BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	
	)	
Euclid of Virginia, Inc.	)	
4225 Connecticut Avenue	)	RCRA (3008) Appeal No. 06-05
Washington, D.C. 20008	)	
	)	
RESPONDENT	)	

COMPLAINANT'S NOTICE OF CROSS APPEAL

The Initial Decision in the above-captioned matter found Respondent liable for nearly all of the violations alleged by Complainant, and for most of the time periods specified in Complainant's Post-Hearing Brief. However, the Initial Decision found Respondent not liable for the violations alleged in Count 47 of the First Amended Complaint, and found Respondent not liable for that portion of the period of violation alleged in Counts 54 and 57 which occurred prior to May 4, 1998. Initial Decision at 39 - 40 and 42 - 44. The Initial Decision found Respondent liable for all other remaining violations and time periods claimed by Complainant, ordered Respondent to remedy all violations for which it was found liable, and imposed a civil penalty of $3,085,293.

Respondent filed an appeal which appears to challenge both the liability findings and the penalty assessment in the Initial Decision. Complainant did not initially appeal any portion of the Initial Decision. However, pursuant to the "cross-appeal" provisions of 40 C.F.R. § 22.30(a)(1), Complainant hereby appeals such portions of the Initial Decision which denied liability for Counts 47 and for portions of Counts 54 and 57. Complainant urges that the Environmental Appeals Board affirm the Initial Decision in all other respects.

Respectfully submitted,

_____ _____

Date

BENJAMIN D. FIELDS
Senior Assistant Regional Counsel
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Of Counsel: GARY JONESI
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Office of Civil Enforcement

CERTIFICATE OF SERVICE

I hereby certify that on the date below I served the original and copies of the attached Complainant's Notice of Cross-Appeal as follows:

Original via Federal Express, copy via CDX Electronic Submission:	U.S. Environmental Protection Agency Clerk of the Board, Environmental Appeals Board 1341 G Street, N.W., Suite 600 Washington, D.C. 20005
Copy via Hand Delivery:	Lydia Guy, Regional Hearing Clerk U.S. Environmental Protection Agency – Region III
Copy via Federal Express:	Thomas F. DeCaro, Jr. DeCaro & Howell, P.C. Suite 201 14406 Old Mill Road Upper Marlboro, Maryland 20772-3029

_____
Date

_____
Benjamin D. Fields
Senior Assistant Regional Counsel

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COMPLAINANT'S BRIEF ON CROSS APPEAL AND BRIEF IN OPPOSITION TO RESPONDENT'S APPEAL

BENJAMIN D. FIELDS
Senior Assistant Regional Counsel
A. J. D'ANGELO
Senior Assistant Regional Counsel

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COMPLAINANT'S BRIEF ON CROSS APPEAL AND
BRIEF IN OPPOSITION TO RESPONDENT'S APPEAL

I. Introduction

The original Complaint in this matter was filed on September 30, 2002, alleging violations of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively referred to hereafter as "RCRA"). The original Complaint was filed pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice" or "Consolidated Rules"), 40 C.F.R. Part 22. Specifically, the original Complaint alleged that Respondent Euclid of Virginia, Inc. ("Euclid" or "Respondent") violated Subtitle I of RCRA, 42 U.S.C. §§ 6991-6991*i*, EPA's regulations promulgated thereunder at 40 C.F.R. Part 280, and the Maryland, Virginia and District of Columbia state underground storage tank ("UST") programs, as authorized by EPA pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991*c,* at 23 different gas stations owned and/or operated by Euclid in Maryland, Virginia and the District of Columbia. With the Presiding Officer's leave, a First Amended Complaint was filed on November 25, 2003.

A hearing in this matter was conducted between January 12, 2004 and February 5, 2004 (the "Hearing"). On January 8, 2004, prior to the start of the Hearing, the parties filed a First Set of Stipulations, containing 162 stipulations. During the course of the Hearing, the parties entered into a number of additional oral stipulations on the record, primarily with regard to the admissibility of exhibits. In addition, near the end of the Hearing the parties filed a Second Set of Written Stipulations, containing four additional written stipulations. TR-15 at 76. Specific stipulations in the First Set of Stipulations will be cited herein as Stipulation 1, Stipulation 2, etc. Specific stipulations in the Second Set of Written Stipulations will be cited herein as Stipulation(2d) 1, Stipulation(2d) 2, etc. Stipulations made on the record during the Hearing will be cited with reference to the transcript pages on which the stipulation occurred.

The numbering for each day of the Hearing transcript in this matter begins with Page 1. To alleviate any confusion this might engender, the parties' Joint Motion to Conform the Transcript suggested an agreed citation format whereby each day of the transcript would be assigned a separate volume number, as follows:

Date	Volume	Citation Format
January 12, 2004	Volume 1	TR-1 at xx
January 13, 2004	Volume 2	TR-2 at xx
January 14, 2004	Volume 3	TR-3 at xx
January 15, 2004	Volume 4	TR-4 at xx
January 16, 2004	Volume 5	TR-5 at xx
January 20, 2004	Volume 6	TR-6 at xx
January 21, 2004	Volume 7	TR-7 at xx
January 22, 2004	Volume 8	TR-8 at xx
January 23, 2004	Volume 9	TR-9 at xx
January 27, 2004	Volume 10	TR-10 at xx
January 28, 2004	Volume 11	TR-11 at xx
January 29, 2004	Volume 12	TR-12 at xx

February 3, 2004	Volume 13	TR-13 at xx
February 4, 2004	Volume 14	TR-14 at xx
February 5, 2004	Volume 15	TR-15 at xx

During the course of the Hearing, Complainant agreed on the record to withdraw Count 19, TR-7 at 5, and Counts 64 and 65. TR-1 at 34-35. In addition, by agreement of the parties, Count 72 was dismissed without prejudice, TR-1 at 35-37, and portions of the allegations in Count 18 were dismissed without prejudice.

In the Initial Decision in this matter the Presiding Officer found Respondent liable for most of the violations alleged in the First Amended Complaint. However, the Presiding Officer found Respondent not liable for the violations alleged in Count 47 (Barlow Road Facility), and found Respondent not liable for a portion of the period of violation alleged in Counts 54 (Wisconsin Avenue Facility) and 57 (Florida Avenue Facility). Initial Decision at 39-40 and 42-44. The Initial Decision imposed a Compliance Order, and assessed a total of $3,085,293 in civil penalties.

Respondent filed an appeal which appears to challenge nearly all aspects of the liability findings in the Initial Decision. In addition, or in the alternative, Respondent's appeal challenges the size of the penalty imposed. Although Complainant did not initially appeal the Initial Decision, Complainant has filed a "cross-appeal," pursuant to 40 C.F.R. § 22.30(a)(1), appealing the Initial Decision's failure to find Respondent liable for the violations alleged in Counts 47 and for the full time periods alleged in Counts 54 and 57. Complainant urges that the Environmental Appeals Board ("EAB" or the "Board") affirm the Initial Decision in all other respects.

Section II of this Brief (Pages 4-43) presents Complainant's cross-appeal, while Section III (Pages 43-157) presents Complainant's response to the issues raised in Respondent's appeal.

II. Cross-Appeal

A. Issue Presented for Review

Complainant's cross-appeal presents a single issue for review: Whether the Presiding Officer, having found that Respondent's system of inventory control, as performed at all of its facilities, did not meet the regulatory requirements for tank release detection, erred in finding that Complainant did not specifically prove Respondent's failure to properly perform inventory control at the Barlow Road, Wisconsin Avenue and Florida Avenue Facilities, as alleged in Counts 47, 54 and 57.

B. Introduction

1. Regulatory Requirements

a. *Federal and Authorized State UST Programs*

This case involves violations of four different sets of UST regulations (three of which are relevant to Complainant's cross-appeal). Pursuant to Section 9003 of RCRA, 42 U.S.C. § 6991*b*, EPA promulgated UST regulations, which are found at 40 C.F.R. Part 280. In addition, Section 9004 of RCRA, 42 U.S.C. § 6991*c*, allows states to submit to EPA state UST programs, which may be approved by EPA so long as they are no less stringent than EPA's standards. 42 U.S.C. § 6991*c*(b)(1). After approval by EPA, an authorized state UST program operates *in lieu* of the federal UST program in such state. 42 U.S.C. § 6991*c*(d)(2).

Maryland, Virginia and the District of Columbia have all submitted state UST programs, and all three programs have received EPA approval.[1] Prior to the effective date of federal authorization of the Maryland, Virginia and District of Columbia UST management programs, the provisions of the federal UST program, 40 C.F.R. Part 280, were applicable to USTs/UST systems located in such states, and such provisions may be enforced by EPA against owners and operators of USTs/UST systems for violations of the federal UST program during that time period. Under Section 9006(d) of RCRA, 42 U.S.C. § 6991*e*(d), EPA may assess a civil penalty against any person who, among other things, violates any requirement of the applicable federal or state UST program.

Maryland's authorized UST program regulations are set forth in Sections 26.10.02 *et seq.* of the Maryland Department of the Environment ("MDE") Code of Maryland Regulations and are cited herein as COMAR §§ 26.10.02 *et seq*. *See* Complainant's Ex. Y-16. Virginia's authorized UST program regulations are set forth in the Virginia Administrative Code, Title 9, Agency 25, Chapter 580, Sections 10 *et seq*., and are cited herein as 9 VAC 25-580-10, *et seq.* *See* Complainant's Ex. Y-17. The District of Columbia's authorized UST program regulations are set forth in the District of Columbia Municipal Regulations, Title 20, Chapters 55 *et seq*., and are cited herein as 20 DCMR §§ 5500 *et seq*. *See* Complainant's Ex. Y-15.

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[1]The State of Maryland was granted final authorization to administer a state UST management program effective June 30, 1992; the Commonwealth of Virginia was granted final authorization to administer a state UST management program effective October 28, 1998; and the District of Columbia was granted final authorization to administer a state UST management program effective May 4, 1998. The provisions of the Maryland, Virginia and District of Columbia UST management programs, through these final authorizations, are enforceable by EPA pursuant to Section 9006 of RCRA, 42 U.S.C. § 6991*e*.

To the extent that factual allegations or legal conclusions set forth in this First Amended Complaint are based on provisions of the Maryland, Virginia or District of Columbia authorized UST management program regulations, those provisions are cited as authority for such allegations or conclusions. However, in some instances all or part of the period of a given violation occurred during a period of time in which there was no federally authorized state UST management program, and in such instances the applicable provisions of the federal UST management program, codified at 40 C.F.R. Part 280, are cited as authority for that period of the violation where a state UST program did not operate in lieu of the federal program. Example of particular relevance to Complainant's cross-appeal are alleged violations of the tank release detection requirements for Euclid's facilities in the District of Columbia. The First Amended Complaint alleges that Euclid failed to perform valid tank release detection for such facilities both prior to and subsequent to the May 4, 1998 effective date of EPA's authorization of the District's UST program. For those violations occurring prior to May 4, 1998, Complainant alleged that Euclid violated the federal UST program.

b. ***Tank Release Detection Requirements***

Pursuant to 40 C.F.R. § 280.40, 20 DCMR § 6000, 9 VAC 25-580-130, and COMAR § 26.10.05.01, owners and operators of new and existing USTs and UST systems must provide a method or combination of methods of release detection monitoring that meets the requirements described in those sections. Pursuant to 40 C.F.R. § 280.70(a), 20 DCMR § 6100.5, 9 VAC 25-580-310.1, and COMAR § 26.10.10.01.A, release detection is required unless the UST system is "empty," which is defined in 40 C.F.R. § 280.70(a), 20 DCMR § 6100.7(a), 9 VAC 25-580-

310.1, and COMAR § 26.10.10.01.A, respectively, as when all materials have been removed using commonly employed practices so that no more than 2.5 centimeters or one inch of residue, or 0.3 percent by weight of the total capacity, remains in the system.

Pursuant to 40 C.F.R. § 280.41(a), 20 DCMR §§ 6003.2 through 6003.5, 9 VAC 25-580-140.1, and COMAR § 26.10.05.02.B, tanks which are part of a petroleum UST system must be monitored at least every 30 days for releases using one of the methods listed in 40 C.F.R. § 280.43(d) through (h), 20 DCMR §§ 6008 through 6012, 9 VAC 25-580-160.4 through 8, and COMAR § 26.10.05.04.E through I, respectively. 40 C.F.R. § 280.41(a), 20 DCMR §§ 6003.2 through 6003.5, 9 VAC 25-580-140.1, and COMAR § 26.10.05.02.B, contain two exceptions to this mandate:

(1) For a limited time period, tanks may be monitored using a combination of inventory control and tank tightness testing in compliance with the requirements of 40 C.F.R. § 280.43(a) through (c), 20 DCMR §§ 6005 through 6007, 9 VAC 25-580-160.1 through 3, or COMAR § 26.10.05.04.B through D, as applicable. This option, however, may only be used on new tanks or newly upgraded tanks. Under the federal program, and in Maryland and Virginia, this combined method may only be used prior to December 22, 1998 or ten years after a tank is installed or upgraded under 40 C.F.R. § 280.21(b), 9 VAC 25-580-60, or COMAR § 26.10.03.02.B, whichever is later. *See* 40 C.F.R. § 280.41(a), 9 VAC 25-580-140.1, and COMAR § 26.10.05.02.B. In the District of Columbia the use of inventory control combined with tank tightness testing was an available tank release detection option only until December 22, 1995, regardless of the

age of the tank or the date of any upgrade, *see* 20 DCMR §§ 6003.3 and 6003.4, and thus is relevant to the violations in this case only for violations which occurred prior to EPA's approval of the District of Columbia's UST program.

(2) Tanks with a capacity of 550 gallons or less may use weekly manual tank gauging conducted in accordance with 40 C.F.R. § 280.43(b), 20 DCMR § 6006, 9 VAC 25-580-160.2, or COMAR § 26.10.05.04.C, as applicable.

Although there are a number of monthly monitoring options available under the regulations, the stipulations entered into by the parties have narrowed the range of options which Euclid claims to have utilized. For the three facilities in question – the Barlow Road, Wisconsin Avenue and Florida Avenue Facilities – Euclid claims only to have conducted inventory control and automatic tank gauging. Stipulations 108, 124 and 132. The Presiding Officer correctly concluded that Euclid did not conduct valid automatic tank gauging at these three facilities until after the period of violation alleged by Complainant. Initial Decision at 39, 43 and 44. Therefore inventory control is the only method of tank release detection at issue in this cross-appeal.

As noted above, inventory control is a temporary method of tank release detection which is acceptable only prior to certain dates. In addition, proper inventory control requires compliance with a number of regulatory requirements, including two requirements which are of particular relevance to this case. Pursuant to 40 C.F.R. § 280.43(a), 20 DCMR § 6005.1 and 9 VAC 25-580-160.1, inventory control must be conducted monthly to detect a release of at least one percent of flow-through plus 130 gallons on a monthly basis. The Maryland provision, COMAR § 26.10.05.04.B(1), is more stringent, requiring that inventory control be conducted

monthly to detect a release of at least one-half of one percent of the metered quantity on a monthly basis. In addition, regulated substance inputs must be reconciled with delivery receipts by measurement of the tank inventory volume before and after delivery. 40 C.F.R. § 280.43(a)(3), 20 DCMR § 6005.4, 9 VAC 25-580-160.1(c) and COMAR § 26.10.05.04.B(1)(c).

2. Complainant's Initial Post-Hearing Brief

The sheer volume of evidence of Euclid's violations presented Complainant with a difficult task in presenting, citing and explaining each of the various grounds for liability, violation by violation, facility by facility, tank by tank. Despite the enormous volume of evidence, and Euclid's continued attempts to introduce irrelevant arguments, the Presiding Officer, for the most part, saw his way through Euclid's the irrelevant arguments and held Euclid liable for *almost* all of the violations as alleged by Complainant.

Despite properly finding for Complainant on *nearly* every point, the Presiding Officer ruled that for one facility (Barlow Road, Count 47) – and for short periods of time for two other facilities (Wisconsin Avenue, Count 54 and Florida Avenue, Count 57) – Complainant did not meet its burden of showing that Euclid failed to perform a valid and applicable method of inventory control. *See* Initial Decision at 39-40 and 42-44. The Presiding Officer's findings in this regard, however, are inconsistent with the conclusion he reached earlier in the Initial Decision, that "the manner in which Euclid conducted inventory control is not in compliance with the inventory control methodology prescribed by the regulations." Initial Decision at 20.

The Presiding Officer does not specifically explain this inconsistency in the Initial Decision. However, the partial denial of liability is attributed in the Initial Decision to a perceived flaw in the structure of Complainant's Initial Post-Hearing Brief. In explaining the deficiencies in Euclid's methods of inventory control for the three facilities in question, Complainant referred the Presiding Officer to an earlier section of its brief which discussed the general shortcomings in Euclid's methods of inventory control as applied to all of Euclid's facilities. *See* Complainant's Initial Post-Hearing Brief at 77, 80 and 82. The Initial Decision noted Complainant's argument that the method of inventory control for the three facilities in question "was subject to all of the shortcomings discussed in Section V.A.2.b(ii) above," Initial Decision at 40, 42-43, but ruled that "referencing an earlier passage in its brief, without a discussion as to the quality of the evidence is just not enough to carry the traditional burdens of proof and persuasion." Initial Decision at 40. This ruling appears to turn not on the actual quality of the evidence, but instead on the propriety of citing an earlier discussion of the evidence at a later point in Complainant's Brief. In light of this ruling, it is necessary to summarize the structure of Complainant's Initial Post-Hearing Brief with regard to tank release detection violations.

Complainant's Initial Post-Hearing Brief divided the discussion of tank release detection into a general discussion addressing evidence common to many and/or all of Euclid's facilities. Complainant's Initial Post-Hearing Brief at 37-64. This discussion was followed by a facility-by-facility discussion which took into consideration facility-specific evidence. Complainant's Initial Post-Hearing Brief at 64-86.

With regard to inventory control in particular, Complainant's Initial Post-Hearing Brief began with a general discussion of inventory control deficiencies. Complainant's Initial Post-Hearing Brief at 45-63. Euclid claimed that its method of inventory control was the same for all facilities, and this section thus discussed the evidence of significant flaws in these methods which applied to *all* of the facilities. This section *also* discussed deficiencies or applicability issues which applied to *most*, but not all, of the facilities. Following this discussion was another section, Complainant's Initial Post-Hearing Brief at 64-86, which discussed the facility-specific evidence for facility-specific deficiencies. This facility-by-facility discussion, however, did not repeat the discussion of the flaws in Euclid's methods which applied to all facilities, but instead referred the reader back to the earlier discussion of these flaws.

As the Presiding Officer notes in the Initial Decision, the facility-specific discussion for the Barlow Road Facility (Count 47) was very brief. *See* Complainant's Initial Post-Hearing Brief at 77-78. The discussion of Euclid's claimed use of ATG testing for this facility was very brief simply because Euclid stipulated that it could produce no evidence whatsoever that it performed ATG testing until *after* the period of alleged violation. The discussion of Euclid's claimed use of inventory control for the Barlow Road Facility was also brief because the USTs at the Barlow Road Facility were not subject to the facility-specific inventory control problems which applied, in varying degrees, to many other Euclid facilities. However, the USTs at the Barlow Road facility *were* subject to the *generally-applicable* deficiencies in the methods used by Euclid to reconcile inventory for all of its facilities, as discussed in Section V.A.2.b(ii) of Complainant's Initial Post-Hearing Brief. The deficiencies discussed in that section of

Complainant's Initial Post-Hearing Brief – including the failure to perform a calculation comparing the inventory to the regulatory standard and the failure to use actual on-hand inventory as the starting point for each month's inventory calculation – applied equally to the Barlow Road Facility as to all of Euclid's other facilities. Rather than repeat the detailed discussion of these deficiencies set forth earlier in Complainant's Brief, the brief discussion of the Barlow Road Facility in Complainant's Initial Post-Hearing Brief referred the Presiding Officer to the earlier discussion. Complainant's Initial Post-Hearing Brief at 77.

The facility-specific discussion for the Wisconsin Avenue Facility noted that inventory control was no longer an acceptable method of tank release detection under the authorized District of Columbia UST program, and noted that Euclid itself did not claim to be using inventory control on the UST Notification Form it filed with the District of Columbia on December 28, 1998. Complainant's Initial Post-Hearing Brief at 80. Beyond these observations, the Wisconsin Avenue discussion also referred the Presiding Officer to the general inventory control defects common to all of Euclid's facilities. Complainant's Initial Post-Hearing Brief at 80.

The facility-specific discussion for the Florida Avenue Facility similarly noted the general expiration of inventory control as an acceptable method of tank release detection in the District of Columbia, and again referred the Presiding Officer to the general inventory control defects common to all of Euclid's facilities. Complainant's Initial Post-Hearing Brief at 82. In addition, Complainant's Initial Post-Hearing Brief discussed a facility-specific inventory control deficiency, although this deficiency is not noted in the Initial Decision: the diesel tank at the

Florida Avenue Facility was neither manifolded to nor blended with any other tank at the Facility, and thus the failure to reconcile this tank separately violated the requirement that a separate reconciliation be performed for all non-blended and non-manifolded tanks. Complainant's Initial Post-Hearing Brief at 82-83.

C. Argument

The Initial Decision followed the structure of Complainant's Initial Post-Hearing Brief in presenting a general discussion of tank release detection issues, Initial Decision at 11-21, followed by a facility-by-facility discussion. Initial Decision at 21-47. The general discussion of tank release detection issues in the Initial Decision includes a specific section on general inventory control issues. Initial Decision at 15-20. This section of the Initial Decision concludes with the holding that "the manner in which Euclid conducted inventory control *at its facilities* is not in compliance with the inventory control methodology prescribed by the regulations." Initial Decision at 20 (emphasis added).

The Presiding Officer's holding, that Euclid's methods of inventory control, for all facilities, did not comply with the UST regulations, is amply supported by the evidence presented in the case, as will be discussed more fully below. The Presiding Officer erred in disregarding the holding on Page 20 of the Initial Decision when he found, later in the Initial Decision, that Complainant's failure to enumerate *additional* facility-specific deficiencies for the three facilities in question precludes a finding of liability for tank release detection violations during periods of time prior to the expiration of inventory control as an acceptable method of tank release detection.

1. Inventory Control is a Temporary Method

It is important to keep in mind throughout this discussion that inventory control is allowed only as a temporary method of release detection.[2] In addition, it is important to note that the reason why inventory was allowed only as a temporary method in the promulgation of the UST regulations is that EPA explicitly recognized the limited reliability of inventory control compared to other available methods of tank release detection. In the preamble to the proposed federal UST regulations, EPA noted the large risk of human error or negligence in the use of inventory control as a release detection method. *See, e.g.*, 52 *Fed. Reg.* 12662, 12669 (April 17, 1987). In the preamble to the final federal UST regulations, EPA noted that inventory control, even when performed properly, was capable of reliably detecting only larger leaks of about 1.0 gallon per hour, as opposed to the 0.2 gallon per hour standard applied to other monthly release detection methods such as automatic tank gauging. 53 *Fed. Reg.* 37082, 37150 (September 23, 1988).

Despite the limited effectiveness of inventory control, EPA decided to allow inventory control as an interim measure. The first reason for this decision had to do with the practical considerations of implementing the UST regulations. In the late 1980's, when the UST regulations were first proposed and promulgated, other methods of tank release detection were

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[2]As noted above, under the federal UST program and the Virginia and Maryland authorized state UST programs, the option to monitor tanks using a combination of inventory control and tank tightness testing may only be used prior to December 22, 1998 or ten years after a tank is installed or upgraded, whichever is later. 40 C.F.R. § 280.41(a), 9 VAC 25-580-140.1, and COMAR § 26.10.05.02.B. Under the District of Columbia authorized state UST program, this option was available only until December 22, 1995, regardless of the age of the tank or the date of any upgrade. 20 DCMR §§ 6003.3 and 6003.4.

not as readily available, and, given the large number of existing USTs, the Agency was concerned that "not enough equipment and qualified installation personnel would become available over the next several years to perform such a retrofitting task reliably on such a mass scale basis." 52 *Fed. Reg.* at 12676. Despite the difficulty in quickly retrofitting thousands of UST facilities, the immediate problem of leaking USTs necessitated that immediate measures be taken to reduce the risk of releases, even while the industry geared up for the eventual use of more sensitive methods of tank release detection. Thus, EPA proposed that daily inventory control, combined with less frequent (but more sensitive) tank tightness testing, be allowed as a method of tank release detection for existing UST systems, but "*only* during the 10-year period of gradual upgrading and replacement." 52 *Fed. Reg.* at 12676 (emphasis in original). In the final rule, this 10-year period corresponded to the expiration of this method (for older tanks) on December 22, 1998, ten years after the effective date of the final regulations.

