BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
	)	
Ram, Inc.	)	Dkt. No. SWDA-06-2005-5301
	)	
Complainant	)	

NOTICE OF APPEAL

The Director of the Multimedia Planning and Permitting Division, U.S. Environmental Protection Agency, Region VI, ("Appellant") seeks review of a decision of Administrative Law Judge Spencer T. Nissen, issued July 12, 2008, assessing a civil penalty of $49,312, for violations of Subtitle I of the Resource Conservation Recovery Act, 42 U.S.C. § 6991. An appeal brief is attached.

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	)
Respondent	)
	)

COMPLAINANT'S APPELLATE BRIEF

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57 Fed. Reg. 41,874

61 Fed. Reg. 1221

INTRODUCTION

Pursuant to 40 C.F.R. § 22.30(a)(1), Complainant, Director of the Multimedia Planning and Permitting Division, U.S. Environmental Protection Agency, Region 6, appeals the Initial Decision of Presiding Officer, Spencer T. Nissen, assessing a civil penalty of $49,312 for violations of Subtitle I of the Resource Conservation Recovery Act, 42 U.S.C. § 6991. During the Hearing on this matter, Respondent admitted liability for all counts not dropped by Complainant. Initial Decision at 3-4. Notwithstanding, the Presiding Officer found that Complainant's proposed penalties were inappropriate and overstated the gravity of the violation both from the standpoint of harm to the regulatory program and gravity of the misconduct. Initial Decision at 24, 30. For the reasons set forth below, Region 6 respectfully requests that the Presiding Officer's Initial Decision be set aside regarding the amount of the penalty for Counts 3, 14, 15 and 16, and that the proposed penalty of $43,847 be assessed collectively for said four counts.

ISSUES PRESENTED FOR REVIEW

A. Whether the Presiding Officer erred in holding that the potential for harm for Counts 3 and 14 was minor where there were significant amounts of gasoline remaining in the tanks and the potential for harm to the environment was substantial, and abused his discretion in disregarding the potential for a substantial adverse effect on the regulatory program in his penalty assessment.

B. Whether the Presiding Officer erred in holding that the potential for harm for Counts 15 and 16 was minor due to Respondent eventually removing the subject tanks after Complainant had noted the violation in its Compliance Evaluation Inspection and filed its Complaint, and abused his discretion in disregarding the potential for a substantial adverse effect on the regulatory program in his penalty assessment.

C. Whether the Presiding Officer abused his discretion by placing at issue the days of noncompliance for Count 15 and erred procedurally in reducing the days of noncompliance multiplier from 5.5 to 1.

SUMMARY OF THE ARGUMENT

Respondent, Ram, Inc., is the owner of the five gasoline and convenience store facilities identified in the Complaint and in the Initial Decision. Respondent is the owner and/or operator of the underground storage tanks (USTs) and UST systems located at said facilities, which were the subject of the Complaint. At the Hearing, Respondent stipulated to liability for each and every standing count and proceeded at the Hearing to dispute solely the penalty amount for the violations.

The Presiding Officer abused his discretion and erred procedurally in reducing the penalty amount for Counts 3, 14, 15 and 16 on the stated grounds. Regarding Counts 3 and 14, the Presiding Officer erroneously minimized the potential for harm to minor and disregarded the potential for a substantial adverse effect of Respondent's violations on the regulatory program. Respondent admittedly failed to verify that the subject tanks were empty while in temporary closure, which in fact they were not. Moreover, Respondent knowingly allowed product to be periodically added to the Count 3 tank while in temporary closure, even though release detection was not being performed on the tank.

Regarding Counts 15 and 16, the Presiding Officer improperly adjusted downward the potential for harm on the basis that Respondent eventually removed the subject tanks. In essence, he rewarded Respondent for doing what was minimally necessary to comply with the requirements that are closely related to the initial harm addressed in the first place. As seen with Counts 3 and 14, the Presiding Officer again ignored the major potential for harm to the regulatory program resulting from Respondent's violations in his ruling on Counts 15 and 16.

Additionally, as Respondent accepted liability for each and every count without caveat as to the alleged period of noncompliance, the Presiding Officer erred procedurally by calling into question *sua sponte* the period of noncompliance for Count 15. Thus the Presiding Officer abused his discretion in reducing the days of noncompliance multiplier from 5.5 to 1. The Presiding Officer also improperly discounted Respondent's failure to produce any records of compliance in his treatment of Count 15.

