, page 95, line 11*].

129. Mr. Cernero testified that the failure to have spill buckets at the northern end of the USTs, in spite of the fact that the USTs had spill buckets at their southern, and used, ends, was a "major-major" deviation [*TR-1, page 94, line 5*].

130. Mr. Cernero found that the north fill ports had "regular" caps. "So the potential for some truck driver inadvertently using that is pretty high in this case" [*TR-1, page 98, lines 6 & 19*].

131. However, it is practically impossible to fill through the north ports because tanker trucks have valves on the right side, the side opposite from the ports [*RX-71*]. A 30-year driver employed by Ram had no knowledge of these north ports ever being used [*TR-3, page 643, lines 17 & 25*]. The north fill ports were not color-coded to identify which product was in

the tank, so any delivery driver would have to ask a station employee which fill port to use if he tried to use it [*TR-2, page 438, line 15*]. One of the ports even had a padlock [*RX-3*]. Mike Majors saw nothing to indicate the north ports had been used [*TR-2, page 438, line 25*]. When he asked Ram about the northern ports he learned they had not been used for fueling during the life of the tanks, that is, since 1990 [*TR-2, page 439, line 13*].

132. In fact, Ram uses the north ports only to remove water from the tanks [*TR-3, page 646, line 19*]. Mr. Allford drew [*RX-71*] to demonstrate why use of the northern ports was impractical, if not impossible.

133. The OCC rules merely require that tanks have spill protection, but the language is stated in terms of tanks, not ports, and does not set forth a requirement that each and every port, whether used or not, must have spill protection [*TR-1, page 194, line 24*] and [*RX-30*].

134. Mike Majors' opinion is that Ram complies with OCC spill protection rules and that the penalty associated with this violation should have been mitigated [*TR-2, page 442, line 24*].

135. Ram nevertheless subsequently addressed this violation by installing spill buckets on the three unused northern ports [*TR-3, page 579, line 15*] at a cost of approximately $1600 to $1800 [*TR-3, page 642, line 2*] and [*RX-4*].

136. Mr. Cernero stated that a lack of spill buckets on the northern fill ports does not cease to be a violation just because the OCC passed the facility at the time of installation or later [*TR-2, page 414, line 10*].

137. The EPA imposed a penalty for this violation of $27,413.93 [*CX-19, page 3*].

138. Martha Walls received an EPA Field Citation with a $1,200 penalty sought and a total of $900 assessed for *four* listed violations, *one* of which was the following: "3) no evidence of overfill protection on three tanks" [*RX-60, page 23*].

139. The OCC rules do not list a penalty for a tank having an unused fill port without spill protection, but they do list a penalty of $1000 for accepting fuel into a tank that does not have spill protection. [*CX-30, page 70*] and [*TR-1, page 214, line 25*].

140. There is no potential for harm because the north spill ports cannot be used, and have not been used, for filling the USTs with product. Therefore the penalty is technical at best, and only then by applying the EPA interpretation of the OCC regulations instead of the OCC interpretation of the OCC regulations.

141. Assuming there indeed was a violation, the Court finds that the circumstances of the installation of these tanks, the positioning of the tanks, the approval of the OCC of the tanks as installed, and the passing inspections by the OCC gave Ram no reasonable basis upon which it could determine that spill buckets on the northern ports would be required under the Oklahoma UST program.

142. In effect, the first date upon which Ram had reasonable notice that this failure constituted a violation was the date of the EPA's inspection.

143. Enforcement of this portion of the UST program as proposed by the EPA is improper under the law.

144. This violation does not warrant any further penalty beyond the cost Ram has already expended to install unnecessary spill buckets.

Count 2: Inadequate capacity in spill buckets

145. Mr. Cernero found this violation to constitute a major potential for harm and a major deviation from the regulation because the capacity of the spill buckets was significantly reduced by the presence of debris in the buckets [*TR-1, page 101, line 1*].