The second rationale for allowing the use of inventory control as an interim measure had to do with the comparatively low risk of failure associated with new or newly upgraded USTs. Because of the lower risk of leaks for tanks during the first 10 years of their operational life, or during the first ten years after they are upgraded to provide corrosion protection,[3] the final rule

[3]While tanks which are upgraded to provide corrosion protection are not new tanks, they are subject to requirements which ensure performance similar to that of a new tank. The requirements allow three upgrading methods, two of which involve the installation of a new liner, which might be expected to have performance similar to that of a new tank. 40 C.F.R. § 280.21(b)(1) and (3), 20 DCMR § 5801.2 and 4, 9 VAC 25-580-60.2.a and c, and COMAR § 26.10.03.02.B(3). The third method, upgrading solely with a cathodic protection system, requires that the tank undergo an assessment to ensure that it is "structurally sound and free of corrosion holes" prior to installing the cathodic protection system. 40 C.F.R. § 280.21(b)(2). *See also*, 20 DCMR § 5801.3, 9 VAC 25-580-60.2.b, and COMAR § 26.10.03.02.B(2).

allowed for the use of inventory control and tightness testing during the initial ten years of a tank's life. 53 *Fed. Reg.* at 37150. The Agency reasoned that this approach would also encourage the upgrading or replacement of unprotected steel tanks before the end of the phase-in period, but the Agency made it very clear that "[a]t the end of the 10-year upgrading period or at the end of the 10-year operational life of new or upgraded systems, these tanks must be equipped with a monthly monitoring method" other than inventory control. 53 *Fed. Reg.* at 37150. In other words, after the expiration of the initial 10-year transition period on December 22, 1998, inventory control would be allowed *in lieu* of more reliable methods of tank release detection *only* on newer tanks with the lowest likelihood of failure.[4]

Given the limited reliability of inventory control as a method of tank release detection, Euclid's failure to utilize a *proper* inventory control methodology is a particularly serious deviation from the regulatory standards. Deviations from proper inventory control methodology can only further reduce inventory control's already-limited reliability.

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[4]The District of Columbia was not bound by EPA's choice to allow inventory control to be used for ten years, and chose instead to exercise its right to address the risks in a more stringent manner in its authorized state UST program. The District of Columbia authorized state program allows the use of inventory control and tank tightness testing only until December 22, 1995, regardless of the age of the tank or the date of any upgrade. 20 DCMR §§ 6003.3 and 6003.4. This more stringent regulation is enforceable by EPA as part of EPA's authority to enforce authorized state programs. 40 C.F.R. § 281.12(a)(3)(i). *See, In re Hardin County, Ohio,* 5 E.A.D. 189 (EAB. 1994). However, as the Presiding Officer correctly notes, EPA may enforce this more stringent regulation only for violations occurring after the May 4, 1998 effective date of EPA's approval of the District of Columbia's authorized UST program.

2. Euclid Failed to Properly Reconcile Inventory

It is not in dispute that Euclid was keeping track of its inventory in some manner. It is hardly surprising that an owner of *any* gas station would want to have some sort of inventory management system, if only to ensure that the owner was receiving the money due to it for the sale of the product contained in the tanks. Euclid's General Manager, Leon Buckner, testified that Koo Yuen, Euclid's President, was particularly concerned with both discovering and preventing theft from his inventory, whether by a driver shorting a delivery or by someone stealing directly from a tank using a siphon. S*ee, e.g.*, TR-10 at 160. However, the inventory control provisions under the UST regulations are not only concerned with gross disparities indicative of theft, but also require that inventory be examined to discover relatively slow leaks which, if uncorrected, could eventually lead to extensive environmental damage. A process which is designed to detect large-scale theft is not necessarily the same thing as a process designed to detect the relatively small discrepancies required to be detected by the inventory control provisions of the UST regulations.[5]

[5]As noted above, the regulations require that inventory control be conducted monthly to detect a release of at least one percent of flow-through plus 130 gallons on a monthly basis, 40 C.F.R. § 280.43(a), 20 DCMR § 6005.1 and 9 VAC 25-580-160.1, except for Maryland, which requires that inventory control be conducted monthly to detect a release of at least one-half of one percent of the metered quantity on a monthly basis.

During meetings with EPA in April, 2002[6], Mr. Buckner related to EPA the method which Euclid used to conduct inventory control. TR-4 at 24. Immediately after meeting with Mr. Buckner, EPA prepared a draft Declaration for Mr. Buckner, describing Euclid's method of inventory control as Mr. Buckner had related it to EPA. Complainant's Ex. Y-8. While Mr. Buckner did not sign this draft Declaration, Respondent later stipulated that the Declaration accurately described Euclid's method of inventory control. Stipulation 6.

Mr. Buckner's Declaration describes a method whereby station operators send in "Daily Business Recap Control Sheets" ("Daily Sheets") on a daily basis. Complainant's Ex. Y-8 at 1203-1204, ¶¶ 2-4. These Daily Sheets contain entries showing the on-hand inventory at the end of the day for each of the tanks at the facility, as determined using either an ATG system or manual stick readings. Complainant's Ex. Y-8 at 1203, ¶ 3.

The Daily Sheets also contain information as to the amount of gasoline delivered to and sold from the facility. Complainant's Ex. Y-8 at 1204, ¶ 4. According to the Declaration, the

[6]Euclid was required by EPA to attend these meetings and required to provide detailed information and documentation with regard to its UST compliance activities, including its methods of tank release detection, pursuant to an information request issued under the authority of Section 9005 of RCRA, 42 U.S.C. § 6991*d*. *See* Complainant's Ex. Y-1. Mr. Buckner was thus put forward as the Euclid employee who would answer EPA's questions with regard to inventory control. A further discussion of the April, 2002 meetings is contained in Complainant's Initial Post-Hearing Brief at 27-30.

amount of gasoline delivered and sold is not typically broken down by grade of gasoline.[7] Complainant's Ex. Y-8 at 1204, ¶ 4.

Mr. Buckner testified that he did some sort of calculation each day on "a little scratch note," and looked at the numbers to see if they are "off by any great number of gallons." TR-10 at 138-139. He admitted that he did not retain these daily calculations for use in his monthly calculation, but instead discarded his "scratch pad" calculations if he did not see anything which made him suspect a leak. TR-10 at 157.

At the end of each month, Mr. Buckner reviews the sales and delivery records for each facility and calculates an expected "book" amount of gasoline, which is the amount of gasoline expected to be on-hand at each facility. Complainant's Ex. Y-8 at 1204, ¶ 5. He derives this figure by subtracting that month's sales and adding that month's deliveries to *the previous month's expected "book" amount*. Complainant's Ex. Y-8 at 1204, ¶ 5. Mr. Buckner then prepares a Monthly Summary Sheet showing all of Euclid's facilities on one sheet, and containing columns showing, for each facility, the expected book amount and the actual measured on-hand inventory at the end of the month. Complainant's Ex. Y-8 at 1204, ¶ 6. The discarded daily scratch pad calculations are not used for these end-of-month "reconciliations," which, according to Mr. Mr. Buckner's Declaration, are calculated using only the "actual amount

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[7]At the Hearing Euclid for the first time claimed that *some* Daily Sheets may contain information on the amount of gasoline delivered and sold broken down by grade of gasoline, TR-10 at 138. This claim, however, does not contradict the general rule, stated in Mr. Buckner's Declaration and stipulated to by Respondent, that the Daily Sheets do not typically contain this information. Complainant's Ex. Y-8 at 1204, ¶ 4. At any rate, Euclid does not claim that its tanks were individually reconciled.

of gasoline on-hand at each facility on the last day of the month, derived from that particular day's Daily Sheet for each facility." Complainant's Ex. Y-8 at 1204, ¶ 6.

During the April, 2002 meetings, Euclid produced for EPA's examination a number of "Monthly Summary Sheets" which Mr. Buckner represented to EPA as being Euclid's *only* monthly reconciliations. Complainant's Ex. Y-8 at 1204, ¶¶ 6-7 and 1207. In April, 2002, EPA did not copy all of Euclid's Monthly Summary Sheets. However, EPA later requested and received in discovery a number of these Monthly Summary Sheets, which are found in Complainant's Ex. Y-30. *See* TR-5 at 164-165, TR-13 at 164-165.

a. *Failure to Apply Regulatory Standard*

Euclid's Monthly Summary Sheets did not included reconciliations which compared inventory discrepancies to the substantive regulatory standards, i.e., the standard that the reconciliation not differ from actual on-hand inventory by more than one percent of flow-through plus 130 gallons on a monthly basis, 40 C.F.R. § 280.43(a), 20 DCMR § 6005.1 and 9 VAC 25-580-160.1, or, in Maryland, the more stringent standard of one-half of one percent of flow-through on a monthly basis. COMAR § 26.10.05.04.B(1). The Monthly Summary Sheets appear to show the difference between on-hand inventory and book inventory, but do not contain any information at all about flow-through for any facility, and thus the number of gallons corresponding to the monthly regulatory standard for a given month cannot be derived from these documents. Euclid's purported monthly "reconciliations" are therefore not reconciliations at all, as contemplated by the regulations. Given Mr. Yuen's professed desire to make sure that no one was stealing his gasoline, *see, e.g.*, TR-10 at 160, he may have personally been content to

"eyeball" the numbers on the Monthly Summary Sheets to satisfy himself that no large-scale theft was occurring. However, eyeballing raw figures is not a reliable method of detecting a loss of product at the specified regulatory levels.

b. *Use of "Running" Book Inventory*

Even the figures which *were* shown on the Monthly Summary Sheets were subject to a very serious flaw. Inventory reconciliation, at its most basic, consists of a comparison between two figures: (1) a figure, referred to as the "book" inventory, which consists of the amount of inventory which is calculated to be in a given tank at the end of the month based upon the total of all deliveries to and sales from the tank *during that month*, and (2) the actual "on-hand" inventory, as measured at the end of the month. In order to compare any measured differences between these two values *on a monthly basis*, as required by the UST regulations, the *beginning* book inventory must be *re-set* each month so that the previous month's end-of-month *on-hand* inventory becomes the *starting* book inventory for the next month.

Mr. Buckner's Declaration makes it clear that Euclid's calculation at the end of each month did *not* start with the previous month's *on-hand* inventory but instead started with the previous month's *book* inventory figure. Complainant's Ex. Y-8 at 1204, ¶ 5. To this figure Mr. Buckner added all deliveries for the month and subtracted sales, and derived an end-of-month book inventory, which was then compared to the actual on-hand inventory at the end of the month. Complainant's Ex. Y-8 at 1204, ¶ 5. As Mr. Buckner explained to EPA's Marie Owens during the April, 2002 meetings, the book inventory used at the end of the month was the

"running" book inventory calculated from the time Euclid began operating each gas station. TR-5 at 35.

It is important to illustrate exactly why it is both illogical and improper to calculate a monthly book inventory using a "running" book total, in contrast to resetting the starting book inventory each month. Under Euclid's running book method, the company would have begun with an empty tank at some date in the distant past, and at the end of the first month of operation would have calculated an end-of-month book inventory by adding all of the recorded deliveries and subtracting all of the sales for the first month. The actual measured on-hand inventory at the end of the first month could then theoretically be compared to the expected book inventory to determine if the difference between the expected and actual was within the monthly limits set forth in the UST regulations.[8]

For the *second* month Euclid's running book method would add deliveries and subtract sales from the previous end-of-month *book* inventory to determine the book inventory expected to be in the tank at the end of the second month. This is in contrast to the proper method, which adds a given month's deliveries and subtracts sales from the previous end-of-month *actual* measured inventory. By using the previous end-of-month *book* inventory as the starting point for the second month's calculations, Euclid would leave in place any discrepancies between the *first* month's book and actual inventories, and the *second* month's discrepancies would merely be

[8]This discussion addresses only what was possible in theory using a running book inventory. As noted above, totally apart from the improper use of a "running" book inventory, Euclid's Monthly Sheets did not include flow-through and did not actually compare the inventory discrepancies to the regulatory standard.

added to those of the first month. Any reconciliation performed at this point would in effect be a *two*-month reconciliation, not a *one*-month reconciliation, because the book inventory at the end of the second month represents the expected book total calculated using all deliveries to and sales from the tank over the first *two* months of the tank's operation.

As this running book inventory process progresses from month to month, the "running" end-of-month book inventory becomes less and less useful as a point of comparison, as discrepancies — whether the result of measuring mistakes, calculation mistakes or leaks – accumulate from month to month. Mistakes in data collection or calculation might cause the discrepancy to show that either too little or two much inventory is present, and thus a previous month's mistaken overage might mask a subsequent month's leak. As the combined monthly discrepancies continue to pile up, the comparison of actual and book inventories becomes further and further from what is needed to comply with the UST regulations. Any "reconciliation" would not be a reconciliation of the inputs and outputs for *each* month, as required by the UST regulations, but would instead be a reconciliation of the inputs and outputs for the entire period of months and years during which the tank was in operation.

A detailed examination of some of the entries shown in Complainant's Ex. Y-30 demonstrates the results which may occur after several months of calculating a running book inventory, and illustrates how little resemblance there is between Euclid's Monthly Sheets and a proper monthly inventory reconciliation. Starting with page 1870 of this exhibit, which is marked at the top "July 31-2000 TLS Reading," Complainant's Ex. Y-30 at 1870, the first column on this page lists Euclid's gas stations, according to the explanation in Leon Buckner's

Declaration. *See* Complainant's Ex. Y-8 at 1204, ¶ 6. The codes for these gas stations are explained in documents provided to EPA at the April, 2002, meetings. Complainant's Ex. Y-7 at 1199. *See also*, TR-4 at 63-64, TR-13 at 216-217. The evidence is unclear as to the meaning of the second column (which appears for this month, but does not appear on every Monthly Sheet), although the fact that the figures go to two decimal places may indicate that this column refers in some manner to dollars and cents.[9] The third column is headed "Actual," which, consistent with the explanation in Leon Buckner's Declaration, denotes the actual measured on-hand inventory on the last day of the month. *See* Complainant's Ex. Y-8 at 1204, ¶ 6. The next column after that is marked "Book," which denotes the running book inventory calculated back to the start of operations at each facility, as explained in Complainant's Ex. Y-8 at 1205, ¶ 5. By doing simple addition and subtraction, it is clear that the final column represents the difference between the "Actual" column and the "Book" column.

In the first column is an entry marked "PP," which, according to the documents produced by Euclid, denotes the Barlow Road Facility at issue in Count 47 (which is located in **P**almer **P**ark, Maryland. Complainant's Ex. Y-7 at 1199. Moving across the row for this facility, the "Actual" column shows inventory on July 31, 2000 of 7010 gallons, and the "Book" column shows an expected inventory of 6908 gallons. The final column shows a positive difference of 102 gallons, meaning that there was 102 gallons *more* fuel on hand than expected, a relatively small amount which does not exceed the regulatory threshold for declaring a suspected release

[9]Dollars and cents might be relevant to the business purposes for which Euclid created these documents, but is irrelevant to an inventory reconciliation for regulatory purposes.

set forth in COMAR § 26.10.05.04.B(1), which requires that inventory control be conducted monthly to detect a release of at least one-half of one percent of the metered quantity on a monthly basis.

For August 31, 2000, the results for the Barlow Road Facility (Row "PP") are similarly within the range of minor error, with a difference between the "Act" column and the "Book" column of only a positive 50 gallons, which shows up in the final column marked "Diff," presumably meaning "difference." Complainant's Ex. Y-30 at 1871. As with the previous page, this page shows slightly more gasoline on hand than would have been expected.

For September 30, 2000, the numbers on the "PP" row begin to diverge quite a bit from the expected total, with the "Diff" column showing that there was 341 gallons *less* on hand than would have been expected based on the book calculations. Complainant's Ex. Y-30 at 1872. As noted above, the Monthly Summary Sheets do not show the monthly flow-through, so it is impossible to determine compliance with the regulatory standard from these purported "reconciliations." However, on the eve of trial Euclid, for the first time, produced a document, Respondent's Ex. X-5, which appears to be a computer reconstruction of Euclid's inventory records. The significance and reliability of this last-minute document is in dispute, and will be discussed below more fully below, but assuming for purposes of illustration the accuracy of Euclid's September sales figure of 69,496 gallons for the Barlow Road Facility, as shown in Respondent's Ex. X-5 at 3479, the loss of 341 gallons shown in the "Diff" column in Complainant's Ex. Y-30 at 1872 would be dangerously close to the regulatory standard cut-off of

one-half of one percent of metered sales above which Maryland requires that a leak be declared.[10] COMAR § 26.10.05.04.B(1). If one takes into consideration that the previous month's "reconciliation" showed a running balance of 50 gallons *more* than expected, the actual amount of gasoline "lost" during September, 2000 would appear to be 391 gallons, which would *exceed* the threshold for declaring a suspected leak.

For October 21, 2000, the Monthly Sheet is difficult to read, but it appears that the "corrected" book column, *see* Complainant's Ex. Y-8 at 1204, ¶ 6, is relatively close to the actual amount on hand at the end of the month. Complainant's Exs. Y-8 at 1207, Y-30 at 1873. However, for the November 30, 2000, Monthly Sheet there is a big jump: the difference between the actual and book inventory for the Barlow Road Facility ("PP") shows a shortfall of 1471 gallons, Complainant's Ex. Y-30 at 1874, greatly exceeding the threshold for declaring a suspected leak.[11]

The Monthly Sheet for December 31, 2000 shows a shortage of 1561 gallons for the Barlow Road Facility, Complainant's Ex. Y-30 at 1875. Because this shortage was calculated using a running book inventory, the actual amount "lost" during December is the difference between the amount shown short in November – 1471 gallons – and the 1561 gallons shown as short in December, amounting to a loss in December of only 90 gallons. For January 31, 2001, the Monthly sheet shows a shortage of 241 gallons, by itself below the "leak" threshold, but,

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[10]One-half of one percent of 69,496 gallons is 347.48 gallons.

[11]Based on the sales of 70,617 gallons claimed for November, 2000, *see* Respondent's Ex. Y-5 at 3479, a suspected leak would be detected when the difference between actual and book exceeds 353.09 gallons.

when compared to the previous month's shortfall, an apparent *gain* of 1320 gallons. Complainant's Ex. Y-30 at 1876. Influx of water into a tank may be the result of a leak, and thus even a *gain* which exceeds the regulatory threshold must be investigated as a possible leak. S*ee,* Complainant's Ex. Y-18 at 1591, ¶ Z. Thus the Monthly Sheet for January, 2001 would also show a presumptive leak.

The February 28, 2001 Monthly Sheet shows an even larger difference from the expected volume at the Barlow Road Facility, with the difference between the actual and the book value coming out to a shortage of 5131 gallons. Complainant's Ex. Y-30 at 1877. This figure would thus appear to indicate a major release of product. This large difference between the actual and expected volumes at the Barlow Road Facility continues through March, April, May and June, 2001, Complainant's Ex. Y-30 at 1878-1881, before suddenly dropping down to a shortage of only 1259 gallons at the end of July, 2001. Complainant's Ex. Y-30 at 1882. In August, 2001, the Monthly Sheet shows an "Actual" of 12994 gallons and a "Book" of 8825, meaning the calculated difference had now jumped to show 4169 gallons *more* than expected. Complainant's Ex. Y-30 at 1883. Similar large overages are shown through October, November and December, 2001, and January and February, 2002, Complainant's Ex. Y-30 at 1884-1889, before a precipitous drop to an even 100 gallons over in March, 2002, representing a presumptive *loss* of 4027 gallons from the previous month's *overage* of 4127 gallons. Complainant's Ex. Y-30 at 1890.

The illustration described above, using figures from the very facility for which the Presiding Officer denied liability, shows a method of "inventory reconciliation" which shows no

evidence that discrepancies were compared to the regulatory standard, and where the huge overages and shortfalls, which are repeated and amplified from month-to-month, make it difficult or impossible to effectively "eyeball" the figures. Moreover, there is no evidence that Respondent took any action as a result of the huge overages and shortfalls shown on documents which Euclid claims to be its monthly "inventory reconciliations."

Similarly unexplained fluctuations and discrepancies are similarly shown for each of the other facilities listed in Complainant's Ex. Y-30, including monthly discrepancies between book inventory and actual inventory which range into the tens of thousands of gallons, exceeding the capacity of the tanks which they purport to reconcile. Given the wild swings and gross discrepancies apparent on the face of these documents, Euclid's claim that these Monthly Sheets represent a system of inventory control which meets the regulatory requirements for tank release detection is beyond comprehension.

3. Euclid's Claimed Computer Inventory Reconciliation

Although Euclid *stipulated* that Mr. Buckner's Declaration described its methods of inventory control, Mr. Yuen, in his testimony, claimed he was, at some point, performing a type of inventory reconciliation *different* from the stipulated method. This purported method involved the use of a spreadsheet, which Mr. Yuen claimed he kept on his home computer but never printed out. TR-13 at 86. As evidence of this purported method, Euclid produced Respondent's Ex. X-5, which was claimed to have been printed out using this spreadsheet program. Mr. Yuen's testimony, however, appears to carefully avoid a direct statement that the format and

figures on Respondent's Ex. X-5 is the same as the configuration of the spreadsheet as used in his everyday work.

Mr. Buckner, on the other hand, was *very* clear that he had never seen the spreadsheet set forth in Respondent's Ex. X-5 prior to the Hearing. TR-10 at 179-180. Mr. Buckner, as Euclid's designated spokesperson on inventory control in response to EPA's formal information request, had told EPA during the April, 2002 meetings that *he* was the person who managed Euclid's inventory, and Mr. Buckner at that time carefully explained Euclid's documents and inventory reconciliation process to EPA. TR-4 at 24. Prior to providing Respondent's Ex. X-5 to Complainant, Euclid had already *stipulated* that Mr. Buckner's Declaration – which contained no mention of computer records – fully described Euclid's methods of inventory control. Stipulation 6. Even beyond this binding stipulation, the circumstances cast very significant doubt on Mr. Yuen's claims at the Hearing that he was performing some sort of inventory reconciliation other than that described in Mr. Buckner's Declaration.

Assuming, solely for argument's sake, that Euclid did, as claimed, enter the raw data on its Daily Recap Sheets into Mr. Yuen's computer, it would perhaps be possible that Euclid could *reconstruct*, after the fact, a monthly inventory reconciliation of the type shown in Respondent's Ex. X-5. Such a reconciliation would be much closer to a proper inventory reconciliation, although Respondent's Ex. X-5 still combines all tanks for each facility, a method which is improper for most of Euclid's facilities. *See* Initial Decision at 18-19. However, reconstructing an inventory reconciliation after the fact is not the same thing as performing contemporaneous monthly reconciliations to detect and correct releases at an early stage, before such releases cause

widespread environmental damage. The reconstruction of an inventory reconciliation at a later date clearly does not meet the requirement for tank release detection at least every 30 days.

While Respondent has never made clear *exactly* when Respondent's Ex. X-5 was generated, it is *very* clear from the face of the document that it was not in existence until at least August, 2003, since the document contains entries through the end of July, 2003. Mr. Yuen, as noted above, admitted that he never printed records from his spreadsheet. TR-13 at 86. Even assuming that the raw data on the numerous Daily Sheets was in Mr. Yuen's computer when Respondent's Ex. X-5 was printed out, this does not tell us anything at all about when the raw data was *inputted* into his computer.

Moreover, even assuming, for arguments sake, that the raw data *was* contemporaneously entered into Mr. Yuen's computer on a daily basis, this in turn does not mean that such raw data was contemporaneously assembled *in the proper order* to constitute a monthly inventory reconciliation. Just because Mr. Yuen's spreadsheet could be configured *after the fact* to show monthly inventory reconciliations does not mean that Mr. Yuen's spreadsheet program has *always* been configured to show Mr. Yuen exactly the same columns and calculations as shown on Respondent's Ex. X-5. Spreadsheet and database programs may store a good deal of raw data, but will give the user only the information and calculations asked for, no more and no less.