STANDARD OF REVIEW

Section 22.30(f) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("CROP") states that the Board "shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in" an appealed initial decision and authorizes the Board, if appropriate, to "assess a penalty that is higher . . . than the amount recommended to be assessed in the decision." 40 C.F.R. § 22.30(f). Employing this standard from the CROP, the Board generally reviews a Presiding Officer's determination *de novo*. In re Chempace Corp., 9 E.A.D. 119, 134 (EAB, 2000); In re Ocean State Asbestos Removal, Inc., 7 E.A.D. 522, 530 (EAB 1998).[1] Deference is given to the trial judge's assessment of the facts and the witnesses. In re City of Salisbury, Maryland, 10 E.A.D. ___, CWA Appeal No. 00-01 (EAB January 16, 2002), slip op. at 18. The Board generally will overturn a Presiding Officer's penalty determination only where there is an abuse of discretion or clear error in assessing the

1 *See also* the Administrative Procedure Act, 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all power which it would have in making the initial decision except as it may limit the issues on notice or by rule.")

penalty. In re Robert Wallin, 10 E.A.D. ___, CWA Appeal No. 00-3 (EAB 2001), slip op. at 19. For all of the reasons set forth in the following sections of this brief, the Board should set aside the Presiding Officer's conclusions regarding the amount of the penalty for Counts 3, 14, 15 and 16.

FACTUAL AND PROCEDURAL BACKGROUND

The Complaint in this matter was filed on August 19, 2005, pursuant to Section 9006 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act[2] ("RCRA"or the "ACT"), 42 U.S.C. § 6991e, and the CROP, 40 C.F.R. Part 22. Specifically, the Complaint alleged that Respondent Ram, Inc. ("Ram" or "Respondent") failed to comply with requirements of the State Underground Storage Tank ("UST") regulations issued by the Oklahoma Corporation Commission ("OCC") and found under Title 165 of the Oklahoma Administrative Code ("OAC"), Chapter 25, cited as OAC 165:25. *See* 40 C.F.R. § 282.86.[3]

On February 3, 2006, the Presiding Officer issued an order directing the parties to exchange prehearing information on or before March 6, 2006. Complainant filed its prehearing exchange on March 3, 2006. On March 6, 2006, Respondent sent copies of its prehearing exchange by courier to the Presiding Officer, Regional Hearing Clerk, and Complainant.

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

3 The Oklahoma UST program was authorized pursuant to 40 C.F.R. Part 281 on August 12, 1992 by the U.S. Environmental protection Agency ("EPA") (57 Fed. Reg. 41,874) and became effective on October 14, 1992. The approved State regulations were identified in the Federal Register on January 18, 1996 (61 Fed. Reg. 1221) and are listed at 40 C.F.R. § 282.86. For ease of reference, Complainant will cite both to the Federal regulations and the OCC regulations in this appellate brief.

On April 14, 2006, Respondent filed a Motion to request Additional Discovery and Brief in Support Thereof. The Presiding Officer denied Respondent's discovery request.

A hearing in this matter was held in McAlester, Oklahoma, on May 9 through 11, 2006 (the "Hearing").[4] During the course of the Hearing, Complainant agreed on the record to withdraw Counts 5, 6, 11, 13, 18 and 19. Tr.-1 at 14. Respondent stipulated to liability on each count not dropped or dismissed by Complainant, but contested the amount of the proposed penalties on the basis that they were so excessive as to be a violation of substantive due process. Tr.-1 at 23, 56.

Supplemental post-hearing briefs were filed on July 14, 2005. Complainant filed its response to Respondent's post-hearing brief on August 14, 2005, and Respondent filed its response to Complainant's brief on August 15, 2005.

The Presiding Officer dated his Initial Decision in this matter July 12, 2008.[5] In the decision, he found that although the EPA Penalty Guidance for Violations of UST Regulations was followed, the penalty calculated by Complainant overstates the gravity of the violation both from the standpoint of harm to the regulatory program and gravity of the misconduct. Initial Decision at 24. The Initial Decision assessed a total of $49,312 in civil penalties.

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4 The numbering for the Hearing transcript in this matter begins with Page 1 in Volume I and continues consecutively through Page 671 in Volume III. The following citation format has been used whereby each day of the transcript is assigned a separate volume number:

Date	Volume	Citation
May 9, 2006	Volume I	Tr.-1 at xx
May 10, 2006	Volume II	Tr.-2 at xx
May 11, 2006	Volume III	Tr.-3 at xx

5 The Certificate of Service is dated July 15, 2008.

Complainant urges that the Environmental Appeals Board ("EAB" or the "Board") assess Complainant's proposed penalty for Counts 3, 14, 15 and 16, in the amount of $43, 847; assess a total penalty amount for all standing counts of not less than $86,012; and affirm the Initial Decision in all other respects.