146. At the same time, however, Mr. Cernero testified that having no spill bucket at all would also be a major violation [*TR-1, page 215, line 4*]. *See also*, Count 1, above.

147. In this instance Ram had installed spill buckets on the tanks in question; the simply had debris in them [*RX-9*] and [*TR-1, page 215, line 13*]. The buckets were capable of retaining additional spilled product [*TR-2, page 444, line 7*].

148. If a tank were filled on the day of inspection, the spill bucket could have product in it from that filling [*TR-2, page 445, line 11*]. The tanks were filled at QuickMart the day EPA inspected, according to release detection data which showed deliveries were made [*TR-2, page 445, line 14*] and [*RX-63*].

149. QuickMart does not have a history of dirty spill buckets, as this issue has not been identified on OCC inspections since at least 2002 [*RX-5 thru 8*].

150. Ram subsequently addressed this violation by again emphasizing to managers that the buckets must be kept free of debris, and Ram purchased pumps for the drivers to use at the stations to remove liquids left after filling the UST [*TR-3, page 579, line 20*].

151. The EPA imposed a penalty for this violation of $9,000.00 [*CX-19, page 4*].

152. Quick Shop received an EPA Field Citation with a $3,600 penalty sought and not yet assessed for *ten* listed violations, *one* of which was the following: "5) inadequate overfill protection (flapper valves not functioning)" [*RX-60, page 14*].

153. The OCC rules do not list a penalty for failure to clean spill buckets [*CX-30, Appendix S, page 70*], but they do list a penalty of $1000 for accepting fuel into a tank that does not have spill protection. [*CX-30, page 70*] and [*TR-1, page 214, line 25*].

154. Based upon Mr. Cernero's interpretation, the EPA UST penalty guidance penalizes those who have dirty spill buckets the same as those who have no spill buckets at all.

155. Assuming there indeed was a violation, the Court finds that the circumstances do not warrant a major-major assessment, the period of violation should be reduced to one day installation of these tanks, because the positioning of the tanks, the approval of the OCC of the tanks as installed, and the passing inspections by the OCC gave Ram no reasonable basis upon which it could determine that spill buckets on the northern ports would be required under the Oklahoma UST program.

156. In effect, the first date upon which Ram had reasonable notice that this failure constituted a violation was the date of the EPA's inspection.

157. Enforcement of this portion of the UST program as proposed by the EPA is improper under the law.

158. This violation does not warrant any further penalty beyond the cost Ram has already expended to enhance its practices with regard to cleaning debris from spill buckets.

159. No more than a nominal penalty is appropriate in this case.

Count 3: Failed to do release detection on a temporary closed tank

160. Mr. Cernero found that a failure to do release detection is a major potential for harm and a major deviation [*TR-1, page 107, line 5*]. When reaching this decision, Mr. Cernero did not know what percent of the tank volume the 9 inches of liquid represented, and stated that the volume inadvertently left in the tank wouldn't affect whether it was a major or a minor because the regulations state that you may not leave more than an inch of product in the tank [*TR-1, page 223, line 16*].

161. Mr. Cernero did not properly distinguish the potential for harm between releases of a few extra inches of product versus a full tank of product.

162. The UST regulations state that a facility must keep 12 months of written data on its release detection, so Mr. Cernero assessed penalties against Ram for failure to maintain records for a period of one year and one day [*TR-1, page 109, line 8*]. One extra day increases the penalty multiplier [*TR-2, page 262, line 23*].

163. Ram used the tank involved in this violation only infrequently, and then only for a short time, for what it considered to be emergencies. In Ram's case, when there was excess product on delivery trucks). Ram could not determine from the definitions in the OCC UST regulations that that their use of the tank for this purpose did not meet EPA's definition of "emergency" under the regulations and therefore required ongoing release detection [*TR-3, page 614, line 24*].