In fact, it is undisputed that at least in *some* aspects the data in Respondent's Ex. X-5 was *not* accurate. Page 3471 of Respondent's Ex. X-5 purports to be data for the Frederick Avenue Facility, in Baltimore, Maryland. The entry for the Frederick Avenue Facility for January, 1999 is blank, appearing to show that there were no gasoline sales in that month. Mr. Yuen initially

testified that there were no sales at the Frederick Avenue Facility during January, 1999, TR-13 at 176, but, after being confronted with evidence to the contrary, Euclid later *stipulated* that in fact Mr. Yuen was *wrong*, that the Frederick Avenue Facility *was* selling gasoline for at least part of January, 1999. Stipulation(2d) 2. Even though there *were* sales for this facility in January, 1999, those sales are not reflected in Respondent's Ex. X-5. Whether the information in Mr. Yuen's computer with regard to the Frederick Avenue Facility was simply inaccurate, or whether Mr. Yuen deliberately manipulated the information to support his since-recanted claim that the Frederick Avenue Facility was closed during January, 1999, the admitted inaccuracy of the information set forth in Respondent's Ex. X-5 makes it impossible to infer an acceptable method of inventory control solely from such a compromised document.

Throughout the extensive investigation of Euclid's facilities, the Respondent was repeatedly asked to produce any and all documentation showing that it was performing inventory control (or any other method of tank release detection). Euclid, however, did not produce anything even remotely resembling Respondent's Ex. X-5 in response to *any* of these information demands, neither when requested by EPA in March, 2001,with regard to the 420 Rhode Island Facility (*see* Complainant's Exs. A-5 and A-6); nor in June, 2001, when EPA conducted an inspection of Euclid's records facility; nor during the April, 2002, meetings; nor on the numerous occasions when state inspectors asked Euclid for inventory control records.[12] In the April, 2002,

[12]A detailed exposition of the extensive investigation of Euclid's operations and the numerous information requests is set forth in Complainant's Initial Post-Hearing Brief at 12-34. This exposition demonstrates the extraordinary the lengths to which Complainant went to allow Euclid every opportunity to come forward with evidence of its purported compliance methods.

meetings, after EPA had made it clear that it was conducting a global investigation of Euclid's facilities and compliance activities, Euclid produced to EPA only the handwritten Monthly Summary Sheets together with Mr. Buckner's explanation of Euclid's inventory control protocol. During these meetings, Mr. Yuen did mention that he inputted some inventory data into his home computer, but Euclid did not produce any computerized inventory records at this time, even when EPA specifically requested any and all records which Euclid claimed as evidence of compliance (including an explicit warning that Euclid should not show up later at a hearing on the case and attempt to prove that it had been conducting inventory reconciliations which were different from what was produced to EPA during the April, 2002, meetings). TR-50 at 131-132, TR-13 at 89.

Even when required to produce all of its evidence by the Presiding Officer and the Consolidated Rules, Euclid did not produce the claimed computerized records in its various Prehearing Exchanges in this case. Respondent's Ex. X-5 was produced only in response to the Presiding Officers granting of *Complainant's* Motion for Discovery, which was filed on July 24, 2003, but not granted by the Presiding Officer until November 19, 2003. If the information in Respondent's Ex. X-5 had truly been at Mr. Yuen's fingertips on a monthly basis, it would have been a simple task to print out such information and include it in response to any of the many EPA or state information requests or in Euclid's Prehearing Exchange. Euclid's failure to do so is persuasive evidence that such records were not in fact generated by and used by Euclid on a monthly basis, but were, at best, reconstructed after the fact.

Further, Mr. Yuen's claims with regard to the use of computerized inventory reconciliations are inconsistent with the documentation which *was* produced to EPA. If Mr.

Yuen had truly been using a computer spreadsheet to perform monthly reconciliations, then there would be little or no purpose in generating the Monthly Summary Sheets. Euclid was compiling some sort of inventory summary each month on the Monthly Summary Sheets, albeit a summary which used a running book inventory and did not compare the results to the regulatory standard. It is not clear why Mr. Yuen would even bother producing these handwritten summaries if he was in fact using more accurate information allegedly at his fingertips in a computer spreadsheet.[13]

Mr. Yuen's claims with regard to computerized inventory reconciliation are also inconsistent with the testimony elicited from Mr. Buckner, under direct examination personally conducted by Mr. Yuen. Mr. Buckner agreed with Mr. Yuen's leading question suggesting that Euclid's method of tank release detection was a "traditional system, pen in hand," to which Mr. Buckner added that this system did not need "fancy equipment." TR-10 at 205.

Finally, it cannot be emphasized often enough that Euclid *stipulated* that Mr. Buckner's Declaration – which contains no mention whatsoever of computer spreadsheets – accurately described Euclid's methods of inventory control. Stipulation 6. This stipulation is part of the record in this case, and Euclid is not free to argue against the facts contained therein. At the very least, Euclid's agreement to such a stipulation severely undercuts the credibility of its later claims which contradict that stipulation.

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[13]Mr. Buckner testified that he wrote only the list of facilities and the column showing actual on-hand product at the end of the month, while all of the other handwriting on the Monthly Summary Sheets was Mr. Yuen's. TR-10 at 171-172.

Mr. Yuen, for all of the reasons discussed above, is simply not credible in his claim that he was ready to provide EPA with computerized records in 2002 but that EPA refused to look at them. TR-13 at 88-89. Far more credible is Ms. Owens testimony on this point: that EPA told Mr. Yuen in April, 2002 that he should produce whatever computer records he had if they showed reconciliations which were different from the Monthly Summary Sheets, but that Mr. Yuen declined to produce any computer records, stating that whatever computer records he had were no different than the Monthly Summary Sheets already provided to EPA by Mr. Buckner. TR-15 at 131-132. Ms. Owens' further testified that EPA specifically warned Mr. Yuen in April, 2002 to produce any documentation he had at that time instead of attempting to show up at a hearing with previously-undisclosed documents. TR-15 at 131-132. Mr. Yuen's own testimony confirmed that he had been so warned by Ms. Owens. TR-13 at 89.

The Presiding Officer noted Mr. Yuen's claim of computerized records in a footnote, Initial Decision at 17, fn. 21, but did not make an explicit finding with regard to the credibility of Mr. Yuen's testimony. The Presiding Officer, however, noted Euclid's stipulation, that Mr. Buckner's declaration accurately describes the company's protocol for conducting inventory control, Initial Decision at 16, fn. 19, and correctly concluded that Euclid's manner of conducting inventory control was not in compliance with the UST regulations. Initial Decision at 20. The Presiding Officer thus implicitly rejected Mr. Yuen's claim that a computer spreadsheet in the nature of that shown in Respondent's Ex. X-5 had been in continuous use.

4. Individual Facilities at Issue

a. *Barlow Road Facility*

For the Barlow Road Facility (Count 47), Euclid's only claimed methods of tank release detection were inventory control combined with tank tightness testing, and in-tank ATG testing. Stipulation 108. The Initial Decision correctly noted Euclid's stipulation that it had no record of a passing ATG result for the Barlow Road Facility prior to August 15, 2003, Stipulation 109, and thus found that Euclid was not performing ATG testing during the alleged period of violation. Initial Decision at 39. The Presiding Officer, however, incorrectly found that Complainant had not met its burden of proving that Euclid failed to provide a valid method of inventory control during the alleged period of violation. Initial Decision at 39-40. Although the Presiding Officer noted that the section of Complainant's Initial Post-Hearing Brief devoted to the Barlow Road Facility stated that Euclid's method of inventory control at the Barlow Road Facility "was subject to all of the shortcomings discussed in Section V.A.2.b(ii) above," Initial Decision at 40, 42-43, the Presiding Officer then ruled that "referencing an earlier passage in its brief, without a discussion as to the quality of the evidence is just not enough to carry the traditional burdens of proof and persuasion." Initial Decision at 40.

The Initial Decision cites no authority for the proposition that the discussion of a particular facility in a post-hearing brief may not refer the reader to an earlier passage in the brief. Complainant can discern no logical reason why such a rule should apply. Prior to discussing the specific evidence for each facility, Complainant's Initial Post-Hearing Brief had already contained a detailed discussion of the evidence showing the deficiencies in Euclid's entire system

of inventory control, in particular, its failure to perform monthly inventory reconciliations which could be compared to the monthly standard. Once this general discussion was concluded, the issue of inventory control was essentially over, at least from the standpoint of liability; Complainant had met its burden of rebutting, for *all* of Euclid's facilities, Euclid's claims with regard to the use of inventory control as a method of tank release detection. In fact, the Initial Decision appears to rule exactly that on Page 20.

Complainant's facility-by-facility discussion of inventory control noted only facility-specific deficiencies which were *in addition to* the generally-applicable deficiencies previously discussed. The Barlow Road Facility happened to be the only facility for which there were no additional facility-specific deficiencies other than the generally-applicable deficiencies already discussed, and thus the facility-specific discussion of inventory control for the Barlow Road Facility merely cited back to the generally applicable discussion. Ironically, however, the generally-applicable discussion in Section V.A.2.b(ii) of Complainant's Initial Post-Hearing Brief itself contains a detailed discussion of the wildly-fluctuating entries for the Barlow Road Facility in the Monthly Sheets as an *example* to illustrate the *general* deficiencies in the Monthly Sheets as a method of inventory reconciliation. Complainant's Initial Post-Hearing Brief at 54-58.

Faced with the gargantuan task of addressing the voluminous evidence for each of the many violations in the case, Complainant chose to make certain generally-applicable arguments only once, instead of repeating the same argument again and again in each facility-specific discussion. Even using this shortcut, the volume of facility-specific facts was such that

Complainant's Initial Post-Hearing Brief was more than 400 pages long. There is no reason why Complainant should have been compelled to lengthen its Brief even further by repeating for each facility arguments which had already been explained in detail. Complainant's cross-reference to an earlier discussion in its Brief should not in any way reduce the degree of consideration given to that earlier discussion with regard to all of Euclid's facilities.

b. *Wisconsin Avenue Facility*

Euclid's only claimed methods of tank release detection for the gasoline tanks[14] at the Wisconsin Avenue Facility (Count 54) were inventory control combined with tank tightness testing, and in-tank ATG testing. Stipulation 124. The Initial Decision correctly noted Euclid's stipulation that it had no record of a passing ATG result for the Wisconsin Avenue Facility prior to August 14, 2003, Stipulation 125, and thus found that Euclid was not performing ATG testing during the alleged period of violation. Initial Decision at 43. The Presiding Officer also noted that the District of Columbia authorized UST program did not allow the use of inventory control as a method of tank release detection at any time during the alleged period of violation. Initial Decision at 42. The Presiding Officer also noted that EPA does not have the authority to enforce the District of Columbia UST program with regard to violations occurring prior to EPA's approval of such program on May 4, 1998. Initial Decision at 54. Therefore, for the alleged period of violation between September 30, 1997 and May 4, 1998, Complainant could not rely upon the District of Columbia's prohibition of inventory control as a method of tank release

[14]Ths cross-appeal does not address the used oil tank at the Wisconsin Avenue Facility, which the Presiding Officer correctly held to be in violation during the entire period alleged by Complainant. *See* Initial Decision at 43.

detection, and could only rely on the federal UST program, under which a *proper* program of inventory control would have been an acceptable method of tank release detection until December 22, 1998. Initial Decision at 42.

However, Euclid did not comply with the tank release detection requirements of either the District of Columbia UST program or the federal UST program during the entire period of violation alleged, including the period prior to May 4, 1998. As with the Barlow Road Facility, Complainant noted in the discussion of the Wisconsin Avenue Facility that the inventory control used at that Facility, which was identical to that used at every other Euclid Facility, "was subject to all of the shortcomings discussed in Section V.A.2.b(ii) above." Complainant's Initial Post-Hearing Brief at 80. As with the Barlow Road Facility discussed above, the Presiding Officer is simply wrong in ruling that Complainant cannot meet its burden of proof for a given facility by cross-referencing an earlier portion of its brief which discussed the evidence of deficiencies which applied to Euclid's system of inventory control as a whole, including Euclid's failure, at the Wisconsin Avenue Facility and all of its other facilities, to perform monthly inventory reconciliations which could be compared to the monthly standard.

c. *Florida Avenue Facility*

Euclid's only claimed methods of tank release detection for the USTs at the Florida Avenue Facility (Count 57) were inventory control combined with tank tightness testing, and in-tank ATG testing. Stipulation 132. The Initial Decision correctly noted that Euclid stipulated that there was no ATG at the Florida Avenue Facility until December, 1999, Stipulation 133, and Euclid also stipulated that it had no record of a passing ATG result for the Florida Avenue

Facility prior to August 14, 2003, Stipulation 134. Initial Decision at 44. The Presiding Officer thus found that Euclid was not performing ATG testing during the alleged period of violation. Initial Decision at 44.

The Presiding Officer again noted that the District of Columbia authorized UST program did not allow the use of inventory control as a method of tank release detection at any time during the alleged period of violation. Initial Decision at 44. However, for the alleged period of violation between September 30, 1997 and EPA's approval of the District of Columbia UST program on May 4, 1998, the Presiding Officer ruled that "EPA has little to offer by way of evidence," and concluded that "EPA essentially has offered no proof that the Federal UST regulations were violated prior to May 4, 1998." Initial Decision at 44.

Complainant did note, in its discussion of the Florida Avenue Facility, that the inventory control used at that Facility, which was identical to that used at every other Euclid Facility, "was subject to all of the shortcomings discussed in Section V.A.2.b(ii) above." Complainant's Initial Post-Hearing Brief at 82. As with the Barlow Road and Wisconsin Avenue Facilities discussed above, the Presiding Officer is simply wrong in ruling that Complainant cannot meet its burden of proof for a given facility by cross-referencing the earlier portion of its brief which discussed the evidence of deficiencies which applied to Euclid's system of inventory control as a whole. Euclid's failure, at all of its facilities, to perform monthly inventory reconciliations which could be compared to the monthly standard, applied to the Florida Avenue Facility no less than any of Euclid's other facilities. Euclid thus did not comply with the tank release detection requirements

in either the District of Columbia UST program or in the federal UST program during the entire period of violation alleged, including the period prior to May 4, 1998.

Moreover, Complainant's Initial Post-Hearing Brief did in fact identify a *facility-specific* problem with the inventory control at the Florida Avenue Facility, which the Presiding Officer appears to have overlooked. Complainant's Brief cites to the undisputed evidence that one of the three USTs at the Florida Avenue Facility contained diesel fuel, which could not be manifolded with or blended with the two gasoline tanks. Complainant's Initial Post-Hearing Brief at 82, Answer, ¶ 440. The Presiding Officer explicitly ruled that the UST regulations require that tanks be reconciled individually, except where subject to the exception set forth in an EPA guidance document for blended or manifolded tanks. Initial Decision at 18-19. The Presiding Officer also found, based upon undisputed evidence, that such reconciliation as Euclid was performing was not on a tank-by-tank basis but instead used the combine totals from all of the tanks at a given facility. Initial Decision at 18. For other Euclid facilities which contained at least one tank which was not blended with or manifolded to all of the other tanks at the facility, the Presiding Officer found such circumstances to be facility-specific grounds upon which to reject Euclid's claims with regard to inventory control. *See,* Initial Decision at 22, 24, 30, 31, 33 and 34. Euclid's use of combined inventory figures for the Florida Avenue Facility is thus an additional reason why the Presiding Officer should have rejected Euclid's inventory control claim for that Facility.

5. Civil Penalties

Complainant's Initial Post-Hearing Brief set forth in great detail Complainant's relation of the facts of this case to the statutory penalty factors set forth in Section 9006(c) of RCRA, 42 U.S.C. § 6991*e*(c) and the applicable penalty policy, the November 1990 "U.S. EPA Penalty Guidance for Violations of UST Regulations" ("Penalty Policy"), Complainant's Ex. Y-13. The penalty discussion in Complainant's Initial Post-Hearing Brief included an explanation of the penalty calculation framework set out in the Penalty Policy, Complainant's Initial Post-Hearing Brief at 254-264 and a general discussion of the application of the framework to the violations in this case. Complainant's Initial Post-Hearing Brief at 264-280. This general discussion provided, *inter alia*, a justification, based upon the evidence in this case, for proposed "baseline" values for the various adjustment factors set out in the Penalty Policy. *See* Complainant's Initial Post-Hearing Brief at 264-269. In the violation-by-violation and facility-by-facility discussion which followed the general discussion, Complainant's Initial Post-Hearing Brief at 280-398, these "baseline" values were applied in most instances, but in some instances the baseline values were modified upward or downward based upon particular circumstances surrounding a particular violation.

For most violations, the Presiding Officer assessed the exact civil penalty proposed in Complainant's Initial Post-Hearing Brief, finding that the evidence presented by Complainant "provides substantial support for the penalty amounts requested by EPA." Initial Decision at 23-24, fn 39. However, the Presiding Officer found no liability for the alleged tank release detection violations at the Barlow Road Facility and thus imposed no penalty for Count 47. The Presiding

Officer also made small reductions from Complainant's proposed penalties for the tank release detection violations at the Wisconsin Avenue Facility (Count 54) and the Florida Avenue Facility (Count 57) in view of his finding that a portion of the alleged period of violation was not proved. Initial Decision at 40, 43 and 44-45.

In view of the substantial overall penalty assessed by the Presiding Officer in this case, Complainant wants to emphasize that its primary concern in filing this cross-appeal is not to further increase the assessed penalty. Complainant's primary purpose in raising the release detection issues with regard to Counts 47, 54 and 57 is to ensure that the record is clear with regard to the severe deficiencies in Euclid's methods of inventory control. Respondent's Appeal Brief attempts to argue that Euclid's efforts at inventory reconciliation warranted a substantial reduction in the assessed penalty even if those efforts "departed in some respects from the best practices related to use of this method to comply with the regulations." *See, e.g.*, Respondent's Appeal Brief at 30-31. While the Presiding Officer found that Euclid's methods of inventory reconciliation as used for all facilities did *not* comply with the UST regulations, Initial Decision at 19-20, his later denial of liability for Count 47 and portions of Counts 54 and 57 confuses this question, and, if not corrected, could introduce ambiguity into what is otherwise a very clear record of Euclid's significant noncompliance with the UST regulations. It is therefore important that the Board ensure that the Agency's Final Order corrects this ambiguity and makes clear the extent to which Euclid's entire inventory reconciliation methodology deviated from the regulatory requirements.

Although an additional penalty is not Complainant's *primary* goal in this cross-appeal, Complainant *does* believe that the application of the statutory penalty factors and the Penalty Policy warrants additional penalties for the violations at issue herein. Complainant believes that it has already provided sufficient justification for the full penalties proposed in Complainant's Initial Post-Hearing Brief for the tank release detection violations alleged in Counts 47, 54 and 57, and Complainant will stand on the arguments set forth therein. *See*, Complainant's Initial Post-Hearing Brief at 264-283, 304-305 and 307-311. As set forth in Complainant's Initial Post-Hearing Brief, Complainant requests that the EAB impose a penalty of $50,339 for the violations set forth in Count 47, Complainant's Initial Post-Hearing Brief at 304-305. Complainant also requests that the Board increase by $16,899 the penalty assessed in the Initial Decision for Count 54 (from $100,000 to the full proposed penalty of $116,899), Complainant's Initial Post-Hearing Brief at 307-309, and increase by $12,024 the penalty assessed in the Initial Decision for Count 57 (from $65,000 to the full proposed penalty of $77,024). Complainant's Initial Post-Hearing Brief at 309-311.

III. Respondent's Appeal

A. Issues Presented for Review

Respondent's Appeal raises the following issues for review:

1. Whether EPA's detailed discussions with Maryland, Virginia and the District of Columbia regarding EPA's intention to file this matter constitute sufficient notice pursuant to Section 9006(a)(2) of RCRA.

2. Whether the Presiding Officer committed clear error or an abuse of discretion in assessing the penalty specified in the Initial Decision.

3. Whether Complainant has presented sufficient evidence to support the Presiding Officer's findings of liability in the Initial Decision.

B. Introduction

1. Regulatory Requirements

The regulatory requirements applicable to this case have been set forth at length in Complainant's Initial Post-Hearing Brief at 34-36, 87-89, 143-152, 211, 235-236, and 238-241. The Board is referred to these passages in Complainant's Initial Post-Hearing Brief for an overview of the regulatory requirements. Complainant will further discuss these requirements herein only insofar as specifically relevant to the issues raised.

2. General Issues on Appeal

It is difficult to respond in an organized manner to Respondent's Appeal Brief because the organization of Respondent's Brief is haphazard at best. Respondent's Brief repeatedly jumps from one type of violation to another and from one argument to another within the same paragraph, even within the same sentence. Despite the disjointed and contradictory nature of Respondent's arguments, Complainant has attempted to organize what it perceives to be the issues raised by Respondent's Appeal so that these issues can be addressed in an organized fashion.

One particular ambiguity in Respondent's Appeal Brief is its failure to clearly distinguish between arguments concerning liability and arguments regarding penalty. During its discussion

of the allegedly "excessive" penalty, Respondent repeatedly argues that the penalty is too high because it is not liable. During its discussion of liability, Respondent repeatedly admits that it did not comply with the letter of the UST regulations, but nonetheless argues that its conduct did not warrant a penalty of the level imposed.

While issues of liability and penalty are certainly related, they are clear distinctions between liability and penalty arguments. For example, there are significant differences in the burden of proof with regard to liability as opposed to mitigating defenses. Complainant bears the ultimate burden of proof with regard to liability and an initial burden of justifying the proposed penalty. However, once Complainant presents a *prima facie* case as to penalty, showing that it considered each of the statutory factors and proposed a penalty consistent with those factors, the burden shifts, and it is Respondent who bears the burden of rebutting Complainant's *prima facie* case, including the burden of proving any mitigating facts it believes were not properly considered. *In re: Spitzer Great Lakes,* Ltd., 9 E.A.D. 302, 320 (EAB 2000). *See, also, In re Norman C. Mayes*, RCRA (9006) Appeal No. 04-01, slip op. at 48 and fn 28 (EAB March 3, 2005), 12 E.A.D. ___; *In re John A. Capozzi d/b/a Capozzi Custom Cabinets*, 11 E.A.D. 10, 30 fn 27 (EAB 2003) (quoting approvingly from the RCRA Subtitle C Penalty Policy stating that a respondent has the burden of proving "any mitigating circumstance").

While Respondent attempts to frame certain of its arguments as matters of legal interpretation, for the most part Respondent's claims on appeal amount to a disagreement with the Presiding Officer's factual findings. Respondent thus faces a difficult burden on appeal. The Hearing in this matter included nearly four weeks of testimony and the presentation of more than

2000 pages of documentary exhibits. After hearing the testimony and observing the demeanor of Complainant's seven witnesses and Respondent's ten witnesses, and after examining the extensive documentary evidence, the Presiding Officer found Complainant's witnesses and documentation to be the more credible and persuasive.

The Presiding Officer's factual findings are entitled to considerable deference on appeal. Although the EAB has broad authority in reviewing an initial decision, the Board "ordinarily defers to a presiding officer's factual findings where credibility of witnesses is at issue." *Mayes*, slip op. at 57, fn 35. *See, also*, *In Re: City of Salisbury, Maryland*, 10 E.A.D. 263, 276 (EAB 2002); *In Re: Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998) ("where credibility of witnesses is at issue . . . we generally defer to the presiding officer's factual findings because the presiding officer had the opportunity to observe the witnesses testify and to evaluate their credibility"); *In re Echevarria*, 5 E.A.D. 626, 639 (EAB 1994) ("Because the presiding officer had the opportunity to observe the witnesses testify and to evaluate their credibility, his factual findings are entitled to considerable deference"); *In re: Great Lakes Division of National Steel Corp.*, 5 E.A.D. 355, 372 (EAB 1994) (the EAB "will generally give considerable deference to a presiding officer's determinations as to the credibility to be afforded the testimony of witnesses at a hearing").