ARGUMENT

I. THE PRESIDING OFFICER ERRED IN REDUCING THE POTENTIAL FOR HARM RESULTING FROM RESPONDENT'S VIOLATIONS TO MINOR IN HIS PENALTY ASSESSMENT FOR COUNTS 3 AND 14.

The subject tank in violation for Count 3 was a 12,000-gallon diesel tank. As noted in the Initial Decision, said tank contained approximately eight inches of product at the time of the EPA inspection which would convert into approximately 832 gallons of product. Initial Decision at 11-12. The subject tank in violation for Count 14 was a 1,000-gallon premium tank, which contained approximately 9 inches, 65 to 70 gallons, of product at the time of the EPA inspection. Initial Decision at 20. For both counts, the Presiding Officer held that the potential for harm was minor "because of the small amount of product remaining in the tank as opposed to it being full or some major fraction thereof." Initial Decision at 12, 20. The Presiding Officer reduced the penalty from $4,500[6] to $600 for each count. In so ruling, he erred.

A. The Presiding Officer unreasonably minimized the potential for harm to human health and the environment.

In his initial decision, the Presiding Officer based his reduction of the penalty for Counts 3 and 14 merely on what he determined to be a small amount of product remaining in each tank. The UST regulations allow for no more than one inch of residue

6 Complainant's bases for calculating the penalties for Counts 3 and 14 can be found in Tr.-1 at 105-110 and Tr.-1 at 141-143, respectively.

to remain in a tank when emptied using commonly employed practices.[7] However, according to the uncontested testimony, at the time of the inspection the tanks at issue here contained approximately eight and nine times the amount of allowable residue, respectively. EPA determined that the amount of product in each tank was 8-9 inches and 9 inches, respectively. For a period of at least a year, Respondent failed to conduct the required monthly release detection for the tanks. Moreover, with respect to Count 3, Respondent admittedly placed excess product from "overloaded" delivery trucks in the tank, even though release detection was not being performed and the tank was allegedly in temporary closure. Tr.-3 at 614-615; Initial Decision at 11. Regarding Count 14, Respondent's witness testified that she believed the tank was empty and that Ram relied on its truck drivers to pull out the product. Tr.-3 at 599. However, no evidence was presented demonstrating Respondent had in fact confirmed that that either tank had been properly emptied. The release of 832 gallons of diesel or 65-70 gallons of premium gasoline may have caused a situation resulting in well beyond a relatively low risk to human health and the environment (i.e., minor potential for harm).

EPA notes the Board's decision in Carroll Oil where it found moderate potential for harm where visible amounts of gasoline were observed but not measured by the EPA inspectors and where the record provided uncontested testimony that Respondent "pumped all the product out of the tanks" "to as low a number as we possibly could."[8] Unlike Carroll Oil, in the instant case, the amount and nature of the gasoline remaining in

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7 *See* Initial Decision at 11-12 ("Under the regulation, OAC 165-25-3-62(b), a tank is empty [for the purposes of this Subchapter] when using commonly employed practices no more than one inch of residue remains in the tank.").

8 In re Carroll Oil Company, Inc., Docket No. RCRA-8-99-05 (ALJ Moran Apr. 30, 2001), rev'd, 10 E.A.D. __ (EAB 2002)

each tank was measured, and Respondent merely relied on its drivers to pull the product without documenting or verifying that the tanks were in fact emptied. Further, as noted above, Respondent continued to add product to one of the temporarily closed tanks. As asserted by Complainant, the violations may have caused a situation resulting in a substantial or continuing risk to human health and the environment (i.e., major potential for harm), especially considering that a release of the materials would have gone undetected for a year or longer.[9]

B. The Presiding Officer disregarded the potential for a substantial adverse effect on the regulatory program.

In addition to understating the potential for harm to human health and the environment resulting from Respondent's violations, the Presiding Officer ignored the potential for the violations to have a substantial adverse effect on the regulatory program. As discussed above, Respondent admitted its practice of placing excess product from overloaded delivery trucks in the Count 3 tank and admitted liability for failing to conduct the required release detection on the both tanks. Further, Respondent attempts to justify its noncompliance by reliance on the unconfirmed actions of a third party. Such conduct blatantly disregards the regulations and should not be rewarded with a finding of minor potential for harm. Failing to assess significant penalties against owners/operators for knowingly adding product to tanks in temporary closure while failing to conduct release detection detrimentally compromises the regulatory program, particularly in the present area where such practices are already a concern. Moreover, the integrity of and accountability to the regulatory program is dangerously undermined if owners/operators

9 *See* Tr.-1 at 108. *See also* Tr.-1 at 141 (testimony of Mr. Cernero that an undetected release could occur for a long period of time and cause contamination of soil and groundwater and could cause potential for vapors and explosions).

are allowed to rely on third parties to fulfill their regulatory obligations without verifying and documenting the activities of the third parties and receive only minimal penalties in so doing.