164. After each use, Ram had instructed that this tank be emptied, and in this case a Ram employee did in fact drain what he believed to be the entire product out of this tank. However, when vacuuming out a tank sometimes the vacuum hose used for removal curls up at the end, missing that last few inches of product, and because the hose starts "sucking air" the operator may mistakenly believe that the entire product has been removed. Ram did not intend to leave product in the tank [*TR-3, page 617, line 17*].

165. The OCC has not cited Ram for failure to conduct release detection monitoring on the temporary closed tank since at least 2002 [*RX-5 thru 8*], nor has it notified Ram that its conduct violated this requirement [*TR-1, page 220, line 5*].

166. In effect, the first date upon which Ram had reasonable notice that this failure constituted a violation was the date of the EPA's inspection.

167. Accordingly, it is improper to penalize Ram for more days of violation than the one day of the inspection.

168. Ram has subsequently addressed this violation by using SIR, or statistical inventory reconciliation, as the form of release detection at the Citgo QuickMart [*TR-3, page 580, line 25*].

169. The EPA penalty for this violation was $4,500.00 [*CX-19, page 5*].

170. Quick Shop in Oklahoma received an EPA Field Citation with a $3,600 total penalty sought and not yet assessed for *ten* listed violations, *one* of which was the following: "1) product in tank but registered as temporarily out of service; 2) no release detection for tanks" [*RX-60, page 14*].

171. The comparable OCC penalty for failure to correct such a violation would be $250 [*CX-30, Appendix S, page 71*].

172. Eight inches of product beyond the one-inch regulatory maximum for an empty tank should not be classed as major non-compliance.

173. Enforcement of this portion of the UST program as proposed by the EPA is improper under the law.

174. Penalizing Ram for a year and a day is excessive. More than a nominal penalty is not warranted.

Count 4: Using the wrong method of release detection

175. Mr. Cernero found that although release detection was in fact being conducted, since the method of release detection being used was incorrect, the deviation presented a major potential for harm and constituted a major deviation from the rule [*TR-1, page 112, line 1*]. Mr. Cernero made no adjustment to reflect that fact that Ram was in fact conducting release detection. A major deviation finding should be imposed upon a facility which fails to conduct any release detection at all [*TR-1, page 71, line 24 through page 72, line5*].

Because Ram was not conducting "acceptable monitoring" at this facility, Mr. Cernero estimated that Ram avoided a $5,000 capitol expenditure for the installation of automatic tank gauging. The gravity portion of the penalty came out to be only $146 per tank [*TR-1, page 110, line 23* and *page 114, line 7*]. However, the implementation of Statistical Inventory Review ("SIR"), the method of release detection Mr. Cernero believed Ram should have been utilizing, has no capital investment cost [*TR-2, page 278, lines 2-20*].

176. Mr. Cernero testified that if Ram were not doing any monitoring at all, that would be a major threat and a major violation [*TR-1, page 224, line 19*], and yet, Ram was performing a type of release monitoring [*TR-1, page 225, line 5*].

177. Mr. Cernero was in fact unable to give an example of what he considered to be a "minor-minor" violation [*TR-2, page 256, line 24*].

178. Ram's own consultant, Mr. Majors, who had been a consultant in the Oklahoma UST program for 11 years, did not understand that the alterations Ram made to its system constituted a "modification" and not an "upgrade" until Mr. Cernero stated his position on the matter [*TR-2, lines 4-9*].

179. Although the OCC had inspected this facility numerous times since the expiration of the term in which Ram could utilize the older form of release detection, the OCC had never notified Ram that this older method constituted a violation [*RX-5-8*] and [*TR-1, page 225, line 18*]. The last OCC inspection was on July 2, 2004, less than a year before the EPA inspection, and no release detection violation was noted [*TR-1, page 226, line 1*] and [*RX-7*].

180. In effect, the first date upon which Ram had reasonable notice that this failure constituted a violation was the date of the EPA's inspection.