Section 22.30(a) of the Consolidated Rules, 40 C.F.R. § 22.30(a), requires that an appeal brief contain "appropriate references to the record." However, in the face of overwhelming evidence of its violations, Respondent's Appeal Brief is nearly devoid of citations to the record. Respondents's Brief contains numerous expository passages in which supposed facts are

discussed but no citations to the record are included. This omission would not be serious if Respondent's Appeal Brief referred the Board back to discussions in Respondent's Post-Hearing Brief which contained the necessary record citations, but Respondent's Appeal Brief does not refer back to its Post-Hearing Brief. Moreover, Respondent's Post-Hearing Brief was equally devoid of record citations.

Respondent's failure to cite the record is hardly surprising, given that most of Respondent's factual claims are not supported by anything in the record, and in fact are often directly contradicted by the record. Even in instances where Respondent *does* cite to the Transcript, Respondent's paraphrases of the Transcript often bear little or no resemblance to the actual passages cited.

Similarly, where Respondent's Brief discusses the legal requirements of the UST regulations, these discussions inaccurately describe those requirements. Euclid persists in the most basic misconceptions despite EPA's best efforts at pointing out to Euclid the clear language of the regulations. An illustrative example is Euclid's continued refusal to recognize the distinction between the two separate and distinct line release detection requirements: (1) the requirement to use a mechanical line leak detector or other continuous device to detect "catastrophic" (3.0 gallons per hour) line leaks, and (2) the requirement to use annual tightness testing or monthly methods (such as interstitial sump sensors) to detect smaller releases of 0.1 or 0.2 gallons per hour, respectively. This distinction was clearly explained in Complainant's opening statement, TR-1 at 51-52, was specifically explained by at least one of Complainant's witnesses, TR-5 at 98-100, and was fully discussed in Complainant's Initial Post-Hearing Brief at

87-89. In addition, the distinction is patently obvious to anyone reading the applicable regulations set forth at 40 C.F.R. § 280.41(b)(1), 20 DCMR § 6004.2, 9 VAC 25-580-140.2.a, and COMAR § 26.10.05.02.C(2).

Nonetheless, Respondent's Post-Hearing Brief confused the distinction, incorrectly arguing that "40 CFR §280.44(a) also permits the use of a line leak detection method which restricts the flow of a regulated substance, *as an alternative to the alarm system* . . . The presence of these devices meets the line leak detection requirements *even if it is determined that the sump sensors do not meet those requirements.*" Respondent's Post-Hearing Brief at 24-25 (emphasis added). Complainant's Reply Post-Hearing Brief pointed out the absurdity of Respondent's continued inability to recognize the distinction between the two independent line release detection requirements, Complainant's Reply Post-Hearing Brief at 2-3, and yet in Respondent's Appeal Brief, Euclid once *again* argues that it is not liable for the failure to perform periodic line release detection because "40 CFR §280.44(a) also permits the use of a line leak detection method which restricts the flow of a regulated substance, as an alternative to the alarm system . . . The presence of these devices meets the line leak detection requirements even if it is determined that the sump sensors do not meet those requirements." Respondent's Appeal Brief at 44.

There is simply no excuse for a company with twenty-three gas stations to be unable to understand that mechanical line leak detectors and interstitial sump sensors apply to two very different line release detection requirements, and cannot be used as a substitutes for each other. This disregard for the law and facts not only pervades Euclid's Appeal Brief, but also pervades Euclid's entire approach to UST compliance. Euclid's unwillingness to accept the clear dictates

of the regulations and the clear warnings of regulatory agencies – whether due to intentional disregard or merely to gross negligence – is a key reason why Euclid is now facing a large assessed penalty for violations involving 23 facilities and 70 underground storage tanks.

C. Argument

1. State Notification

Respondent's lead argument is an unpersuasive attempt to have the entire case dismissed because Complainant allegedly did not provide notice to Virginia, Maryland and the District of Columbia prior to filing the First Amended Complaint, as set forth in Section 9006(a)(2) of RCRA, 42 U.S.C. § 6991*e*(a)(2). This defense was not raised in Respondent's Answer to the Initial Complaint, in its Answer to the First Amended Complaint or in any of Respondent's Prehearing Exchanges or pre-hearing filings. The argument was raised for the first time on the opening day of the Hearing. TR-1 at 41-43. There is no need, however, to resolve the question of whether Respondent has waived any Section 9006(a)(2) defense by waiting until the Hearing to raise the issue, because the evidence is very clear that the requirements of Section 9006(a)(2) were in fact fulfilled.

Section 9006(a)(2) of RCRA, 42 U.S.C. § 6991*e*(a)(2), states as follows:

> In the case of a violation of any requirement of this subchapter where such violation occurs in a State with a program approved under Section 6991*c* of this title, [EPA] shall give notice to the State in which such violation occurred prior to issuing an order or commencing a civil action under this section.

This language requires that notice be given, but does not require any particular form of notice, and in particular does not state that the notice must be in writing. Pursuant to the plain language

of the statute, the only requirement is that a state be given notice that EPA plans to commence an enforcement action.

It is hard to imagine a case where the state notification was as comprehensive and timely as the notifications to the three states in this case. The multi-facility enforcement action in this case was the result of close cooperation between EPA, Maryland, Virginia and the District of Columbia. After initial inspections showed apparent noncompliance, EPA and the three states first held a formal meeting with regard to Euclid in the spring of 2001, and it was agreed at this meeting that EPA would be the focal point or "clearing house" for information, while the states and EPA would each conduct further inspections of Euclid's facilities. TR-3 at 193-195, TR-4 at 4-5. After a number of additional state and EPA inspections showed serious violations, a second meeting was held in 2001 during which it was jointly decided by EPA and the three states that EPA would take the lead in an enforcement action against Euclid. TR-4 at 9-11.

During this second multi-agency meeting, EPA and the states discussed what was anticipated to be a "large enforcement action" of a magnitude beyond the scope of the states' enforcement experience. TR-4 at 9-10. The state agencies, in fact, expressed a concern that they would have insufficient resources to maintain their traditional inspection and emergency response functions if they were required to take the lead on an enforcement action of the magnitude anticipated during the meeting. TR-4 at 10. The states thus encouraged and supported EPA's agreement to take the lead in preparing and prosecuting a multi-facility, multi-state enforcement action against Euclid. TR-4 at 10. Subsequent to the second meeting, the ongoing status of EPA's proposed enforcement action was discussed with all three states during

monthly conference calls. TR-4 at 11-12. This uncontroverted testimony clearly establishes that the states were informed of and actively supported EPA's intention to bring this enforcement action against Euclid.

In fact, not only were the states *aware of* EPA's intention to bring an enforcement action, the states also actively *participated* in the prosecution of the enforcement action. Witnesses from all three state agencies provided extensive substantive testimony at the Hearing in this matter. TR-1 at 91-248, TR-2 at 6-151, 199-232, TR-3 at 5-174. All three state witnesses confirmed on the record that their respective states had understood and supported EPA's intention to take the lead in bringing an enforcement action against Euclid. TR-1 at 190, 242-244, TR-2 at 40-41, 80, TR-3 at 10, 27, 104.

The cases cited by Respondent are either inapplicable, irrelevant or opposed to Respondent's argument. The language regarding written notice in *Harmon Industries v. Browner*, 191 F.3d 894, 898-899 (8th Cir. 1999) did not represent a holding in the case, in which the existence of written notice was undisputed, but instead represented the court's paraphrase of an argument by EPA. EPA argued in *Harmon* that, having given written notice to the state, EPA was free to "overfile" against a defendant notwithstanding that the state had already concluded an enforcement action arising out of the same operable facts. Whether or not notice under Section 9006(a)(2) was required to be in writing was not even remotely at issue in *Harmon*. In contrast to *Harmon*, in the case at bar there is no "overfiling" issue whatsoever. The states involved did not bring enforcement actions with regard to the violations alleged and proved by EPA and

instead affirmatively agreed with and cooperated with EPA's decision to file an enforcement action against Euclid.

U.S. v. Power Engineering Company, 125 F.Supp. 1050 (D.Co. 2000) also does not help Euclid's argument. While *Power Engineering mentions* the Section 9006(a)(2) notice requirement, the *form* of the required notice under RCRA is not discussed at all. Similarly, the form of the required citizen suit notice is not discussed in *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), in which the complete failure of the plaintiff to give *any* notice to EPA and the state was not in dispute.

Hazardous Waste Treatment Council v. U.S.E.P.A., 886 F.2d 355 (D.C.Cir. 1989) does not have anything to do with notice to the states, although it repeats the truism that EPA, in an enforcement action under RCRA, must come forward with at least *some evidence* of every element of a violation. It is difficult to see how notice to a state could be deemed to be an element of a violation of RCRA, but it is unnecessary to determine whether it is or is not because in this case there is clear and uncontroverted evidence that EPA did in fact notify all three states of its intent to bring an enforcement action against Euclid for violations of the UST requirements.

Respondent also cites *In the Matter of Brenntag Great Lakes LLC*, Docket No. RCRA-05-2002-0001, Order on Cross-Motions for Accelerated Decision (December 19, 2002). *Brenntag*, though, provides no support for Respondent's position, and in fact *Brenntag* strongly supports *Complainant's* position that the notice in this case was adequate. *Brenntag* involved a challenge to EPA's right to bring any enforcement action at all in a state with an EPA-authorized hazardous waste program under Subtitle C of RCRA. The presiding officer in *Brenntag* rejected

the respondent's claim that EPA did not have the authority to enforce an authorized state program, holding that the only restriction on EPA's authority was the requirement that notice be given pursuant to Section 3008(a)(2) of RCRA, 42 U.S.C. § 6926(a) (this language is identical to the language in Section 9006(a)(2) of RCRA). The presiding officer in *Brenntag* also addressed the sufficiency of EPA's notice to the state in that case, and explicitly stated that where "the state authorities already knew that EPA would be bringing an enforcement action in their state," then "requiring EPA to give some sort of official notice to the state would be a pointless exercise." *Brenntag* at 6, footnote 4.

As demonstrated above, in the present case EPA and the states have cooperated throughout the investigation and prosecution of this case, and the decision that EPA would take the lead in enforcing against Euclid was made jointly with the states. Once EPA and the states agreed that EPA was going to take the lead on an enforcement action, there can be no question but that the statutory duty of providing notice was fulfilled. EPA nonetheless continued to update the states on the status of its proposed enforcement action on at least a monthly basis.

Euclid tries to distinguish *Brenntag* by arguing that *Brenntag* turned upon undisputed evidence that the state had *requested* EPA to bring the action in question. This argument is not borne out by the language cited above, which focuses not on the state's request but on the fact the "the state authorities already knew that EPA would be bringing an enforcement action in their state." *Brenntag* at 6, footnote 4. In any event, the evidence in the case at bar demonstrates not only a clear acquiescence on the part of the states to EPA's proposed enforcement action, but in fact an affirmative desire on the part of the states that EPA bring an enforcement action against

Euclid to avoid the resource drain such a large case would pose were the states themselves to bring actions against Euclid.

In the face of the clear evidence presented on this issue, the Initial Decision concluded that the "cooperative enforcement effort between the District Columbia, Maryland, Virginia and EPA easily lays to rest respondent's 'long shot' argument that there was no Section 9006(a)(2) notification." Initial Decision at 8. This finding is strongly supported by the evidence presented, and thus there are no grounds for the Presiding Officer's findings to be disturbed by the EAB.

2. Penalty Issues – Introduction

Respondent's Appeal Brief contains a section arguing that the penalties imposed in this case are excessive. Respondent's Appeal Brief at 14-21. Respondent's penalty discussion, however, does not address the substance of Complainant's extensive explanation of its penalty calculation in Complainant's Initial Post-Hearing Brief. The Presiding Officer in most instances accepted Complainant's proposed penalties without modification, in effect adopting Complainant's penalty reasoning, except in the few instances where the Initial Decision contains a specific explanation of the Presiding Officer's deviation from Complainant's proposed penalty.

Complainant's reasoning for its penalty calculation, as set forth in Complainant's Initial Post-Hearing Brief at 254-398, generally followed the UST Penalty Policy, deviating from that Policy only to *reduce* the penalty in some instances below the penalties called for in the Penalty Policy. Where, as here, the Presiding Officer's penalty assessment "falls within the range of penalties provided in the penalty guidelines," *Mayes*, slip op. at 57-58, the EAB "generally will not substitute its judgment for that of the presiding officer absent a showing that the presiding

officer committed clear error or an abuse of discretion in assessing the penalty." *Mayes*, slip op. at 57-58. *See, also, In re B&R Oil Company, Inc.*, 8 E.A.D. 39, 57 (EAB 1998), *In re Pacific Refining*, 5 E.A.D. 607 (EAB 1994); *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994).

The penalty explanation in Complainant's Initial Post-Hearing Brief included a discussion of the statutory authority, Complainant's Initial Post-Hearing Brief at 254, a general discussion of the penalty calculation framework set out in the UST Penalty Policy, Complainant's Initial Post-Hearing Brief at 254-264, a general discussion of the application of the framework to the violations in this case, Complainant's Initial Post-Hearing Brief at 264-280, and a detailed discussion of the facility-by-facility, tank-by-tank and violation-by-violation penalty calculation. Complainant's Initial Post-Hearing Brief at 280-398.

Complainant does not believe it is necessary to exhaustively repeat its prior explanation of the UST Penalty Policy and such Policy's application to each and every violation in this case. However, prior to attempting to directly address Respondent's disjointed and incoherent penalty arguments, this Brief will summarize some of the more salient evidence influencing Complainant's calculation, in particular the evidence influencing the violator-specific adjustment factors used in Complainant's penalty calculation, and will discuss the process used to calculate the violator-specific and facility-specific adjustments.

a. *Euclid's Prior Enforcement History*

Prior to the filing of the initial Complaint in this matter, Euclid had already been the subject of a number of state and federal enforcement actions, both formal and informal. For

example, one such enforcement action involved an incident in 2000 at a new gas station built by Euclid on Georgia Avenue in the District of Columbia. In that incident Kofi Berko, an inspector with the District of Columbia Department of Health ("DCDOH"), discovered that Euclid had installed two new single-walled gasoline USTs, despite the requirement in the District of Columbia UST program that all new USTs utilize double-walled construction. TR-2 at 207-208. Dr. Berko discovered this problem after the tanks were in the ground, but before they were covered and paved over, and he immediately informed both the contractor and Mr. Yuen that it was illegal to operate such tanks in the District of Columbia. TR-2 at 208-211, TR-3 at 83-87. Despite Dr. Berko's warnings, Euclid paved over the single-walled tanks and began operating the station. TR-2 at 207-211. After DCDOH issued Euclid several orders to stop operating the facility, and initiated an administrative enforcement proceeding, the matter was eventually settled, resulting in Euclid's replacement of the single-walled tanks with double-walled tanks and payment of a $10,000 penalty. TR-2 at 211-212, Complainant's Ex. U-3.

In 1997, the Maryland Department of the Environment ("MDE") issued an administrative complaint against Euclid, alleging that Euclid did not maintain financial assurances for its USTs in Maryland. Complainant's Ex. Y-9. On January 6, 1998, MDE and Euclid executed a settlement of that administrative case, with Euclid obtaining UST insurance and agreeing to pay a penalty of $35,000. Complainant's Ex. Y-9a.

Another enforcement action was taken by MDE against Euclid in 1999 for failing to comply with the December 22, 1998 UST upgrade requirements at the Frederick Avenue Facility in Baltimore. Complainant's Ex. L-6. The case was settled after Euclid decided not to contest

MDE's allegations. Complainant's Exs. L-6a, L-6b and L-6c. In the settlement of that action, Euclid agreed to correct the violations and pay a penalty of $13,500 in settlement of that matter and another MDE enforcement action involving Euclid's 15501 New Hampshire Avenue Facility in Silver Spring, Maryland. Complainant's Ex. L-6c, Stipulation(2d) 2. An additional Maryland action was brought in 1998, assessing a $500 penalty for the failure to report a gasoline release at Euclid's 3800 Rhode Island Avenue Facility in Brentwood, Maryland. Complainant's Ex. Q-3.

Euclid has also been the subject of a prior enforcement action by EPA involving violations at the 15501 New Hampshire Avenue Facility. *See, In the Matter of Euclid of Virginia, Inc. and Clark Automotive Services, Inc.,* Docket Nos. RCRA-3-2001-5001, 5002, Slip Op. (May 1, 2003). In addition, state agencies have issued Euclid a number of notices of violation and other written communications informing Euclid that the state agencies consider numerous Euclid facilities to be in violation of the UST regulations. *See, e.g.* Complainant's Exs. D-8, E-5, F-9, G-6, N-10, O-8, Y-11.

b. *Euclid's Lack of Cooperation*

Euclid's lack of cooperation with the investigations conducted by EPA and the state agencies provides a significant factual basis for the penalty assessment in this case. A detailed description of the joint EPA/state investigation, with citations to the record, is contained in Complainant's Initial Post-Hearing Brief at 12-34. Complainant will here summarize the salient points of the investigation with regard to Euclid's level of cooperation.

The investigation of Euclid which led to the Hearing in this matter originally arose out of two independent and non-coordinated inspections of Euclid facilities. The earliest of these two

inspections was an inspection by the Virginia Department of Environmental Quality ("VADEQ") of Euclid's Spotswood Trail Facility in Ruckersville, Virginia. Katherine Willis, an inspector with VADEQ, initiated the inspection process by telephoning Tony Chowney, an individual who had at one time served as a Euclid contractor, and was listed as the owner's contact on an UST Notification Form filed with the Commonwealth of Virginia. Tr-1 at 135-136. Ms. Willis' initial contact with Mr. Chowney was by telephone on January 31, 2001. TR-1 at 137, Complainant's Ex. D-5. She followed up this telephone call with a Formal Inspection Notification Letter, dated, February 1, 2001, which documented the agreed inspection date of March 1, 2001, and directed Mr. Chowney, on behalf of Euclid, to be prepared to verify, by documentation or otherwise, compliance with the UST regulations. TR-1 at 138-140, Complainant's Ex. D-6. This letter also required that Mr. Chowney, or another Euclid representative, bring to the inspection specified compliance records, including release detection records and corrosion protection records. TR-1 at 140, Complainant's Ex. D-6.

Mr. Chowney was present when Ms. Willis arrived to inspect the Spotswood Trail Facility on March 1, 2001. TR-1 at 143-144. Mr. Chowney was able at that time to provide some closure documents for tanks at the facility which were no longer in service, and provided copies of a proposal for the installation of the tanks at the facility, TR-1 at 144, 147-148, but could provide no release detection records other than a records of a single, out-of-date, line tightness test and line leak detector test. TR-1 at 144.

At the conclusion of the March 1, 2001 inspection, Ms. Willis discussed her findings with Mr. Chowney and indicated to him that she needed Euclid to submit certain documentation,

including release detection records. TR-1 at 167-168. Mr. Chowney indicated that there would be no problem providing that information within 30 days, but he did not contact Ms. Willis or submit any additional documentation as promised. TR-1 at 168-169. Ms. Willis then followed up with a Warning Letter, dated April 10, 2001, warning Euclid that it may be in violation of the UST regulations. TR-1 at 170-172. This letter specifically requested that Euclid submit records, including release detection records, by April 20, 2001. Complainant's Ex. D-8 at 0213, 0215. Euclid did not respond to the April 10, 2001 Warning Letter. TR-1 at 175.

One May 22, 2001, more than a month after the April 20, 2001 deadline set forth in the Warning Letter, Ms. Willis attempted to telephone Mr. Chowney, but was unable to reach him except via the exchange of telephone messages. Tr-1 at 176-178, Complainant's Ex. D-10 at 0219a. On June 1, 2001, however, Ms. Willis was contacted by Koo Yuen, Euclid's President, who informed her that Euclid would be submitting documentation shortly in response to Ms. Willis' phone messages to Mr. Chowney. TR-1 at 178-179, Complainant's Ex. D-10 at 0219b. After several days had passed without receiving any documentation from Mr. Yuen, Ms. Willis attempted to contact Mr. Yuen but was unable to reach him because the telephone number for Euclid which was listed on the state Notification Form was not in fact Euclid's number, but was apparently the phone number of an unrelated company for which Mr. Chowney also worked (a company with no knowledge of or apparent connection to Euclid). TR-1 at 180-183, Complainant's Ex. D-10 at 0219c.

Finally, on June 21, 2001, Ms. Willis received a telefax, with no cover sheet or narrative, consisting of a copy of the April 10, 2001 Warning Letter to Euclid, a copy of an invoice from

Bear Petroleum for some repairs at the Spotswood Trail Facility, and a copy of what appeared to be automatic tank gauging printouts. TR-1 at 184-186, Complainant's Ex. D-9. The ATG printouts showed two passing 0.2 gallon/hour test results for the super unleaded tank, although this documentation was for tests run *subsequent* to her March 1, 2001 inspection. TR-1 at 186-187, Complainant's Ex. D-9 at 0219. The printouts also showed two inconclusive test results for the regular unleaded grade tank. TR-1 at 186-187, Complainant's Ex. D-9 at 0219. Ms. Willis never received further information or documentation whatsoever with regard to Euclid's compliance with release detection requirements at the Spotswood Trail Facility. TR-1 at 188-189.

The second independent inspection of a Euclid facility, also in March, 2001, was an EPA inspection of Euclid's 420 Rhode Island Avenue Facility in the District of Columbia. Marie Owens, EPA Region III's UST Enforcement Team Leader, conducted this inspection along with two other EPA inspectors and Dr. Kofi Berko, the DCDOH inspector.

During the March 16, 2001, inspection Ms. Owens observed what she felt to be significant violations. TR-3 at 183. Ms. Owens followed up this inspection with a telephone call to Mr. Yuen on March 27, 2001. TR-3 at 183-184, Complainant's Ex. A-5. During this telephone call EPA was unable to confirm the compliance status of the facility, and therefore EPA followed up the call with a telefax and letter on March 30, 2001, expressing EPA's concerns in writing and formally requesting that Euclid provide specific information with regard to compliance at the facility. TR-3 at 184-186, Complainant's Ex. A-5. This communication required Euclid to provide a description of and documentation of its tank and line release

detection methods, including in particular an EPA request for information and records regarding inventory reconciliation, to the extent that Euclid claimed that it was using inventory reconciliation as a method of release detection. TR-3 at 187, Complainant's Ex. A-5 at 0031.

EPA received a response to this information request from Mr. Yuen on April 5, 2001. TR-3 at 186, Complainant's Ex. A-6. This response provided EPA with records of tank and line tightness testing and line leak detector testing which occurred on March 17, 2001, the day after EPA's inspection, but did not include either a narrative description of, or documentation of, any line release detection methods prior to that date. TR-3 at 188, Complainant's Ex. A-6. The response contained no narrative regarding current or past tank release detection methods, but instead contained only a cost proposal from a contractor to install a Veeder-Root ATG on the premises. TR-3 at 188-189, Complainant's Ex. A-6 at 0054-0055. The inclusion of this cost proposal in response to EPA's question regarding current and past tank release detection seemed to imply that Euclid was using an ATG at the Facility, but in fact the proposal to install an ATG had not yet been implemented. Stipulation 17.

In late May and early June, 2001 Dr. Berko, the DCDOH inspector, conducted inspections of the six Euclid facilities then in operation in the District of Columbia. TR-2 at 222-231, TR-3 at 14-24, 36-38, 45-51, 59-61, 65-69, Complainant's Exs. A-7, B-3, M-4, R-8, S-4, S-5, U-4. After this round of inspections, DCDOH issued a letter to Euclid, dated June 8, 2001, which described potential violations at all six Euclid facilities in the District,[15] and directed

[15]A seventh District of Columbia Euclid facility involved in this case, the 5420 New Hampshire Avenue Facility, was not yet in operation at that time.

Euclid to take measures to correct the violations and to submit documentation to DCDOH. TR-2 at 5, Complainant's Ex. Y-11. The June 8, 2001, letter specifically required Euclid to submit documentation, including documentation of monthly inventory reconciliation. Complainant's Ex. Y-11. Euclid did not respond to this letter, and did not provide inventory reconciliation records or any of the other information requested in the June 8, 2001 letter. TR-3 at 6-7, 25, 37-38, 51-52, 61, 69.