The Presiding Officer thus erred in downgrading from major to minor the potential for harm resulting from Respondent's violations in Counts 3 and 14. Such a downgrade is neither warranted nor supported by the record. Accordingly, the penalty of $600 per count as calculated by the Presiding Officer should be set aside and a penalty in the amount of $4,500 per count assessed.

II. THE PRESIDING OFFICER ERRED BY FINDING THE POTENTIAL FOR HARM FOR COUNTS 15 AND 16 TO BE MINOR.

Counts 15 and 16 both addressed four tanks in temporary closure at the Monroe's Service Station facility. The four tanks consisted of one 8,000-gallon unleaded, one 1,000-gallon unleaded, one 1,000-gallon premium, and one 1,000-gallon midgrade. For both counts, the Presiding Officer erroneously held that because the tanks were eventually taken out, the potential for harm was minor. Consequently, he erred in reducing the potential for harm matrix value to $200 and assessing a penalty in the amount of $800 as opposed to $16,500 for Count 15 and $5,147.12 as opposed to $18,347.11 for Count 16.[10]

10 Complainant's bases for calculating the penalties for Counts 15 and 16 can be found in Tr.-1 at 143-151 and Tr.-1 at 151-157, respectively.

A. The fact that Respondent eventually removed the tanks is not a proper basis for penalty mitigation.

As discussed in In re Mayes, "the UST Penalty Policy explains that:

> In order to have the matrix value reduced, the owner/operator must demonstrate cooperative behavior by going beyond what is minimally required to comply with requirements that are closely related to the initial harm addressed. For example, an owner/operator may indicate a willingness to establish an environmental auditing program to check compliance at other UST facilities, if appropriate, or may demonstrate efforts to accelerate compliance with other UST regulations for which the phase-in deadline has not yet passed. Because compliance with the regulation is expected from the regulated community, no downward adjustment may be made if the good faith efforts to comply primarily consist of coming into compliance. That is, there should be no 'reward' for doing now what should have been done in the first place. On the other hand, lack of cooperation with enforcement officials can result in an increase of up to 50 percent of the matrix value. UST Penalty Policy, at 18." (Mayes Initial Decision at 49)

Count 15 addressed Respondent's failure to operate cathodic protection systems continuously on the tanks while in temporary closure. Count 16 addressed Respondent's failure to test the cathodic protection systems on the tanks since their installation. In order to come into compliance, Respondent was required to either operate and test the cathodic protection systems or permanently close and remove the tanks. Had Respondent done nothing, the tanks would have remained in a noncompliant status, and additional penalties would be warranted. Respondent chose to remove the tanks, which satisfied only a minimal requirement option to finally come into compliance with the UST regulations. Respondent's conduct of removing the tanks, after the inspection and after the Complaint was filed, were not above and beyond what was necessary to comply with requirements that are closely related to the initial harm addressed. Tr.-3 at 613.

Furthermore, considering Respondent's lengthy period of noncompliance[11], the eventual removal of the tanks does not constitute cooperative behavior to merit a reduction and would be, in fact, a reward for doing now what should have been done already. Therefore, the Presiding Officer improperly adjusted downward Complainant's proposed matrix value to reflect Respondent's late compliance.

B. The Presiding Officer abused his discretion by failing to properly consider the potential for a substantial adverse effect on the regulatory program in his penalty assessment.

As discussed supra, the Presiding Officer again ignores the potential for major harm to the regulatory program resulting from Respondent's violations in his ruling. Late compliance with the law is not the same as compliance in the first instant. The regulated community may not disregard the regulations and put off complying with them until after an EPA inspection occurs or enforcement action is taken. Moreover, to mitigate penalties for such action would not only handicap the regulatory program, it would also foster greater threats to human health and the environment. Accountability of UST owners and operators to the regulatory program is vital in the face of limited federal resources. The assessment of significant penalties where appropriate, as in the instant matter, is critical to ensuring that EPA's enforcement authority is not diminished in the public eye and that the regulatory efforts of the UST program are not derailed.