In May, 2001, VADEQ sent Euclid a letter notifying it of a June 5, 2001 inspection to be conducted by VADEQ at Euclid's John Mosby Highway Facility in Chantilly, Virginia. TR-2 at 156-158, Complainant's Ex. C-5. On May 25, 2001, after discussions with George Houghton of EPA, VADEQ sent another letter to Euclid, confirming the June 5, 2001 inspection date, but noting that EPA would be taking the lead on the inspection. TR-2 at 162, Complainant's Ex. C-2. Both letters required Euclid to have an authorized representative present at the June 5, 2001 inspection, and to bring to the inspection a number of documents, including release detection records and corrosion protection records for the past five years. Complainant's Exs. C-2, C-5. Despite this requirement, Euclid did not provide release detection records or corrosion protection records at the time of the inspection, other than a printout of the on-hand inventory for the day of the inspection. TR-2 at 171-175, 196-197.

In June, 2001, Jackie Ryan, an inspector with MDE, conducted a series of inspections at five Euclid facilities in Maryland. These inspections were followed by a number of follow-up inspections and communications with Euclid. With rare exceptions, as noted below, Euclid did not provide the information requested at the inspections or in the follow-up communications.

The first of this group of inspections occurred at Euclid's Baltimore Avenue Facility in Hyattsville, Maryland on June 11, 2001. TR-2 at 24. The facility operator could produce neither tank nor line release detection records during this inspection. TR-2 at 28-29, 31. The operator also could not provide any cathodic protection records for the waste oil tank, which Ms. Ryan suspected to be a steel tank due to the presence of a test station which normally would be present only for a steel tank. TR-2 at 33-34. At the conclusion of this inspection, Ms. Ryan left with the operator a carbon copy of the inspection report which she had generated during the inspection. TR-2 at 34, 146-147. This report detailed suspected violations and required that the owner and/or operator submit, by June 15, 2001, records of inventory control, line release detection testing and cathodic protection, and records of tank release detection for the waste oil tank. Complainant's Ex. O-6 at 0689, TR-2 at 29, 33-34. This inspection report was apparently passed along to Euclid by the station operator, because, shortly after this inspection, Ms. Ryan received an envelope containing line tightness testing and line release detector testing results for Euclid's Baltimore Avenue Facility and 3800 Rhode Island Avenue Facility, with a cover page indicating that the communication came from Koo Yuen. TR-2 at 38-39, 147-148. The test results for the Baltimore Avenue Facility were for testing performed in April, 1998, which was greater than one year prior to the date of the inspection. TR-2 at 38-39. This envelope did not contain inventory control records or any other records regarding tank or line release detection. TR-2 at 38-39, 79-80.

Ms. Ryan returned to the Baltimore Avenue Facility on August 6, 2001, but did not find significant improvement. TR-2 at 37, Complainant's Ex. O-8. On August 24, 2001, MDE sent

Euclid a Notice of Violation ("NOV") with regard to this facility, noting a number of apparent violations and requiring Euclid to perform several compliance activities and report to MDE within 30 days. TR-2 at 39-40, Complainant's Ex. O-9. MDE never received a response to this NOV. TR-2 at 40.

On June 12, 2001, Ms. Ryan conducted the second of her June, 2001, inspections, at Euclid's 3800 Rhode Island Avenue Facility in Brentwood, Maryland. TR-2 at 42, Complainant's Ex. In her inspection report, a copy of which she left at the facility, Ms. Ryan directed the owner/operator to, among other things, send her valid test data from the ATG, TR-2 at 48, Complainant's Ex. Q-7 at 0814, No. 13, documentation of release detection for the waste oil tank, TR-2 at 49, Complainant's Ex. Q-7 at 0814, No. 14, and line release detection records. TR-2 at 40, Complainant's Ex. Q-7 at 0815, No. 15.c. She never received tank release detection records from this facility. TR-2 at 49-50, 79-80. Ms. Ryan did receive a record of a line tightness test, which came in the same packet as the records she received with regard to the Baltimore Avenue Facility, TR-2 at 50, 147, but this record was for tests performed in December, 1995. TR-2 at 50.

Ms. Ryan's third inspection in June, 2001, was at Euclid's Annapolis Road Facility in Landover Hills, Maryland, on June 13, 2001. TR-2 at 59, Complainant's Ex. N-8. In the inspection report, a copy of which she left at the facility, she required that the owner/operator send her documentation of tank and line release detection by June 22, 2001. TR-2 at 60-61, Complainant's Ex. N-8 at 0642, No. 9. However, by the time of a follow-up visit to the facility on July 27, 2001, she had still not received such documentation. TR-2 at 66, Complainant's Ex.

N-9. A Notice of Violation was issued for this facility on August 10, 2001, noting a number of apparent violations and requiring several compliance activities to be completed within 30 days, including the submission of inventory records and line release detection results. TR-2 at 67, Complainant's Ex. N-10. The only response to this NOV was the submission, at least six months later, of tank tightness test documents from tests conducted in February, 2002. TR-2 at 67-68, 79-80.

Ms. Ryan's fourth inspection in June, 2001, was at Euclid's 68th Avenue Facility in Landover Hills, Maryland, also conducted on June 13, 2001. Complainant's Ex. F-7. In her inspection report, a copy of which she left at the facility, she directed the owner/operator to provide her with reconciled inventory records, line tightness test results and line leak detector results by June 22, 2001. Complainant's Ex. F-7 at 0295 No. 14. However, when she returned to the facility on July 27, 2001, there had been no apparent attempt to remedy any of the deficiencies she had identified, and she had yet to receive the requested information. TR-2 at 71-72, Complainant's Ex. F-8. A Notice of Violation was issued for this facility on August 10, 2001, requiring, among other things, the submission within 30 days of reconciled inventory records, line tightness testing records and line leak detector testing records. TR-2 at 72-73, Complainant's Ex. F-9. No response to this NOV was ever received. TR-2 at 72-73, 79-80.

The fifth of Ms. Ryan's June, 2001, inspections occurred on June 14, 2001 at Euclid's University Avenue Facility, in Langley Park, Maryland. TR-2 at 73. Her inspection report, a copy of which she left at the facility, directed the owner/operator to provide, by June 22, 2001, reconciled inventory records, Complainant's Ex. K-5 at 0455, No. 9.b., and line release detection

records. TR-2 at 75, Complainant's Ex. K-5 at 0455, No. 9.f. No such records were ever received for this facility. TR-2 at 75, 79-80.

On June 14, 2001, EPA inspectors conducted an inspection of Euclid's main corporate office at 4225 Connecticut Avenue in the District of Columbia. TR-4 at 5. During this inspection, the inspectors asked Euclid to produce any and all release detection records, including any kind of inventory records, and also asked for records which reflected the ownership of its businesses and the USTs at its facilities. TR-4 at 5. These records were sought for all of Euclid's facilities. TR-4 at 6. Euclid's General Manager, Leon Buckner, was present for this inspection, and Mr. Yuen also attended, but only for a very short time. TR-4 at 5.

During this inspection the procedure followed was that EPA would ask Mr. Buckner for a particular type of record, and Mr. Buckner went out of the office to another room containing filing cabinets, gathered files which he deemed to be responsive, and brought them back to the inspectors. TR-4 at 6. Many of the records in the files brought back by Mr. Buckner were not responsive to EPA's requests, and the inspectors had to sift through the files to find relevant documents, flagging anything which appeared to be pertinent. TR-4 at 6-7. EPA photocopied approximately seven boxes of documents, including a large number of what Euclid refers to as Daily Recap forms, an example of which is found in Complainant's Ex. Y-8, Page 1206. TR-4 at 7-8.

On February 26, 2002, EPA sent Euclid, and various related entities, a formal information request pursuant to Section 9005 of RCRA, requiring Mr. Yuen, as Euclid's President, to personally appear and to be prepared to provide both documentation and narrative explanations

of Euclid's UST compliance methods and activities. TR-4 at 14-15, Complainant's Ex. Y-1. After some back and forth discussion regarding locations, dates and persons to attend, TR-4 at 16-17, 20-21, Complainant's Exs. Y-1, Y-3, Y-4, the meeting commenced on April 22, 2002, with Euclid represented by Mr. Buckner and a Euclid contractor, Thomas "Ted" Beck, and by legal counsel. TR-4 at 23. Mr. Yuen did not attend until April 29, 2002. TR-15 at 131, Complainant's Ex. Y-4.

Ms. Owens had expected that it would be time-consuming for Euclid to provide documentation of its compliance methods, but she had not expected it to be difficult for Euclid to simply inform EPA as to the particular method or methods of compliance which it claimed to be utilizing at each facility. TR-4 at 22-23. Ms. Owens was surprised to find that, for most facilities, neither Mr. Yuen, Mr. Buckner nor Mr. Beck could tell her which compliance methods, if any, were being utilized. TR-4 at 23, 26-27. The Euclid personnel and the EPA personnel together sifted through voluminous piles of Euclid's records in an attempt to find clues as to what equipment might be present at each facility, and thus determine what methods of compliance *might* have been in use. TR-4 at 27-30.

At the conclusion of the April, 2002, meetings, EPA made it clear to Euclid that EPA did not consider Euclid's response to be complete, and that EPA continued to require Euclid to provide answers to the many questions which Euclid had been unable to answer during the meetings. TR-4 at 48. Euclid, however, did not provide further information to EPA subsequent to the April, 2002 meetings until after the filing of the initial Complaint in this matter. TR-4 at 48.

During discussions between EPA and Euclid in September, 2002 (just prior to the filing of the original Complaint in this matter), EPA learned that Mr. Beck had completed site surveys for all of the Euclid sites, and had documented some of his findings in written reports. TR-4 at 48-49. These reports had mostly been compiled in June, 2002, Complainant's Ex. Y-6, but had not been provided to EPA despite EPA's earlier warning, at the April 2002 meetings, that Euclid was required to more fully comply with the February, 2002 Information Request. At EPA's request, Euclid orally agreed to provide these documents, but did not actually provide Mr. Beck's reports to EPA at this time. TR-4 at 49, 54-56, 61-62.

Although Euclid had provided none of the required follow-up information to EPA's information request, Euclid nonetheless made a number of claims in its Answer to the original Complaint regarding methods of compliance which it had not previously claimed. TR-4 at 49-51. EPA felt that it needed additional technical expertise to evaluate the accuracy of some of these new claims, and therefore hired an outside expert, John Cignatta, an engineer and President of Datanet Engineering, Inc. TR-4 at 51-52. Beginning on March 27, 2003, Mr. Cignatta accompanied EPA on a number of inspections or Euclid facilities. TR-4 at 52.

The first inspection conducted with Mr. Cignatta was on March 27, 2003, at Euclid's 6181 Annapolis Road Facility. TR-4 at 53. In its Answer to the original Complaint, Euclid had claimed that line release detection at this site was achieved using sump sensors.[16] Original

[16]A sump sensor system is a type of interstitial monitoring system in which double-walled pipes slope to a sealed sump, so that a release from the inner wall of the piping would drain to the sump and be detected by sensors placed near the bottom of the sump. TR-2 at 33, TR-4 at 50, 78-80.

Answer, ¶ 285. At the March 27, 2003, inspection EPA discovered that the Annapolis Road Facility had neither sensors nor sealed sumps. TR-4 at 53-54. Mr. Beck was present at this inspection and agreed that there was no sump sensor system at the facility. TR-4 at 54. Moreover, at the time of the inspection Mr. Beck carried with him a copy of his own report for that facility, dated June 5, 2002, which noted that there was no "containment in submersible pit" and thus there could not be a sump sensor system at the facility. TR-4 at 53-54, Complainant's Ex. Y-6 at 1183. Euclid had thus claimed to have a sump sensor system at this facility even after receiving its own contractor's report stating that no such system was present. Mr. Beck told EPA that he had thought that Euclid had already provided his reports to EPA, and he promised to send copies of all of his reports to EPA. TR-4 at 55-56.

On March 27, 2003 EPA also conducted an inspection at Euclid's Baltimore Avenue Facility. TR-4 at 57. As with the Annapolis Road Facility, the inspection of the Baltimore Avenue Facility showed significant ongoing violations of the UST regulations, including additional violations of which EPA had not been aware prior to the inspections. TR-4 at 59. Shortly thereafter, between April 14 and April 16, 2003, EPA conducted inspections at several of Euclid's facilities in the District of Columbia, accompanied by Dr. Berko, the DCDOH inspector. TR-4 at 57. Continued non-compliance and additional violations were also discovered at these inspections.

Given the ongoing problems discovered during this round of inspections, EPA felt that it was important to inspect additional facilities to determine if other unknown problems existed. TR-4 at 58-60. Given the difficulty in inspecting the large number of facilities owned and/or

operated by Euclid, EPA felt that it was important to obtain Mr. Beck's reports to assist in targeting the facilities where inspections were most needed. TR-4 at 56-57. Immediately following the District of Columbia inspections, Ms. Owens began attempting to contact Mr. Beck to attempt to schedule additional inspections. TR-4 at 58. This contact was necessary due to the conditions Euclid had placed on its consent to EPA to conduct inspections, which provided consent only if Mr. Beck was present. TR-4 at 60. In addition, Ms. Owens continued to specifically request copies of Mr. Beck's reports. TR-4 at 61. Mr. Beck, however, did not at this time return Ms. Owens' telephone messages. TR-4 at 58.

In response to Mr. Beck's failure to return Ms. Owens' calls, EPA issued another information request, on May 2, 2003, explicitly requiring Euclid to produce Mr. Beck's reports no later than May 9, 2003.[17] TR-4 at 61-62, Complainant's Ex. Y-5. In addition, EPA, assisted by the U.S. Department of Justice, obtained administrative search warrants for all fourteen of Euclid's Maryland facilities. TR-4 at 60-61. Armed with these search warrants, EPA no longer needed Euclid's consent to conduct inspections of Euclid's Maryland facilities, and thus EPA's inspections could no longer be thwarted by Mr. Beck's failure to respond to EPA attempts to arrange for his presence.

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[17]As discussed above, EPA made it clear to Euclid after the April, 2002, meetings that it still considered the February, 2002, information request to be open and that Euclid remained under a continuing obligation to supplement its earlier responses with more complete information regarding its compliance. TR-4 at 48. Thus the May, 2003, information request arguably was not necessary, but did serve to make crystal clear that EPA expected Euclid to immediately produce Mr. Beck's reports to EPA, and to reiterate the possible enforcement consequences if Euclid did not do so. Complainant's Ex. Y-5.

On May 9, 2003, EPA executed three of the Maryland search warrants. TR-4 at 61. Also on that day, EPA finally received copies of Mr. Beck's reports. TR-4 at 49, 61-63, Complainant's Exs. Y-5, Y-6. Subsequent to the May 9, 2003 inspections EPA continued to conduct inspections of Euclid's facilities through the summer of 2003. TR-4 at 64.

On July 24, 2003, Complainant filed a Motion for Complete Prehearing Exchange and Motion for Discovery. The Motion for Discovery requested, among other things, any records Respondent had of monthly monitoring using in-tank ATG testing, interstitial tank or line monitoring, and annual line tightness testing and leak detector testing – all information which Euclid had been required to produce pursuant to the still-open February, 2002 Information Request. Complainant's Ex. Y-1. Euclid, however, did not produce further information to EPA until after the Motion for Discovery was granted by the Presiding Officer on November 19, 2003.

c. *Calculation of Violator-Specific Adjustment Factors*

Section 9006(d)(2) of RCRA, 42 U.S.C. § 6991*e*(d)(2), provides for civil penalties of up to $10,000 for each tank for each day of violation. Pursuant to the Debt Collection Improvement Act of 1996 ("DCIA") and the subsequent Civil Monetary Penalty Inflation Adjustment Rule, 61 Fed. Reg. 69360 (December 31, 1996), codified at 40 C.F.R. Part 19 ("Penalty Inflation Rule"), violations which occur subsequent to January 30, 1997 are subject to a new statutory maximum penalty of ten percent greater than the prior statutory maximum, or $11,000 per violation per day.[18]

[18]The maximum statutory penalty under many EPA-administered statutes was again increased for inflation in 2004. *See*, 40 C.F.R. Part 19. Because of the particular rounding rules applied, the statutory maximum under Section 9006(d)(2) of RCRa was not increased. However,

The UST Penalty Policy contains a base penalty matrix which considers two separate components of the basic nature of the violation: (1) the extent to which the violator deviated from the regulatory requirements, and (2) the potential for harm to human health, the environment and/or the integrity of the regulatory program. Complainant's Ex. Y-13 at 1250-1253. The penalty matrix levels range from $50 to $1,500, Complainant's Ex. Y-13 at 1252, which covers only a small portion of the full penalty range, which by statute may be as high as $11,000 per day per tank (as adjusted under the DCIA and the Penalty Inflation Rule). The base penalty number generated using the matrix is then adjusted to consider other circumstances which are relevant to the statutory penalty factors. Because the maximum matrix level is so much lower than the statutory maximum, it is clear that the Penalty Policy contemplates the use of the various adjustment factors as a normal part of the penalty assessment.

An important stage in the penalty calculation considers four "violator specific adjustments" which are applied to the initial matrix value. These four factors are: (1) the violator's degree of cooperation or noncooperation with enforcement officials, (2) the violator's degree of wilfulness or negligence, (3) the violator's history of noncompliance, and (4) other unique case-specific factors. Complainant's Ex. Y-13 at 1253-1255. These four factors are

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pursuant to an EPA policy entitled *Modifications to EPA's Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule (Pursuant to the Debt Collection Improvement Act of 1996 (Effective October 1, 2004)*, dated September 21, penalties in EPA penalty policies for violations occurring after January 30, 1997 and before March 15, 2004 are to be adjusted upward by 10%, while violations occurring after March 15, 2004 the penalties are to be adjusted upward by a total of 28.95%. All of the violations in this case occurred subsequent to January 30, 1997 but prior to March 15, 2004, and thus the penalty for each violation was increased by 10% from the initial Penalty Policy calculation.

concerned with the nature of, and behavior of, the particular violator, as opposed to the matrix amounts, which focus on the nature of the violation itself. Only the first three of these factors were applied in this case.

The degree of cooperation or non-cooperation is concerned with the violator's response to enforcement activities. Complainant's Ex. Y-13 at 1254. In the context of this case, this factor addresses primarily Respondent's lack of cooperation with investigative efforts.

The degree of wilfulness or negligence factor is concerned with the relative culpability of the violator. Complainant's Ex. Y-13 at 1254. Although RCRA is a strict liability statute, a penalty reduction may be warranted where a violator had little control over the violation. On the other hand, a penalty increase is warranted where the violator had knowledge of the requirement and/or the specific violation, or was negligent in failing to have such knowledge.

The history of noncompliance factor assesses the violator's degree of recidivism, Complainant's Ex. Y-13 at 1255, and is concerned with preserving the deterrence value of enforcement efforts.

The fourth adjustment factor is a catch-all for unusual or unique violator-specific factors which are not adequately taken into consideration elsewhere in the adjustments. In some EPA penalty policies this factor is described as "other factors as justice may require," but regardless of the exact terminology, the use of this factor is designed to be "far from routine, since application of the other adjustment factors normally produces a penalty that is fair and just." *In re: Spang & Company*, 6 E.A.D. 226, 250 (EAB 1995). Complainant did not use this factor to enhance or reduce the penalty in this case.

(i) Degree of Non-Cooperation

Euclid's level of cooperation with the investigations conducted by EPA and the state agencies was very poor. As discussed above, Euclid repeatedly ignored directives asking the Company to provide information and documentation, or provided information which was grossly incomplete. Even after the filing of the original Complaint in this matter, Respondent continued to delay in providing information, and on a number of instances provided information which was misleading or incorrect. For example, as noted above, Euclid claimed in its Answer to the original Complaint that the Annapolis Road Facility utilized sump sensors, Original Answer, ¶ 285, despite the prior conclusion of Euclid's own contractor, Mr. Beck, that the facility had neither sensors nor sealed sumps. TR-4 at 53-54, Complainant's Ex. Y-6 at 1183.

The Penalty Policy allows an upward adjustment as high as 50% for noncooperation. Despite Euclid's repeated lack of cooperation, the upward adjustments Complainant proposed for noncooperation in this matter ranged no higher than 25%. Complainant used as a baseline an upward adjustment of 15%. This baseline took into consideration Euclid's repeated failures to respond to information requests by state agencies, Euclid's general failure to provide meaningful information and documentation regarding its compliance activities during the April, 2002, meetings, and Euclid's continued failure to provide promised updates to EPA after the April, 2002, meetings. The 15% baseline also took into consideration Euclid's continued noncooperation after the filing of the original complaint in this matter, including the extended delay in providing Mr. Beck's June, 2002 site surveys, and the failure to cooperate in scheduling inspections.

Complainant is not arguing that Euclid was completely uncooperative at all times. Beginning with the April, 2002, meetings, Euclid did schedule several meetings with EPA, and eventually allowed EPA to conduct *most* of its inspections with Euclid's consent. This limited degree of cooperation is taken into consideration in setting the baseline at only a 15% increase, out of a maximum of 50%. Given the repeated instances in which Euclid would not provide information or even respond to requests, this baseline appears to be very conservative.

During the April, 2002, meetings, Euclid's inability to provide information about its compliance activities was to a large extent due to its own lack of knowledge as to what equipment was present at each facility. This explanation, however, is of little value in mitigating the failure to provide information at those meetings. At least as of the June 14, 2001, records inspection, Euclid was or should have been aware that EPA was conducting a comprehensive investigation into its compliance methods at all of its facilities, and thus Euclid should have been prepared, by April, 2002 , at least to identify for EPA the compliance methods Euclid wished to claim for each of its facilities.

From the baseline 15% increase, further refinements to the noncooperation adjustment were made. Where Euclid made affirmatively incorrect or misleading claims to EPA or the states about the violation in a particular count, an additional 5% was added to the penalty for that count. Where incorrect or misleading claims were made on more than one occasion with regard to the same violation, an additional 10% was added. In other instances the 15% baseline was *reduced.* For example, in a few instances Euclid was able to provide *partial* information to EPA when originally asked, but was not able to provide complete information. In such instanced a reduction

was made from the baseline adjustment. Other counts involved types of violations – such as overfill violations – on which EPA did not focus closely during the April, 2002, meetings, and about which Euclid provided to EPA useful information when EPA finally did focus on these violations. In these instances, Complainant did not assess *any* upward adjustment for noncooperation.

(ii) Negligence or Wilfulness

Euclid exhibited high levels of culpability with regard to most of the violations in this case. During 2001, EPA and the states conducted numerous inspections of Euclid's facilities, and communicated with Euclid repeatedly with regard to the violations discovered. During the April, 2002, meetings, EPA made it very clear to Euclid that EPA was investigating every aspect of Euclid's compliance with the UST regulations, and discussed with Euclid at length the requirements of the UST regulations. In addition, EPA specifically warned Euclid at these meetings that it could face substantial penalties for its apparently widespread noncompliance. Despite all of these many communications, and despite EPA's filing of the original Complaint in this matter, Euclid *still* did not bring its facilities into compliance. In the spring and summer of 2003, approximately a year after the April, 2002, meetings, EPA again conducted a series of inspections of Euclid and found noncompliance that was even more widespread than EPA had previously suspected. Even right to the very eve of the Hearing in this matter, many of Euclid's facilities were showing inconsistent compliance – or no compliance – with many requirements, including, in particular, the tank release detection requirements. *See* Complainant's Ex. Y-40.

The inspection of 13 of its facilities in the spring and summer of 2001, together with the repeated unfavorable inspection reports and warning letters those inspections generated, should have alerted Euclid to the need for a comprehensive review of its UST compliance practices. Certainly after the April, 2002, meetings, there can be no question but that Euclid was well aware of EPA's belief that most or all of Euclid's facilities were in violation of the UST regulations. Given this, the existence of widespread violations continuing up to the start of the Hearing in January, 2004, can only be described as gross negligence, if not a willful disregard for the UST regulations.

Despite this high degree of culpability, Complainant set a baseline upward adjustment for culpability at only 15%, much lower than the maximum of 50% permitted in the Penalty Policy. In a number of instances, however, EPA added to this baseline figure. Where a violation at a particular facility continued after EPA or a state had identified to Euclid the same violation at the same facility, an additional amount was added to the baseline. In other instances, higher culpability adjustments were made – up to the full 50% – where the particular circumstances warranted. For example, a 50% increase was assessed for the release detection violations at the 420 Rhode Island Avenue Facility because violations persisted there after repeated efforts by EPA and the District of Columbia focusing on compliance at that facility. In addition, the maximum 50% increase was assessed for Euclid's failure to obtain financial assurances in the District of Columbia even after an enforcement action in Maryland had made it clear to Euclid that its general liability insurance did not meet the UST financial responsibility requirements.

There are a few violation-specific instances in which upward adjustments of less than 15% were made, usually where the violation was of relatively short duration. In addition, for overfill violations at facilities where float-activated drop tube overfill valves were present but incorrectly installed, Complainant applied a *downward* penalty adjustment. As discussed in greater detail below, Complainant in most instances gave little or no weight to Euclid's attempts to pass off the blame for its violations on its unidentified installation contractors. However, a drop tube overfill valve is one of the few pieces of UST compliance equipment with which the owner/operator is generally *not* required to interface on a regular basis after the initial installation. Unlike ball float valves, which require constant inspection and maintenance, or ATG systems, which require constant reading of results, the owner/operator might genuinely have no reason to inspect a drop tube "flapper" valve on an ongoing basis, and thus it is not completely unreasonable for the owner to rely on its installation contractor's initial installation of the component. Of course, it is always the owner/operator's responsibility to ensure compliance, and there is no evidence that a contractor deliberately defrauded Euclid, so a significant penalty is still warranted for Euclid's failure to do what was necessary to ensure compliance with the regulatory standards. However, for this one type of violation, Complainant agreed that Euclid's claimed reliance on a contractor was grounds for a reduction in the penalty. Complainant has generously applied the maximum 25% culpability reduction to the penalty for overfill counts with incorrectly-installed drop tube valves.

(iii) History of Noncompliance

Euclid's continued violation of the UST regulations, despite a history of past enforcement actions, demonstrates that those past enforcement actions were not sufficient to deter noncompliance. Complainant did not consider inspections by themselves in applying this adjustment factor, even where the inspector left a written directive with the operator of the station. However, where enforcement actions moved beyond the inspection level and involved written communications from EPA or a state agency subsequent to the inspection, *see, e.g.* Complainant's Exs. D-8, E-5, F-9, G-6, N-10, O-8, Y-11, Euclid's failure to take appropriate action began to seriously undermine the UST enforcement program. The enforcement program is undermined even further where Euclid's widespread violations continued after repeated administrative penalty actions. *See* Complainant's Exs. L-6, L-6a, L-6b, L-6c, Q-3, U-3, Y-9, Y-9a, Y-26.

Euclid's enforcement history also includes an ongoing failure to comply with a cleanup mandated by MDE at Euclid's Enterprise Road Facility in Mitchellville, Maryland. Although it is an open question as to whether the contamination at that site was caused by Euclid or by a prior owner, Euclid's responsibility for the cleanup is not in question. Nonetheless, at least by the time of the Hearing, Euclid had failed to implement a Remedial Action Plan for this facility despite the findings of its own contractor that remedial action was necessary and despite a formal warning from MDE in October, 2002. Stipulation(2d) 3, Complainant's Ex. G-6.

As with the other two adjustment factors, Complainant was particularly generous in imposing a baseline increase of 15% for history of noncompliance, much lower than the maximum 50% increase allowed under the Penalty Policy.

d. *Environmental Sensitivity*

Another stage in the calculation of a penalty under the UST Penalty Policy takes into consideration the location of the violation, thus taking into consideration the relative risks to human health and the environment posed by the threat of a release at that location. Complainant's Ex. Y-13 at 1256-1257. In contrast to the "potential for harm" factor in the initial penalty matrix, which looks at the probability that harm of some sort will occur from the type of violation involved, the "environmental sensitivity" factor is concerned with the potential severity of that harm given the characteristics of the location where the violation occurs. Complainant's Ex. Y-13 at 1256. This factor is applied through the use of an "environmental sensitivity multiplier," ranging from 1.0 (no increase in penalty) to 2.0 (a 100% increase in the penalty).

The expert reports of Complainant's hydrogeologist, Joel Hennessy, and toxicologist, Samuel Rotenberg, Complainant's Exs. Y-22, Y-23, together conclude that most of Euclid's facilities are located in areas with a particularly high risk that a release would cause harm to human health. Most of Euclid's facilities are located in areas with shallow groundwater, permeable soils, high levels of urbanization, and high population. Complainant's Exs. Y-22, Y-

23. Respondent does not contest these assertions, and has stipulated to all of the facts and conclusions contained in these individuals expert reports. Stipulation 5.[19]

In this case Mr. Hennessy and Dr. Rotenberg focused exclusively on risks to human health, which are deemed to be the more substantial risk in the areas where these particular facilities are located. In their reports, each expert provided background information regarding the risks posed by releases of gasoline from USTs and the potential pathways of exposure. Mr. Hennessy's report also provided ratings for each of Euclid's facilities for two factors: (1) the degree to which groundwater is used as drinking water source, and (2) the likelihood that a release would contaminate groundwater. Dr. Rotenberg's report rated each of Euclid's facilities for another factor, population in proximity to the site. In addition, Dr. Rotenberg, building on the information contained in Mr. Hennessy's report, also rated each site on the basis of the potential for significant human exposure. Finally, Dr. Rotenberg combines his population rating and exposure rating into an overall combined risk rating for each facility. This overall risk rating was used by Complainant to derive environmental sensitivity multipliers ranging for the various violations ranging from 1.0 to 2.0.

e. *Days of Noncompliance Multiplier*

The calculation of a penalty under the UST Penalty Policy also includes a consideration of the duration of a given violation. Complainant's Ex. Y-13 at 1257. This consideration directly implements the statutory language in Section 9006(d)(2) of RCRA, 42 U.S.C.

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[19]The parties' written stipulation mistakenly identifies these exhibits as Complainant's Exs. X-5 and X-6, respectively. This mistake was discussed on the record at the Hearing and the parties agreed that Stipulation 5 applies to Complainant's Exs. Y-22 and Y-23. TR-1 at 16-18.

§ 6991*e*(d)(2), which subjects violators to an inflation-adjusted maximum penalty of $11,000 "*for each tank for each day of violation*." (Emphasis added.). Instead of repeating a given level of penalty for each day of violation, the Penalty Policy introduces a "days of non-compliance multiplier" ("DNM"), a penalty multiplier based on the number of days of noncompliance. Complainant's Ex. Y-13 at 1257.

It is difficult to understate the effect that the multiplier concept has in terms of *lowering* the maximum penalties which are assessed under the Penalty Policy, particularly for extended violations. The inflation-adjusted maximum, not including economic benefit, which can be assessed for a single day of violation for one tank under the Penalty Policy is $9,900.[20] If the same violation continued for five years, the DNM would be 6.5. Complainant's Ex. Y-13 at 1257. The maximum penalty for five years of one violation at a single UST would thus be $64,350, which comes out to approximately $35 for each day of the violation. This *maximum* daily penalty is approximately three-tenths of one percent of the statutory maximum of $11,000 per day. The use of a days of noncompliance multiplier instead of a per-day penalty calculation is thus a very restrained and reasonable way to implement the statutory language making a violator subject to a penalty "for each day of violation." In the case at bar, the penalties imposed

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[20]This assumes that each factor is assessed at the maximum prescribed in the Penalty Policy, as such:

> **$1,500** [maximum matrix penalty] **x 1.1** [10% inflation increase] **x 3.0** [maximum violator-specific adjustments of 50% for each of 4 factors] **x 2.0** [maximum environmental sensitivity multiplier] = **$9,900**

are in all instances substantially *lower* than the maximum allowable under the Penalty Policy, and are many orders of magnitude lower than the maximum allowed under Subtitle I of RCRA.

3. Respondent's Specific Penalty Issues

Respondent has not clearly distinguished its various arguments regarding the size of the penalty in this case. For the sake of clarity, Complainant has attempted to separate each of the various themes which crop up at various points in Respondent's discussion of the penalty.

a. *Shifting Blame to Installers and Other Contractors*

Throughout its Appeal Brief, Respondent attempts to argue that it should not be held responsible for its violations because those violations were the fault of "certified installers" and other contractors. Euclid appears to raise this argument with regard to both liability and penalty, but it is unconvincing regardless of the context in which the argument is put forth.

Reliance on a third party contractor is not a defense to liability under an environmental statute. *In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 796 (EAB 1997). Moreover, the Board's language in *Green Thumb* indicates that the EAB would not look with favor on an argument that reliance on a third party can, by itself, be a reasonable grounds for the mitigation of a penalty. After noting the respondent's argument that it had delegated its responsibilities to a contractor, the Board in *Green Thumb* stated "we would point out that not only do Respondent's assertions fail to address [the regulatory] requirements, but also that they are quite troubling. The Respondent seems unaware that its statements are not at all exculpatory." *Green Thumb,* 6 E.A.D. at 796.

The policy goals behind strict liability statutes such as Subtitle I of RCRA are concerned with removing the incentive for the owner to remain ignorant of the law and ignorant of the technical necessities for compliance. In the context of another strict liability statute, the legislative history accompanying the 1977 Amendments to the Clean Air Act reflects Congress' rationale for establishing strict liability schemes in environmental statutes:

> Where protection of the public health is the root purpose of a regulatory scheme (such as the Clean Air Act), persons who own or operate pollution sources in violation of such health regulations must be held strictly accountable. This rule of law was believed to be the only way to assure due care in the operation of any such source. Any other rule would make it in the owner or operator's interest not to have actual knowledge of the manner of operation of the source.

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H.R. Rep. No. 94-1175, 94th Cong., 2d Sess. at 52 (1976), quoted in *United States v. J & D Enterprises of Duluth*, 955 F. Supp. 1153, 1158 (D.Minn. 1997). These policy goals would be similarly thwarted if reliance on a third party were grounds for a reduction in the penalty, unless, perhaps, in a situation where the respondent could demonstrate a high level of care in attempting to avoid the violations.

In addition to the negative policy implications of Euclid's "contractor"defense, Euclid has in most instances shown no basis for its alleged reliance. It is difficult to see how Euclid would have had any reason whatsoever to rely on its installation contractors to fulfil its ongoing obligations under the UST regulations. A tank installer and other contractor will only perform the work for which he or she is contracted. No tank owner could reasonably believe that the hiring of a tank installer obligates the installer to also install equipment to meet one of the

various tank release detection compliance options, nor could the owner reasonably believe that the installation contract requires the installer to examine results from that equipment on a monthly basis.

Even where an installer is specifically hired to install an ATG system, there is no reason why the installer would assume that the purpose of the ATG system is to conduct in-tank ATG testing or any other specific function not specified in the installation contract. ATG systems may have any number of uses, and may be installed without any intent to use the systems to conduct monthly in-tank testing (and such systems may legitimately be installed without the hardware and software necessary to do so). Mr. Buckner provided an example of Euclid's own use of such systems other than for in-tank testing. Mr. Buckner opined that he believed that Euclid's ATG units were not a reliable method of tank release detection, TR-10 at 202-203, but he noted that the ATGs were quite useful "for the convenience of detecting water in the tank and not having to go out in the cold weather and open up the tank gauge and stick it with the – and find out what the inventory is." TR-10 at 203. Respondent apparently used the tank level indicator function of its ATGs on a regular basis, using the ATGs in place of manual "sticking" the tanks to measure product inventory levels. *See, e.g.*, TR-2 at 184, TR-3 at 54, TR-7 at 66-67, TR-10 at 203.

The signing of an ATG installation contract does not impose an obligation on the installer to attempt to determine the owner's intended use for the unit or to otherwise act as a compliance consultant. ATG systems may come with a multitude of possible options in terms of software, probes and other connections, but the ATG installer will only install what he or she is contracted to install. It is the responsibility of the facility owner to request, maintain and operate the proper

equipment and software to accomplish the task or tasks for which the *owner* intends the ATG unit to be used. Moreover, an *installer* cannot possibly be relied upon to maintain an ATG unit, nor would any reasonable owner believe that the installer will, without further compensation, check the unit on a monthly basis to determine if passing results have been obtained.

Similarly, in the absence of an ongoing maintenance contract, it would be completely unreasonable to expect the *installer* of a sump sensor system to ensure that the system is operational on an ongoing basis, nor is it reasonable to expect the installer to train the convenience store lessees who collect for gasoline sales as to the proper response to system alarms. These functions are not in any way inherent in the mere fact that a contractor is hired to install a piece of equipment.

Euclid's argument makes even *less* sense with regard to Euclid's failure to conduct required cathodic protection testing on its steel tanks. Euclid was found to have delayed testing which had been required to have been conducted for many years prior to the date on which Euclid (prompted by EPA) finally arranged for testing. *See* Initial Decision at 78, 81, 85, 89-90, 94. Euclid's argument would have us believe that the penalty should be reduced because the unidentified contractor who *installed* the cathodic protection system did not *on his own* return to conduct required periodic testing..

Respondent's argument with regard to *improper* cathodic protection testing paid for by Euclid may have some superficial appeal. Complainant alleged – and proved – that cathodic testing performed by a Euclid contractor, Piping & Corrosion Specialties, Inc., after the filing of the original Complaint, did not meet the requirements for proper cathodic protection testing.

Initial Decision at 81-82, 85-88, 90-91, 95. It was not unreasonable for Euclid to place *some* reliance on the representations of its contractor that testing would be properly performed. However, upon a closer examination of the facts, Euclid's arguments for penalty mitigation do not hold up. Euclid, in each instance, had been in violation of the requirement for cathodic protection testing for many *years* prior to engaging Piping & Corrosion Specialties, Inc. (which occurred only *after* the filing of the original Complaint in this matter). Thus the failure of Euclid's contractor to use proper testing methods only briefly extended the duration of violations which had *already* extended for years. That portion of the penalty for Euclid's failure to conduct testing which is attributable to Euclid's reliance on Piping & Corrosion Specialties, Inc. is thus minimal at best.

As noted above, however, for one type of violation, Complainant's proposed penalty calculation afforded Euclid a reduction on the basis of Euclid's presumed reliance on a contractor. A drop tube overfill valve is one of the few pieces of UST compliance equipment with which the owner/operator is generally not required to interface after installation. Of course, it is always the owner/operator's responsibility to ensure compliance, and Euclid introduced no evidence to indicate that a contractor committed deliberate fraud, so a significant penalty is still warranted for instances where Euclid failed to ensure that its unidentified contractors correctly install drop tube overfill valves. For those counts in which a drop tube overfill valve was present but incorrectly installed, Complainant nonetheless gave Euclid every benefit of the doubt, and applied a 25% reduction for reduced culpability, the maximum allowed under the UST Penalty

Policy. The generosity of this reduction becomes more evident when one considers Euclid's complete failure to establish that it exercised due care in selecting and overseeing its contractors.

To the extent that Euclid is arguing that its reliance on contractors should mitigate the penalty which would otherwise be imposed, this argument goes beyond Complainant's *prima facie* case, and is thus an affirmative defense on which Euclid bears both the initial burden of coming forward with evidence and the ultimate burden of proof. *Mayes*, slip op. at 48 and fn 28; *Capozzi ,* 11 E.A.D. at 30, fn 27; *Spitzer,* 9 E.A.D. at 320. Euclid, however, introduced no evidence even as to the *identity* of the supposed contractor for any given installation. Further, while Euclid has repeatedly claimed that these unnamed installers were "state-certified," it has introduced no evidence to that effect. In the absence of actual evidence, Euclid appears to be arguing that the installers *must* have been certified simply because the states *required* that they be certified. Respondent's Appeal Brief at 14-15. Given the massive scope of the regulatory noncompliance proved in this case, it is ironic, to say the least, for Euclid to attempt to argue that a *requirement* that it use only state-licensed contractors was by itself evidence that Euclid *did* use only such licensed contractors.

Moreover, a mere claim to have used "state-certified" contractors falls far short of establishing due care in ensuring compliance with regulatory requirements. Mr. Buckner testified that he considered a license sufficient proof that a contractor could properly install UST compliance equipment, TR-10 at 103, but this assumption is no more reasonable than would be an assumption that anyone with a driver's license is a good driver, or the assumption that anyone with a law degree is qualified to argue one's case before the Supreme Court. Complainant's

expert witness, Mr. Cignatta, is involved with the planning and teaching of certification course, and testified that the state committees responsible for those certification courses are careful not to portray completion of the courses as a guarantee of competence. *See* TR-9 at 127-129.

In fact, Mr. Buckner admitted, on *direct* examination by Mr. Yuen, that in most instances he did not even require documentation of this minimal level of qualification. When asked if he was shown a copy of each contractor's license and insurance prior to each job, Mr. Buckner replied only that "I have requested that from certain people in the past, yes." TR-10 at 103. This lack of inquiry into the qualifications of its contractors is particularly telling given Respondent's continued refrain that one UST violation after another was not its fault but was the fault of its contractors. If one is to credit Euclid's argument that its contractors were responsible for each of the multitude of violations in this case, one would have to conclude that Euclid had a particular knack for hiring incompetent contractors.

As discussed above, in most instances Euclid's violations are primarily a result of Euclid's own lack of ongoing follow-up, not the result of incorrect equipment installation. However, even in situations where equipment was incorrectly installed, the circumstances make it very difficult to believe that Euclid exercised due care in choosing its contractors. For example, during an inspection of the Barlow Road Facility on June 17, 2003, it was discovered that the valves for *both* tanks at the Facility had been installed *upside-down*, and were therefore completely inoperable. Stipulation 115, TR-8 at 56-58, TR-14 at 135-137, Complainant's Ex. Y-21 at 1741, Figure 24, Respondent's Exs. X-7 at 9011, X-10 at 3567. Even the brief introduction to drop tube overfill valves provided at the Hearing would be sufficient to make it clear to

anyone attempting to install such a valve that the float must pivot upward in order to activate the valve. *See* TR-7 at 180-186, Complainant's Exs. Y-38 at 1993, Y-39 at 1997. The upside-down installation of *two* such a valves at the same facility could not possibly have been done by a contractor with even the most rudimentary familiarity with the operation of such valve. It is hard to imagine that such an obviously faulty installation could have occurred if Euclid had made a reasonable effort to ascertain the knowledge, credentials and experience of its installation contractor.

There is no way of knowing the actual credentials of the contractor who installed the Barlow Road overfill valves because, as with every other installation, Euclid has introduced no evidence as to the identity of the installer. However, it is reasonable to infer from the upside-down valve installation at the Barlow Road Facility that Euclid, in at least that instance, selected its contractor primarily with regard to factors such as price and availability, rather than as a result of a reasonable inquiry into the contractor's qualifications.

Euclid's reliance on *In re Rybond, Inc.*, 6 E.A.D. 614 (EAB 1996), is misplaced. In *Rybond*, the Board reduced a default penalty upon finding that Rybond did not have direct control over the violation, the storage of hazardous waste without a permit. 6 E.A.D. at 639-640. In *Rybond*, however, the respondent's connection to the violation was particularly indirect. Rybond leased space to a number of different parties, and EPA did not dispute Rybond's claim that it was unaware of the storage of hazardous waste by a third party lessee over which Rybond had no direct control. 6 E.A.D. at 639-640. This situation is very different from Euclid's case, where the violations involved underground storage tanks which were directly owned and

operated by Euclid, and which were integral to Euclid's business of selling gasoline. Euclid itself selected and hired the contractors to whom it is attempting to pass the blame, and Euclid at all times had direct control over, and responsibility for, its own UST systems. In fact, Mr. Yuen made it very clear to EPA that the lessees who operated the convenience stores at Euclid's facilities and collected money for gasoline sales were *not* responsible for anything below the ground at Euclid's facilities. TR-4 at 32-33. According to Mr. Yuen, when it comes to the USTs, "the buck stops at Euclid." TR-4 at 32-33.

Closer to Euclid's situation is another case, *In the Matter of Philadelphia Macaroni Co.*, 1998 EPA ALJ LEXIS 34 (ALJ 1998), in which the respondent attempted to argue for a reduced penalty by claiming that its failure to prepare a proper Spill Prevention Control and Countermeasure ("SPCC") plan for a 10,000 gallon oil tank was the fault of its installation contractor. The presiding officer in *Philadelphia Macaroni* found the respondent to be culpable for the violation, and declined to reduce the penalty on the basis of a document produced by the respondent which purported to establish that the installation contractor was responsible for ensuring compliance with environmental laws. The presiding officer found that reliance on the claimed document was not reasonable, noting that the claimed document merely indicated that the contractor would take care of all necessary state and local permits. 1998 EPA ALJ LEXIS 34 at 14-16. The presiding officer in *Philadelphia Macaroni* found the argument for a reduction in penalty to be unpersuasive even where the respondent had written documentation that the contractor had *some* responsibility for regulatory compliance. In contrast, Euclid has not produced any documentary evidence whatsoever that regulatory compliance was part of its

installation contracts, nor is it reasonable to infer that installation contracts would necessarily include ongoing monitoring and maintenance. Euclid's arguments are thus even *less* persuasive than the argument rejected in *Philadelphia Macaroni*.

In sum, Euclid has failed to provide even the most basic evidence of a reasonable reliance on its contractors, and certainly has not provided such convincing evidence to warrant overturning the penalty determinations of the Presiding Officer, made after observation of the various witnesses in this matter.

b. *Lack of Documented Releases*

Respondent repeatedly argues that substantial penalties are not warranted because Complainant has not proved that the violations resulted in actual environmental harm. However, a violation may be "serious because of its potential for harm, regardless of whether actual harm occurred. Proof of actual harm to the environment need not be proven to assess a substantial penalty." *In re V-1 Oil Co.*, 8 E.A.D. 729, 755 (EAB 2000), citing *In re Everwood Treatment Co.*, 6 E.A.D. 589, 602-03 (EAB 1996), *aff'd*, *Everwood Treatment Co. v. EPA*, No. 96-1159-RV-M (S.D. Ala., Jan. 21, 1998). *See, also, In re Woodcrest Mfg., Inc.*, 7 E.A.D. 757, 780 (EAB 1998) (any lack of actual harm to the environment resulting from a respondent's violation . . . is not grounds for reducing the penalty).

Euclid's argument misses the entire point of the UST regulations, which are primarily prophylactic in nature. All underground storage tanks have finite useful lives, but it is impossible to determine exactly when a given UST system will fail. The UST regulations therefore deal primarily with the prevention of *risk*, and contain provisions designed to directly reduce the risk

of releases (*e.g.*, the corrosion prevention and overfill prevention requirements), provisions designed to ensure that releases are detected as early as possible to minimize the environmental harm (*e.g.*, the tank and line release detection requirements), and provisions designed to ensure in advance that sufficient resources will be available to properly and timely address releases which do occur (*e.g.,* the financial responsibility requirements). *See* TR-10 at 4-6.

Few of us would dare to board an airliner knowing that the airline has not performed mandated safety inspections for several years. Moreover, as citizens we would expect our government to severely penalize the airline in such a situation even if no actual crashes had occurred in the past as a result of the airline's failure to perform inspections. The potential harm in the case at bar may not invoke the visceral image of violent mass death that one imagines resulting from an airplane crash, but the potential harm to human health and the environment in this case is substantial nonetheless. In addition to the many chronic health risks posed by a leaking UST, one of the risks is in fact a risk of violent injury or death: a release leading to vapor intrusion into an enclosed space may lead to an explosion in an inhabited building. Complainant's Exs. Y-22 at 1767-1768, Y-23 at 1786-1788. In view of the serious risks posed by USTs, Euclid's failure to perform valid methods of release detection, failure to maintain and test cathodic protection systems, failure to ensure the presence of proper overfill and spill prevention devices and failure to maintain assurances of financial responsibility cannot be dismissed as mere "technical violations," as claimed in Euclid's Brief. Respondent's Appeal Brief at 17.

The point of the UST regulations violated in this case is not to clean up releases and compensate victims, but to *avoid* expensive clean-ups, tort liability and human suffering by minimizing the risk of a release, and by detecting any release before it can cause major damage. If Euclid were to have a release of regulated substances, then Euclid would be subject to *additional* requirements to report, investigate and remediate that release. *See*, 40 C.F.R. Part 280, Subpart E, 20 DCMR Chapter 62, 9 VAC 25-580 Part V, and COMAR § 26.10.08.