III. THE PRESIDING OFFICER ERRED BY REDUCING THE DAYS OF NONCOMPLIANCE MULTIPLIER FOR COUNT 15.

As noted in paragraph 50 of his Initial Decision, the Presiding Officer reduced the days of noncompliance multiplier from 5.5 to 1 for Count 15, concluding that

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11 Respondent was in violation for at least 1,279 days for Count 15 and at least 1,600 days for Count 16. Initial Decision at 20, 22.

"Complainant does not provide an accurate basis for the days of noncompliance." Consequently, he reduced the penalty from $16,500 to $800 for this count, in error.

A. The Presiding Officer erred procedurally by recalculating the days of noncompliance.

Respondent stipulated to liability for each and every count that was not dropped by EPA at the Hearing. Initial Decision at 3-4; Tr.-1 at 56, 65. Count 15 as alleged in the Complaint included the allegation that the period of noncompliance began on the date the USTs were placed in temporary closure, which was August 17, 2001, and continued to February 16, 2005 (the earliest date compliance could have been achieved). Complaint at 27. At the Hearing, Respondent accepted liability "in each and every case" without caveat as to the alleged period of noncompliance for this Count. Moreover, Respondent offered no testimony or other evidence at the Hearing, after conceding liability, to contest the fact that the subject tanks were placed in temporary closure on August 17, 2001 and that it failed to continue operating the cathodic protection system on each tank thereafter. Respondent only testified that it remedied the violations by certifying the cathodic protection system after the post-inspection meeting and subsequently removing the tanks. Tr.-3 at 599-600. As the 1,279 days of noncompliance for the Count 15 violations were not in issue, the Presiding Officer abused his discretion and erred procedurally by calling the days of noncompliance multiplier into question *sua sponte* and reducing it from 5.5 to 1 in re-calculating the penalty.[12]

12 As per the UST penalty policy, the multiplier of 5.5 is required for days of noncompliance of the magnitude in this count. *See* Tr.-1 at 146-147 and CX 19 at 13.

B. The Presiding Officer improperly discounted Respondent's failure to produce any records of compliance in his treatment of Count 15.

In his discussion of Count 15, the Presiding Officer states that "[w]hile Ram was unable to produce any records to the contrary, failure to maintain records is not the violation at issue." Initial Decision at 21. The Presiding Officer overlooks, however, the long-standing principle that the failure to produce records of required activities is prima facie evidence that the activities were not performed.[13] Moreover, as stated above, Respondent accepted liability for this Count without contesting the fact that cathodic protection was not in operation on the tanks during the period of temporary closure. The fact that Respondent provided no records, or testimony, to the contrary supports the penalty as calculated by Complainant.

CONCLUSION

The Presiding Officer erred in holding that the potential for harm for Counts 3 and 14 was minor. Similarly, he erroneously held that the potential for harm for Counts 15 and 16 was minor due to Respondent eventually removing the subject tanks after the violations had already occurred for several years and had been identified by EPA. The Presiding Officer also abused his discretion in disregarding the potential for a substantial adverse effect on the regulatory program in his penalty assessment for each of the four counts. Additionally, the Presiding Officer erred procedurally by placing at issue the days of noncompliance for Count 15 and improperly reduced the days of noncompliance multiplier from 5.5 to 1 in his penalty recalculation. For these and the reasons set forth above, the Presiding Officer's Initial Decision concerning the amount of the penalty

13 *See eg.* In re Morgan Properties, Inc., Docket no. RCRA-UST-94-002 (ALJ Pearlstein July 28, 1997) (Failure to produce records of required tests of UST systems is prima facie evidence that the tests were not performed).

should be set aside for Counts 3, 14, 15 and 16, and the Region's proposed penalty of $43,847 for those four counts should be assessed. Therefore, the total penalty assessed for all standing counts in this matter should be not less than $86,012.

RESPECTFULLY SUBMITTED this 13th day of August, 2008.

Respectfully submitted

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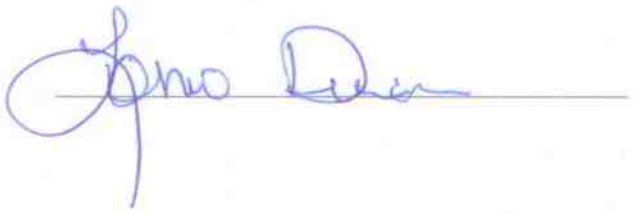
In the Matter of Ram, Inc. Respondent
Docket No. SWDA-06-2005-5301

CERTIFICATE OF SERVICE

I certify that a true copy of the Notice of Intent to Appeal and Appeals Brief in Support was sent this day in the following manner to the addressed listed below.



Dated: August 13, 2008

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