In addition to the severe risks posed by Euclid's violations, those violations harm the regulatory program. For example, Euclid's insistence that its own "pen in hand" method of tank release detection is superior to the requirements of the UST regulations is an attempt to substitute Euclid's judgment for the judgment of EPA and the states in promulgating the UST programs at issue. Euclid's actions and inactions undermine the regulatory scheme developed by EPA, the Agency entrusted by Congress to make the determination as to the proper manner in which to protect the environment from the risks of underground storage tanks.

Euclid's reliance on *U.S. v. DiPaolo*, 466 F.Supp.2d 476 (S.D.N.Y. 2006), is misplaced. The EAB has made very clear its belief that it is rarely, if ever, fruitful to attempt to compare the penalties imposed in different cases, given the particular facts and nuances which are present in each case. *In re FRM Chem, Inc., a.k.a. Industrial Specialties*, Appeal No. FIFRA-05-01, Slip Op. at 20, 112 E.A.D. ___ (EAB June 13, 2006); *In re Chem Lab Products, Inc.*, 10 E.A.D. 711, 728-733 (EAB 2002); *In re Newell Recycling Co.,* 8 E.A.D. 598, 642-643 (EAB 1999), *aff'd* 231 F.3d 204 (5th Cir. 2000). Moreover, the facts in *DiPaolo* are very different from those in the case at bar. In *DiPaolo,* the federal court ruled that EPA was entitled to the full $80,317 civil penalty

which had been previously assessed in an EPA administrative proceeding, and also awarded an *additional* $9,000 penalty for DiPaolo's failure to comply with EPA's compliance order. *DiPaolo*, 466 F.Supp.2d at 486-487. While this additional penalty was much less than the *statutory maximum* of approximately $42 million which could have been imposed, Euclid is incorrect in stating that the $42 million figure represents the number generated by EPA's penalty guidelines (which, as noted above, normally generate penalties which represent but a minute fraction of the statutory maximum). The *DiPaolo* court did note the apparent lack of actual environmental harm caused by the violations, but the court's justification for the imposition of relatively small *additional* penalties relied heavily on the defendant's apparently limited financial resources coupled with the expense the defendant would incur to pay the already-assessed penalty and to meet the terms of the compliance order. *DiPaolo*, 466 F.Supp.2d at 486-487. This situation is quite different from the case at bar, where Euclid has made no claim of financial hardship. To the contrary, Euclid has continued to attempt to defend against its financial responsibility violations by claiming that its vast financial resources make it unnecessary for it to follow the requirements set forth in the UST financial responsibility provisions. *See, e.g.,* Respondent's Appeal Brief at 58-59.

c. *Use of Inventory Control*

Euclid argues that the penalties assessed for its tank release detection were "excessive," and appears to link this assertion to "a disagreement between Euclid and the EPA regarding the proper method of inventory reconciliation." Respondent's Appeal Brief at 14. *See, also,* Respondent's Appeal Brief at 30-31. This argument is unpersuasive for a combination of

reasons. As demonstrated in detail in Complainant's facility-by-facility discussion of tank release detection violations, Complainant's Initial Post-Hearing Brief at 64-86, most of Euclid's tanks were simply ineligible for the use of inventory control, which is allowed only as a temporary method due to the method's low level of reliability. The regulations are very clear as to this restriction on the use of inventory control, and thus Euclid's purported use of inventory control can hardly be viewed as a good faith effort to comply with the regulations. In fact, Euclid was clearly using its methods of inventory control for its own business purposes, and it is thus dubious, at best, that protection of the environment was a motivating factor in Euclid's use of inventory control.

In addition, as discussed at length in this Brief with regard to Complainant's Cross-Appeal, Euclid's method of inventory control, particularly the failure to perform monthly reconciliations which could be applied to the regulatory standard and the improper use of a running book inventory, fell far short of what is required by the UST regulation.

Later in its Appeal Brief, Euclid raises additional arguments with regard to inventory control. Euclid argues that Complainant's arguments with regard to inventory control are based on "policy" instead of on the UST regulations. Respondent's Appeal Brief at 26-28. Respondent's methods of inventory control, however, clearly violate the UST regulations directly, even without reference to the inventory control pamphlet, Complainant's Ex. Y-18, which EPA produced in order to assist the regulated community in conducting inventory control. The regulations require that inventory be reconciled monthly to determine compliance with a specified standard. As discussed at length, above, Euclid's purported reconciliations, as

stipulated by Euclid, did not provide any information whatsoever with regard to "flow-through" of gasoline, and did not include a comparison of Euclid's "reconciled" figures to the monthly "flow-through," as required by the regulations. Further, Euclid's starting number for each month's "reconciliation" was a "running" book inventory which retained previous errors and other discrepancies going back to Euclid's initial operation of each tank. Any inventory reconciliation with these deficiencies cannot be deemed to be "conducted monthly to detect a release of at least [the relevant regulatory standard[21]] on a monthly basis," as required by the regulations, regardless of anything contained or not contained in Complainant's Ex. Y-18. Complainant's Ex. Y-18 does provide examples for the regulated community of what a proper monthly reconciliation might look like, but the basic requirements, that each monthly reconciliation address the regulatory leak threshold and take into consideration deliveries and sales for one month only, are inherent in the regulation itself.

The UST regulations also discuss reconciliations as being performed for a single tank, and the Presiding Officer correctly interpreted this language to mean that reconciliations must be performed on a tank-by-tank basis unless EPA has elsewhere provided otherwise. Initial Decision at 18-19. This interpretation is based upon the regulations themselves. EPA's guidance pamphlet does no more than allows a limited *exception* to this rule by allowing the combined reconciliations for specified tank configurations (manifolded tanks and blended tanks)

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[21]Under the federal UST program and the District of Columbia and Virginia UST programs this figure is "at least one percent of flow-through plus 130 gallons." 40 C.F.R. § 280.43(a), 20 DCMR § 6005.1 and 9 VAC 25-580-160.1. Under the Maryland UST program the figure is "one-half of one percent of the metered quantity.: COMAR § 26.10.05.04.B(1).

where per-tank reconciliations are extremely impractical. Complainant's Ex. Y-18 at 1583. The guidance pamphlet thus creates no new obligations, but instead merely *reduces* the burdens on the regulated community. These exceptions, however, are narrow and apply only to the specific situations set forth in the pamphlet. Complainant's Ex. Y-18 at 1589. If Euclid does not believe that interpretation in the pamphlet should be accorded weight, then the result would be that the exception would be unavailable, and inventory control in all instances would have to be conducted for only one tank a time.

The interpretation that inventory control is to be performed on a tank by tank basis is consistent not only with the language of the regulation but also with the purpose of the regulation. A reconciliation which combines tanks when not absolutely necessary introduces the additional risk that an error for one tank would mask a leak in another. For example, a leak of about 3,000 gallons from one tank at a facility could be masked by the failure to record a similar-sized delivery to another tank.

Euclid also attempts to argue that it utilized inventory forms provided by USTMAN, Inc., a provider of statistical inventory reconciliation ("SIR") services, and claims that the alleged use of these forms somehow show compliance with the inventory control requirements. Respondent's Appeal Brief at 28-29. However, Respondent admits that these forms were never introduced into evidence, Respondent's Appeal Brief at 29, and in fact the forms have never been produced for Complainant's inspection. The only documentary evidence with regard to these forms is an alleged summary showing facilities and months for which these undisclosed records were allegedly prepared. Respondent's Ex. X-2. Mr. Yuen, the sole witness who testified

regarding Respondent's Ex. X-2, did not, and could not, lay a foundation for any of the information set forth in this document. Mr. Yuen testified that he did not prepare Respondent's Ex. X-2, but that the document was instead created by a Euclid contractor, a Mr. David[22], as part of Euclid's preparation for the Hearing. TR-13 at 69. Mr. David did not testify at the Hearing, was never listed as a witness, and was not disclosed to Complainant as the author of Respondent's Ex. X-2 until Mr. Yuen's testimony at the Hearing. Mr. Yuen did not verify the accuracy of Respondent's Ex. X-2, and in fact Mr. Yuen testified that the document was *not* accurate. TR-13 at 218-220.

Respondent's arguments with regard to these phantom USTMAN documents are entitled to no weight whatsoever, either with regard to liability or to penalty. Respondent argues that Respondent's Ex. X-2 shows that proper reports were prepared, but fails to provide even the most basic foundational testimony to support the use of the document. Complainant has been given no opportunity to examine the underlying documentation which Respondent's Ex. X-2 purports to summarize, and Complainant has been afforded no opportunity to cross-examine the individual who allegedly prepared Respondent's Ex. X-2 to determine if this individual – identified by first name only – had any expertise or knowledge whatsoever with regard to the nature of the documents he allegedly summarized. There was clearly no error in the Presiding Officer's decision to give no weight to Euclid's arguments with regard to the purported USTMAN documents. *See* Initial Decision at 20.

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[22]Apparently "David" was the individual's first name. Mr. Yuen could not even remember the individual's last name. TR-13 at 69.

It should also be pointed out that Complainant's penalty calculation for tank release detection violations was already very conservative, despite the large overall numbers generated due to the breadth and duration of the violations. Where an ATG was present at a Euclid facility, Complainant reduced the "extent of deviation" level to "moderate" instead of the "major" level called for in the Penalty Policy. *See* Complainant's Ex. Y-13 at 1268-1269. This penalty reduction was quite generous, given that Euclid's ATGs were either not programmed to perform testing or were otherwise not generating valid results. *See* Complainant's Post-Hearing Brief at 280-281. Further reductions are not warranted solely on the basis of the grossly-deficient application of a tank release detection method – inventory control reconciliation – which in most instances was no longer allowed due to its poor reliability even when properly performed. Certainly the Presiding Officer's failure to make further penalty reductions on the basis of Euclid's weak efforts at inventory control was not a "clear error or an abuse of discretion" sufficient to disturb the Presiding Officer's penalty determination. *See Mayes*, slip op. at 58.

d. *Coating and Wrapping of Metal Components*

In its penalty discussion Euclid hints at, but does not detail, an argument with regard to "wrapping" of "small metal fittings." Respondent's Reply Brief at 14. Respondent goes into this argument in greater detail later in its Brief. *See, e.g.,* Respondent's Appeal Brief at 49-50, 53. Essentially, Euclid argues that its alleged coating and wrapping of metal piping components in contact with the ground was accepted by MDE as a method of isolating metal components from

the ground to avoid the need for cathodic protection. The evidence does not support Euclid's position.

Respondent introduced testimony from its contractor, Ted Beck, regarding an alleged MDE fact sheet, but Respondent did not enter this fact sheet into evidence or provide a copy to Complainant. TR-14 at 110-111. Mr. Beck interpreted this elusive fact sheet as allowing the use of coating or wrapping to prevent buried piping and flex connectors from being considered in contact with the ground.[23] TR-14 at 110. Mr. Beck described briefly what he thought were the proper procedures for coating and wrapping piping, TR-14 at 112, although the Presiding Officer had previously rejected Euclid's attempt to have Mr. Beck qualified as a corrosion protection expert. TR-14 at 90-91, 104-105.

Countering Mr. Beck's testimony was testimony from John Cignatta, Complainant's expert witness, who was accepted by the court as an expert on a number of UST-related issues, including cathodic protection[24]. TR-7 at 41. Mr. Cignatta testified that he is aware of a Maryland guidance document regarding the coating and wrapping of metal flex connectors, but

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[23]It should be noted that Mr. Beck's assertion as to MDE's position is inconsistent with the testimony of Jackie Ryan, the MDE inspector who testified in this case. *See* TR-2 at 130-131.

[24]Mr. Cignatta's impressive credentials are summarized in Complainant's Initial Post-Hearing Brief at 153-156. Mr. Cignatta's credentials were set forth in even greater detail on the record at TR-6 at 171-214, and his resume may be found at Complainant's Ex. Y-21 at 1758-1763. Particularly with regard to corrosion control and cathodic protection in particular, Mr. Cignatta can only be described as one of the leading experts in the field.

this guidance does not apply to straight steel piping such as the piping at issue. TR-15 at 118-119. Mr. Cignatta, testifying as a corrosion expert, described an exacting three-layer process for coating and wrapping to isolate flex connectors from the ground, including the use of a primer layer, a second layer of thick, "conformal" or "gummy" wrapping, and a third layer of rigid, hard plastic tape, with each layer being specifically designed for direct burial application and exposure to hydrocarbons. TR-15 at 119. Moreover, this option is only acceptable when approved by the specific flex connector manufacturer. TR-15 at 199-120.

Euclid did not introduce into evidence the claimed Maryland guidance document, and did not provide expert testimony regarding proper methods of coating and wrapping steel piping to avoid contact with the ground. While Mr. Cignatta agreed that flex connectors could under some circumstances be coated and wrapped as a method of isolation, none of the alleged violations for metal piping in contact with the soil at Euclid's facilities involves flex connectors, with the possible exception of Count 18, where *part* of the underground metal piping may have included a flex connector.

Mr. Beck, Euclid's contractor, did testify that an MDE inspector "approved" the use of coating and wrapping with regard to the underground portion of piping connected to an *above*ground storage tank at the Ocean Gate Highway Facility in Trappe, Maryland. TR-14 at 113-115. This testimony does not provide any description whatsoever as to the particular methods of coating and wrapping which the MDE inspector allegedly "approved."

The actual facility-specific evidence presented at the Hearing provided no support for Euclid's coating and wrapping argument. The evidence, including photographs, showed little or no indication of wrapping of any kind, and neither the photographs nor Mr. Beck's testimony evidenced a manner of wrapping and coating even remotely resembling the exacting system of coating and wrapping described by Mr. Cignatta.[25] The Presiding Officer properly credited Mr. Cignatta's testimony and rejected Euclid's arguments with regard to the alleged coating and wrapping of metal piping components. Initial Decision at 83-84, 89.

e. *Relationship of Penalty to Economic Benefit*

Euclid argues that the economic benefit in this case was "minimal for all violations," Respondent's Appeal Brief at 17, implying that this somehow warrants a reduction in the penalty. However, Euclid does not cite any authority establishing that the ratio of measured economic benefit to the proposed gravity-based penalties is a relevant penalty factor. Respondent's argument finds no support in any of EPA's penalty policies, and in fact there are a number of reported cases in which substantial penalties have been imposed without EPA proving any economic benefit at all. *See, e.g., In the Matter of Ronald L. Hunt*, Docket No. TSCA-03-2003-0285, Slip Op. (March 8, 2005), *aff'd*, Appeal No. TSCA-05-01, 12 E.A.D. ___ (EAB August 17, 2006) (total penalty of $84,224.80 imposed despite "no documentation evidencing that Respondents accrued any financial gain due to the violations"); *In the Matter of Dearborn*

[25]A discussion of this evidence, with record citations, may be found in Complainant's Initial Post-Hearing Brief at 184-185, 195, 196-197, 210-211.

Refining Company, RCRA-05-2001-0019, Slip Op. (August 15, 2003) (Penalty of $1,250,000 imposed although complainant declined to prove an economic benefit). In view of Euclid's contumacious response to repeated warnings by the states and EPA, the alleged lack of economic benefit would seem to have little relevance to the key enforcement goal of deterrence.

In this case the level of calculated economic benefit, while much smaller than the gravity-based penalty, was nonetheless far from inconsequential. Further, in a case such as this there is a substantial gap between the final calculated economic benefit and the economic benefit which *would have* accrued had the Respondent not been forced *by EPA* to spend money to come into compliance. In many instances in this case Complainant calculated the economic benefit on the basis of "delayed costs," *i.e.*, the benefit (tied to interest rates and the cost of money) gained by delaying until a later date compliance costs which should have been spent at an earlier date. The benefit gained by delaying an expense is obviously much lower than the benefit of altogether avoiding the same cost. In this case, though, many of the calculated delayed costs had not yet been incurred by Euclid at the time of the Hearing (and may not yet have been incurred as of the date of this Brief), but Complainant's penalty calculation assumed that Euclid would eventually be required to come into compliance and thus would eventually incur the necessary expenses. If Complainant had not brought this enforcement action, Euclid might never have taken any required actions, and thus many of the"delayed costs" calculated by Complainant would have been avoided altogether.

In addition, Complainant provided strong evidence at the Hearing that Euclid enjoyed a particularly large economic benefit by attempting to run all aspects of a large empire of gas stations with only two employees, instead of hiring an environmental manager or consultant to ensure compliance with the UST regulations, as did nearly all companies of similar size. *See* Complainant's Initial Post-Hearing Brief at 398-401 and record citations noted therein. The Presiding Officer appears to have completely overlooked Complainant's evidence and arguments in this regard, which are not mentioned, favorably or otherwise, in the Initial Decision. Complainant has chosen not to appeal the Presiding Officer's failure to add an *additional* penalty to account for the huge cost savings Euclid reaped by using a skeleton staff incapable of keeping track of its obligations under the UST regulations. However, the clear and uncontroverted evidence provided by Complainant is an additional reason to reject Respondent's claim that the Presiding Officer erred in not reducing the penalty due to the level of the economic benefit penalty which the Presiding Officer added to the gravity-based portion of Complainant's proposed penalty.

f. *Deviations from Penalty Proposed in Amended Complaint*

Euclid asserts that it was somehow improper for the Presiding Officer to award penalties which, in some instances, exceeded the penalties proposed by Complainant in the Second Amended Complaint. At the outset it should be noted that there is nothing in either RCRA or the Consolidated Rules of Practice which prohibit a presiding officer from awarding a greater penalty

than that sought by the complainant. The Board has in at least one case upheld the penalty determination in which the presiding officer awarded more than was sought by the complainant in either the complaint or Complainant's post-hearing brief. *See, In re Chippewa Hazardous Waste Remediation & Energy, Inc.*, CAA Appeal No. 04-02, 12 E.A.D. ___ (EAB December 30, 2005).

In this case, however, the Presiding Officer did not, for any count, award a higher penalty than that sought by Complainant in its Initial Post-Hearing Brief. Complainant's Initial Post-Hearing Brief clearly explained Complainant's penalty calculation for each and every count, and the Presiding Officer correctly adopted the rationale in Complainant's Initial Post-Hearing Brief, except for limited instances where he *reduced* by the Presiding Officer and specifically explained the reasons for the reduction.

As was clearly noted in Complainant's Initial Post-Hearing Brief, the penalty proposed in such Brief was not identical to the penalty proposed in the First Amended Complaint because it was modified to reflect the evidence actually adduced at the Hearing, which included documents not produced by Euclid in discovery until after the filing of the First Amended Complaint. *See*, Complainant's Initial Post-Hearing Brief at 280. For some counts the penalty proposed in Complainant's Initial Post-Hearing Brief was *lower* than that proposed in the First Amended Complaint, and the *overall* penalty proposed was *lower* than the overall penalty proposed in the First Amended Complaint. However, for some counts the penalty proposed in Complainant's

Initial Post-Hearing Brief was greater than that proposed in the First Amended Complaint, primarily where Euclid's last-minute document production demonstrated that a violation was ongoing and had thus extended for longer than the period assumed in the earlier penalty calculation.

g. *"Enforcement Lottery" Argument*

Respondent argues that "if penalties like the one imposed in this case are the norm, then the service station business will be transformed into an enforcement lottery, with those selected for enforcement being driven out of business." Respondent's Appeal Brief at 19. No support is provided for this assertion. It is Complainant's hope that other service station owners do not engage in the type of widespread pattern of noncompliance and disregard for the warnings of regulatory agencies violations that led to the penalties assessed by the Presiding Officer in this case. EPA has on a number of occasions litigated and/or settled UST cases which resulted in far lower penalties than those here imposed, but such cases involved fewer facilities, fewer and shorter periods of violation and more attentive responses to regulatory warnings.

Further, Respondent's dire prediction that service station owners will be driven out of business disregards the provision in the UST Penalty Policy under which EPA takes into consideration whether a respondent has the ability to pay a given penalty. Complainants's Ex. Y-13 at 1259-1260. In this case Respondent did not raise ability to pay as a defense, or make any attempt to demonstrate that the proposed penalty would represent an undue hardship to its

business.[26] To the contrary, Euclid has not only *admitted* vast financial resources, but has actively argued that the fabulous wealth that Euclid's gas stations have earned for Mr. Yuen (together with various LLCs and family trusts which Mr. Yuen controls) should excuse or mitigate Euclid's failure to comply with the express dictates of the financial responsibility regulations.[27]

h. *"Bad Technology" Argument*

Continuing its efforts to deflect the blame for its own acts and omissions, Euclid also attempts to argue that its violations are the fault of the ATG manufacturers. Euclid argues that ATG technology "was problematic, until the ATG equipment was upgraded by the various manufacturers after the period at issue in this case." Respondent's Appeal Brief at 20. According to Euclid, ATG technology "was unreliable" until the after EPA's investigation in this case, when there was a "substantial improvement in the available technology." Respondent's Appeal Brief at 21. At another point in its brief Euclid states that "ATG equipment and

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[26]Where, as here, the statute does not include ability to pay as a specific factor EPA must consider in deriving a penalty, *see* 42 U.S.C. § 6991*e*(c), the burden falls on the respondent to raise and prove inability to pay. *See, e.g., In the Matter of Central Paint and Body Shop, Inc.*, 2 E.A.D. 309 (CJO 1987).

[27]Euclid claims that a combination of various entities controlled by Mr. Yuen holds real property with a net worth of approximately $16 million, Respondent's Ex. X-13 at 3591-3592, and, in addition, claims that these entities control "an inventory of readily saleable petroleum products and a cash reserve" and "other assets" which would "double the net worth as reported." TR-6 at 77.

methodology had not evolved to the point where it was consistently providing reliable test results." Respondent's Appeal Brief at 33.

These claims, for which Respondent cites no evidence, will certainly come as a surprise to the thousands of tank owners who for many years have successfully performed tank release detection using ATG systems. Complainant's expert witness, John Cignatta, testified that the Veeder-Root ATG systems used by Euclid have been used successfully at many other gas stations, so long as the units are properly used and are appropriate for the particular facility at which they are installed. TR-15 at 121-124. Euclid's problem with its ATG systems did not occur because of a problem with the technology, but with Euclid's own failure to educate itself as to the proper ways in which the technology may be used.

"In-tank" or "periodic" ATG testing, as contemplated in 40 C.F.R. § 280.43(d), 20 DCMR § 6008, 9 VAC 25-580-160.4, or COMAR § 26.10.05.04.E, involves the measurement of changes, if any, in the level of product in a tank over a period of time during which no product is added to or dispensed from the tank. After adjusting for temperature and pressure changes during the test period, the ATG then calculates a rate of change in the tank product level and compares this rate to the 0.2 gallon per hour regulatory standard.

Euclid failed to get valid ATG in-tank testing results for several different reasons, not one of which had to do with defects in the technology. At some of its facilities, Euclid had installed ATGs, but had not programmed those ATGs to conduct in-tank testing, and therefore generated

no "in-tank" test results at all. Stipulations 8, 89, TR-2 at 60-61, 66-67, 131, TR-3 at 156, TR-4 at 133-134, TR-5 at 10, Complainant's Ex. N-8 at 0641. At other facilities Euclid could not get passing results because the stations had no "idle time" in which to run the test, *see* TR-2 at 47-48, TR-4 at 91, TR-14 at 156, because the stations operated 24 hours per day, seven days per week. Stipulations 19, 72, 82, 91, 118, 126, 135. When gasoline was dispensed during an in-tank test, the test would either register as "fail" (meaning a release was suspected) or as "invalid" (meaning that no conclusion could be drawn one way or another as to whether a release had occurred). TR-4 at 98, TR-11 at 185-186. An invalid test does not tell the owner/operator whether or not the tank is leaking, and thus, from a regulatory standpoint, an invalid test is the equivalent of no test at all.

At other facilities, Euclid's ATGs were attempting to conduct tests, but would get invalid results for other reasons, such as low product levels, product level increase (*i.e.*, a delivery during the test) or excessive temperature changes during the test. *See, e.g.*, TR-9 at 153-154, Complainant's Exs. D-9 at 0219, O-6 at 0691, O-8 at 0698-0699, 0703-0706, 0708-0710. Although some ATGs – including Veeder-Root ATGs – are fairly sophisticated devices which can take into consideration minor temperature and air pressure changes during the test period in calculating whether a tank is leaking, there is a limit to the degree of temperature and pressure changes during a test for which a given ATG can adjust. If the temperature and/or pressure change during the test period exceeds the range within which that specific ATG can obtain valid

results, then the ATG will record the test as "invalid." TR-4 at 101, TR-9 at 153-154, TR-14 at 155-156. Similarly, an ATG will record a test as "invalid" if the level of product in a tank at the start of the test is less than a minimum level necessary to determine that the entire tank is not leaking. TR-4 at 88, 101, TR-14 at 155-156. Owners/operators who successfully use in-tank ATG testing tank care to schedule in-tank testing for times when the tanks are most likely to have high product levels and stable temperatures, and also schedule testing to occur multiple times each month, to ensure that a valid result can be obtained every 30 days even if conditions at the time of a given test may not allow the ATG to generate a valid test result. TR-15 at 122-123.

Euclid's ATGs also had another problem in obtaining valid test results. Euclid's UST systems include a number of "manifolded" tank systems, where two tanks containing the same grade of gasoline are connected by a siphon. In a manifolded tank system a single pump conveys gasoline out of both tanks to the dispensers, and the siphon equalizes the flow of product between the two tanks. TR-7 at 43-44. Because of the ongoing equalization flow of product between the two manifolded tanks, the Veeder-Root ATGs cannot conduct a traditional multi-hour in-tank test (also referred to as a "static" test) on manifolded tanks. TR-7 at 44-46. Veeder-Root ATGs will *run* a static test on manifolded tanks, and will produce a calculated leak rate, but the ATG will *not* designate the test as a passing test. TR-7 at 46-47. The manufacturer makes no claims as to the reliability of such a calculated number, and has never even attempted to conduct testing to determine if such a test complies with the performance standard set forth in 40 C.F.R.

§ 280.43(d), 20 DCMR § 6008, 9 VAC 25-580-160.4, and COMAR § 26.10.05.04.E. TR-2 at 48-49, TR-4 at 177-178, TR-7 at 48, Complainant's Ex. Y-42.

There are two ways to use a Veeder-Root ATG system to conduct tank release detection on manifolded tanks. One method is to install what is known variously as an "isolation valve" or a "siphon break," *i.e,* a valve which breaks the siphon between two tanks. After the isolation valve is closed and the tanks have been given sufficient time to reach an equalized and quiescent state, the ATG can be used to perform separate static tests for each tank. TR-4 at 177-178, TR-5 at 20-21, TR-7 at 43-45, TR-14 at 152-153. There is no evidence that Euclid has ever utilized such a testing system.

The other method which can be employed is to use what is known as continuous statistical leak detection ("CSLD") software, which allows a Veeder-Root ATG with in-tank probes to conduct valid monthly monitoring of manifolded tanks. TR-2 at 47-48, TR-5 at 21, TR-7 at 43-45, TR-14 at 152-153. In addition, CSLD software is effective at eliminating many of the other problems which prevented Euclid from obtaining valid results. Using this software, the ATG does not have to have a long period of inactivity, but can combine a large number of short test periods to determine if a tank is leaking using a computerized statistical model. TR-2 at 47-48, TR-14 at 156-157.

Many gas station owners have successfully used ATGs *without* CSLD, but only where the facility conditions and nature of the operations at the site so allow. TR-15 at 122-123. Where

conditions and operations are not favorable to the use of an ATG without CSLD, then the UST owner must either purchase the CSLD upgrade or utilize one of the other compliance options set forth in the UST regulations.

Despite the repeated problems it was having using ATGs without CSLD, Euclid did not install CSLD software at any of its facilities until shortly before the Hearing, when CSLD software was installed at a single gas station, the 420 Rhode Island Facility. TR-4 at 93. At the time of the Hearing Euclid was apparently just beginning to explore the possibility of installing such software at its other facilities. TR-11 at 175, TR-15 at 33-34. However, CSLD technology is comparatively expensive, TR-11 at 175-176, and thus, despite the years of noncompliance and multiple warnings from EPA and the states, Euclid had first attempted other alternatives because it wanted to avoid this expense. TR-14 at 159.

The UST regulations afford tank owners a number of choices in terms of the methods and equipment it uses to comply with the regulations. However, not every method is appropriate at every facility. It is the responsibility of the UST owner/operator to choose methods of compliance appropriate to the specific conditions and type of operations present. If such a choice requires knowledge and experience that the owner/operator does not have, then there are any number of consultants whom the owner/operator can hire to provide that expertise. Euclid eventually hired Mr. Beck to serve this function, and it appears that Euclid may have eventually began to allow Mr. Beck necessary funding to purchase CSLD software and otherwise begin the steps necessary to effectively utilize Euclid's ATGs. These steps, however, were too little and too late to avoid years of noncompliance.

4. Violation-Specific Issues

Beginning on Page 22 of Respondent's Appeal Brief, Euclid makes a number of arguments with regard to specific types of violations. As stated previously, it is unclear whether these arguments are intended to attack the only the liability findings in the Initial Decision or the penalty assessment or both. Complainant will do its best to present an organized response to Euclid's disorganized arguments. Complainant will not repeat its arguments on issues, such as inventory control, which have already been addressed in this Brief.

a. *Tank Release Detection*

(i) Record Retention

Respondent raises an argument, rejected by the Presiding Officer, that the record retention periods in the UST regulations act as a *de facto* one-year statute of limitations, trumping the five-year statute of limitations which otherwise would apply. Euclid appears to argue, in several places, that it should not be held responsible for any violations which occurred more than one year prior to EPA's first requests for information.

A limited mandatory record retention period may affect the inferences which can be drawn from a regulated party's lack of records. However, there is no justification for completely cutting off inquiry into potential violations which are within the statute of limitations merely because the mandatory retention period does not require the maintenance of records of the required activities.

In this case, there were many instances where Euclid's ATGs showed that no ATG testing had ever been done. Stipulations 8, 89, TR-2 at 60-61, 66-67, 131, TR-3 at 156, TR-4 at 133-134,

TR-5 at 10, Complainant's Ex. N-8 at 0641. The uncontroverted evidence shows that the Veeder-Root ATGs used by Euclid will indefinitely store the last twelve passing test results, regardless of how long ago those twelve tests occurred.[28] TR-2 at 37-38, 95-96. In this case, for the most part, the storage capacity of the units was not taxed, because no passing results had ever been obtained. Where a printout from a Veeder-Root ATG shows "no test data available," this means that the ATG has *never* performed a valid test. *See,* TR-2 at 38, 61, 131, TR-7 at 49. The Veeder-Root unit is simply not interested in the mandatory record retention period; when the unit says "no test data available," this is conclusive evidence that ATG testing has not been performed at any time.

With regard to inventory control, the records Euclid produced – and stipulated to – showed a failure to comply with the regulatory requirements. There is no reason to believe that Euclid performed *proper* inventory control methods in the past, but discarded the records, then began using *improper* methods just in time to meet the record retention requirements as of the dates that EPA asked Euclid for its inventory control records in early 2001. It is much more reasonable to infer that Euclid's methods of inventory prior to 1998 were no closer to the regulatory requirements than the methods described to EPA and shown on the documents provided to EPA in 2001 and 2002 and stipulated to by Respondent.

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[28]To be more precise, the unit will store the last twelve passing results, with the limitation that it will store no more than one passing test result for a given calendar month. Thus if there were four passing results during January, 2001, the unit would store only one such result, and would still have room for 11 more passing results.

There were a number of instances where Euclid failed to list inventory control, or other claimed compliance methods, on UST notifications which Euclid was required to submit to state agencies. *See, e.g.*, Complainant's Exs. A-3 at 0027, M-3 at 0561, R-7 at 0871, W-3 at 1052. The failure to list a compliance method on a required notification is at least *prima facie* evidence that such method was not being performed at the time of the notification. While it is possible that Euclid was conducting *some* sort of inventory control *for its own purposes*, the fact that Euclid repeatedly failed to even *claim* inventory control as a method of tank release detection when directly asked by EPA or the states, *see, e.g.,* TR-1 at 157-159, 184-189; TR-2 a 29, 33-34, 38-39, 67-68, 75, 79-80, is persuasive evidence that Euclid did not intend for its method of inventory control to be used to comply with the UST regulations.

In many instances, the record retention periods in the UST regulations do not even provide Euclid the slightest cover with which to pursue its record-keeping argument. Even in the few instances where inventory control had not expired as an acceptable tank release detection method, the regulations require that this method be combined with tank tightness testing at least every five years. 40 C.F.R. § 280.41(a), 9 VAC 25-580-140.1, and COMAR § 26.10.05.02.B. Documentation of such a tightness test must be retained at least until the next test is conducted, 40 C.F.R. § 280.45(b), 20 DCMR § 6001.4 and 9 VAC 25-580-180.2, and thus Euclid's inability to provide a tightness test result is at least *prima facie* evidence that no such test has ever been performed.

In light of all of this evidence, and after viewing the witnesses in person, the Presiding Officer, with the exception of Count 45 and portions of Count 54 and 57, agreed that

Complainant proved the periods of violation alleged, even where a small portion of the alleged period of violation fell outside of the period during which Euclid was required to maintain records. Euclid has provided no basis upon which to overturn the Presiding Officer's findings, which were based on his assessment of the witnesses' testimony.

In support of its record retention arguments, Respondent cites several state cases, but these cases are simply not on point. *In re Baltimore Gas & Electric Co.*, 76 MD.PSC 181 (1985) turned on the question of whether the destruction of certain previously-existing records was *itself* a breach of due care, in the face of countervailing evidence that due care was in fact exercised. In contrast, in the case at bar, Euclid has not presented evidence that it complied with the UST regulations other than its speculative claim that it *might* have discarded records which *might* have shown compliance.

The other Maryland and District of Columbia cases cited on Pages 23-24 of Respondent's Appeal Brief do not appear to support the proposition for which they are cited, and appear to have no relevance at all to the case at bar. The discrimination and medical malpractice cases cited by Respondent merely hold that discrimination or malpractice conduct cannot necessarily be inferred from the destruction of personnel records or medical records. This is a far cry from the case at bar, where specific compliance activities were required to be both performed *and* documented. In the case at bar, the lack of documentation that such compliance activities were performed during the required record retention period leads to the reasonable inference that the required compliance activities were similarly not performed prior to the retention period.

Euclid has not cited to state cases which are directly opposed to its position, such as *Division of Unclaimed Property v. McKay Dee Credit Union*, 958 P.2d 234 (Utah 1998) (record-keeping requirement is not a statute of limitations, a claim is not precluded merely because destroyed records may have been useful in rebutting other evidence establishing a claim).

(ii) Automatic Tank Gauging

With regard to automatic tank gauging, Respondent claims that "the regulations regarding tank leak detection, as written, literally do not require that any of the leak detection tests indicate a passing result." Respondent's Appeal Brief at 32. This claim is simply not true. Pursuant to 40 C.F.R. § 280.41(a), 20 DCMR §§ 6003.2 through 6003.5, 9 VAC 25-580-140.1, and COMAR § 26.10.05.02.B, tanks which are part of a petroleum UST system must be monitored at least every 30 days for releases. A tank cannot be said to have been "monitored" for releases if the method used did not generate a valid monitoring result. Where the method used indicates a "failing" result, the UST regulations require the tank owner to consider this as *prima facie* evidence that a release may have occurred, 40 C.F.R. § 280.50(c), 20 DCMR § 6202.4(c), 9 VAC 25-580-190.3., COMAR § 26.10.08.01.B(3), and there is then an *additional* requirement to investigate further to determine if a release has occurred, by reporting such failure to the appropriate state agency and undertaking a more detailed investigation of the potential release, *unless* (1) the monitoring device is found to be defective and is immediately repaired or replaced, *and (2)* additional monitoring is conducted which does *not* show a potential release. 40 C.F.R. § 280.50(c)(1), 20 DCMR § 6202.4(c), 9 VAC 25-580-190.3.a, COMAR § 26.10.08.01.B(3).

Respondent claims that the UST tank release detection requirements are met if "the reason for the result is investigated and resolved," Respondent's Appeal Brief at 32, completely ignoring the requirement that additional monitoring show a passing result. Respondent cites Mr. Buckner's testimony for the proposition that "the reason for failure and invalidity [of ATG tests] was timely investigated," Respondent's Brief at 33, but in fact Mr. Buckner did not testify that failures were timely investigated, did not testify that the reason for failure or invalidity of tests was ever determined, did not testify that ATGs were found to be defective and repaired, and did not testify that new ATG tests were obtained showing passing results. Mr. Buckner merely testified that Euclid was unable to obtain any passing test results from its ATGs, TR-10 at 150-151, and that he *presumed* that there was no release because of his reliance on Euclid's improper and inapplicable methods of inventory reconciliation. TR-10 at 151. Even if Euclid's inventory control methods had not been so deficient, inventory control would still have been only a temporary tank release detection method of limited reliability which was no longer allowed for most of Euclid's tanks. The tank release detection requirements are not satisfied by a failing or invalid ATG test merely because inventory control – an unreliable and expired method of tank release detection – does not show a release.

(iii) Spotswood Trail Facility

Euclid makes specific arguments with regard to a number of different facilities, but, for the most part, these arguments are either frivolous or have been adequately addressed elsewhere herein. However, Complainant will respond specifically to Euclid's argument that the older USTs at the Spotswood Trail Facility in Ruckersville, Virginia were not subject to the tank

release detection requirements because the USTs "were pumped out in 1997." Respondent's Appeal Brief at 29. Pursuant to 40 C.F.R. § 280.70(a) and 9 VAC 25-580-310.1, release detection is required unless the UST system is "empty," which is defined in 40 C.F.R. § 280.70(a) and 9 VAC 25-580-310.1, as when all materials have been removed using commonly employed practices so that no more than 2.5 centimeters or one inch of residue, or 0.3 percent by weight of the total capacity remains in the system. Euclid admitted in its Answer that Tanks 29-3 and 29-4 at the Spotswood Trail Facility were not empty prior to at least March 1, 1999. Answer, ¶ 90. Euclid never moved to amend its Answer, and its attempt to rebut its own pleadings runs counter to the accepted rule that a party is bound by admissions in its pleadings. *See State Farm Mutual Automobile Ins. Co. v. Worthington*, 405 F.2d 683, 686 (8th Cir. 1968); *Giannone v. United States Steel Corp.*, 238 F.2d 544, 547 (3d Cir. 1956); *Hill v. FTC*, 124 F.2d 104, 106 (5th Cir. 1941). *See also*, *Seven-Up Bottling Co. v. Seven-Up Co.*, 420 F. Supp. 1246, 1250-51 (E.D.Mo. 1976), *aff'd* 561 F.2d 1275 (8th Cir. 1977); *Consolidated Rail Corp. v. Providence & Worcester Co.*, 540 F. Supp. 1210, 1220 (D.Dela. 1982); *Giles v. St. Paul Fire & Marine Insurance Co.*, 405 F. Supp. 719, 725 n. 2 (N.D.Ala. 1975).

Even if Euclid had not admitted that the tanks were not empty, Complainant very clearly demonstrated that the tanks in question contained significant levels of product until they were removed from the ground in April, 1999. TR-1 at 191-196, Complainant's Exs. D-11, D-12. Euclid admits that 96 gallons of mixed fuel and water were pumped out of one of these tanks in April, 1999, and 370 gallons of such mixture were pumped out of the other, Respondent's Appeal Brief at 29, but argues that there is no evidence as to the actual amount of regulated

substances within this mixture. The regulations, however, do not require the regulatory agency to analyze the exact mixture of regulated substances in an out-of-service UST. A tank is not "empty" unless "all materials" have been removed down to the specified *de minimis* levels.

For the tanks in question, Euclid claims to have utilized inventory control only as a method of tank release detection. Stipulation 38. Euclid's claim that these tanks were taken out of service in 1997, Respondent's Appeal Brief at 29, would seem to rebut any claim of the use of inventory control between 1997 and the removal of the tanks in April, 1999, because it is highly unlikely that Euclid would perform inventory control reconciliations for a tank from which gasoline was not being dispensed.

Moreover, Euclid did not send Virginia a required notification of temporary closure for these tanks, *see* 9 VAC 25-580-310, preventing the state from investigating the circumstances of the tanks' removal from service (including the presence or lack of continuing release detection). TR-1 at 203-204, 234. It is thus reasonable to draw adverse inferences from this failure. In addition, these tanks were installed in 1978, Answer, ¶ 78, and thus were not eligible to use inventory control at any time subsequent to December 22, 1998.

b. *Line Release Detection*

Respondent's Appeal Brief contains both general arguments with regard to the line release violations found by the Presiding Officer, and facility-specific sections which essentially repeat Euclid's general arguments. *See* Respondent's Appeal Brief at 42-48. Thus Complainant will address the two general issues raised by Respondent, but will not address each specific facility. If the Board deems it to be necessary, a detailed discussion of the evidence with regard

to line release detection violations at each facility may be found in Complainant's Initial Post-Hearing Brief at 103-143.

(i) Record Retention

Euclid repeats its record retention argument with regard to line release detection. After viewing all of the evidence and personally observing the witnesses, the Presiding Officer determined that Complainant had proved violations both within and outside of the record retention period. There is no reason to disturb the Presiding Officer's findings.

The UST regulations require that line release detection records be maintained for at least one year, 40 C.F.R. § 280.45(b), 9 VAC 25-580-180.2, and COMAR § 26.10.05.06.B, except that the District of Columbia authorized state UST program requires that such records be maintained for three years. 20 DCMR § 6001.3. When EPA examined the files Euclid produced during the April, 2002 meeting, Euclid's files contained many kinds of maintenance records dating as far back as the 1980s. TR-4 at 30-31. Mr. Yuen, at the April, 2002, meetings, told EPA that Euclid did not have any specific policy for destroying records, and further stated, at that time, that he did not know of any reason why records would have been removed from the files. TR-4 at 35, TR-15 at 134. Line tightness test results in the files Euclid brought to this meeting dated back well beyond the required record retention period, including records as far back as 1995. *See* Stipulation 43, TR-2 at 50, 79-80.

Moreover, if one looks at the records for tests which occurred *after* EPA first requested that Euclid produce all line tightness testing results, it is clear from the large gaps between these tests that Euclid did not understand or did not care that it was required to conduct *annual* line

tightness testing (to the extent that it wanted to use line tightness testing to comply with the periodic line release detection requirements) and *annual* operational tests of its continuous catastrophic line leak detectors. During the April, 2002, meetings EPA made it clear that Euclid was potentially facing large penalties for non-compliance and particularly emphasized its demand that Euclid produce all of its records, TR-4 at 40-41, 46, but Euclid continued after these meetings to have gaps of greater than one year between its line leak detector tests and line tightness tests. Euclid's lack of an organized annual testing program is further evidence that its lack of records was due not to its destruction of records, but instead was due to its to the failure to perform tests.

In addition, most of Euclid's state notification forms did not list line tightness testing as a method of line release detection (many, in fact, listed no method of line release detection whatsoever). *See,* Complainant's Exs. A-2 at 0027, E-2 at 0246, F-5 at 0284, F-6 at 0286, H-2 at 0346, F-4 at 0351, I-4 at 0373, I-5 at 0382, I-6 at 0388, J-3 at 0418, J-4 at 0423, K-2 at 0444, L-3 at 0485, L-4 at 0491, M-3 at 0561, N-5 at 0630, N-6 at 0636, O-4 at 0681, O-5 at 0683, P-3 at 0754, Q-11 at 0837, Q-12 at 0842, R-7 at 0871, S-3 at 0907, T-4 at 0941, T-6 at 0948, T-7 at 0953, W-3 at 1052, W-8 at 1055k This fact is strong evidence that Euclid did not have – or even understand the need for – an organized plan or program for conducting annual line tightness testing or any other form of line release detection.

Mr. Buckner's testimony appeared to confirm that line tightness testing was not conducted on any set schedule. He testified that tightness testing was requested when Euclid suspected a problem with inventory shortages, TR-10 at 104-105, or might be requested "from

time to time" for no specific reason. TR-10 at 105. Euclid did not present testimony from anyone who actually performed a line tightness test prior to 2002.

Mr. Beck, Euclid's contractor, performed some line tightness and line leak detector testing beginning in 2002, but only began to set up a program of regular testing some time in 2003. TR-10 at 106. Euclid claimed that an individual named Charlie Pyle conducted Euclid's line tightness testing prior to May, 2002, TR-10 at 104-105, but Euclid did not call Mr. Pyle as a witness. In short, Euclid did not put on any witnesses to testify that they conducted or witnessed a line tightness test or line leak detector test at any time other than those tests for which Euclid produced written documentation.

Courts have long recognized a presumption called the "missing witness rule." The rule provides "that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." *Graves v. United States*, 150 U.S. 118, 121 (1893). The rule applies whenever a witness, because of his relationship to one party, is in effect "unavailable" to the other party. *See, Jones v. Otis Elevator Company*, 861 F.2d 655, 659 (11th Cir. 1988). A witness is deemed unavailable, in a practical sense, when the relationship is such that it creates bias or hostility against the opposing party. *Jones v. Otis Elevator Company* 861 F.2d at 659, *citing McClanahan v. United States*, 230 F.2d 919, 926 (5th Cir. 1956). The employer-employee relationship is recognized as one creating practical unavailability because of an employee's economic interests. *Jones v. Otis Elevator Company* 861 F.2d at 659 (11th Cir.

1988), *citing Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 719 F2d 1335, 1353 (7th Cir. 1983).

As a Euclid contractor, Mr. Pyle has a close economic relationship to Euclid, and thus it can be inferred from Euclid's failure to call Mr. Pyle as a witness that he would not be able to identify any additional tests other than those documented by Euclid. Moreover, Euclid did not present testimony from any of its station lessees – clearly witnesses with extremely close economic ties to Euclid – that they witnessed such testing at times other than as shown in Euclid's written documentation.

For most facilities, Euclid's line release detection violations were established solely by a lack of records of *any* line testing prior to EPA's request for Euclid's records. Where *no* line test documentation is available, there is a clear inference that no testing has ever occurred. Notwithstanding the one-year record retention requirement (three years for the District of Columbia), it was quite reasonable for the Presiding Officer to infer that Euclid would not discard its last test result before conducting another test.

In the few instances where Euclid *did* produce a test record pre-dating EPA's information requests, EPA nonetheless argued that totality of the evidence indicated that there was no testing *prior to* Euclid's earliest test record. Even in these instances, the evidence is strong that testing occurred only on the dates for which Euclid produced documentation, based upon Complainant's demonstration, as discussed above, that (1) Euclid did not have a regular line testing program; (2) Euclid did in fact maintain line testing records dating back more than a year, including testing records dating back to 1995; (3) Euclid had no program of record destruction and, when asked in

April 2002, Euclid could not identify any reason why records would be destroyed; and (4) Euclid did not put on any witness who could testify to an instance of additional testing other than those shown in Euclid's documents. The Presiding Officer found Euclid liable for the entire periods of line release detection violations alleged by Complainant, thus demonstrating his acceptance of Complainant's argument that the totality of the circumstances proved that no testing was conducted *at any time* within the statute of limitations other than the testing shown in the documentation produced by Respondent. The Presiding Officer's findings took into consideration his personal observation of Euclid's witnesses, and thus is entitled to great deference.

(ii) Sump Sensors

As an alternative to annual line tightness testing, the UST regulations allow the use of monthly monitoring to meet the periodic line release detection requirements. The only type of monthly line monitoring claimed by Euclid is interstitial monitoring, Stipulations 27, 33, 40, 53, 60, 62, 65, 67, 73, 102, 110, 121, 129, 136, 149, 152, and the only type of interstitial line monitoring system discussed anywhere in the record is a sump sensor system.

A number of different witnesses described the theory and operation of sump sensor interstitial line monitoring systems. S*ee, e.g.*, TR-1 at 116-117, TR-2 at 33, TR-3 at 33-35, TR-4 at 50-51. A particularly cogent explanation was provided by Complainant's UST expert, John Cignatta, who was accepted by the Presiding Officer as an expert witness on line release detection. *See* TR-7 at 41. As described by Mr. Cignatta, an operable sump sensor system has several necessary elements. The system must have double-walled piping which is sloped so that

it drains to a sump; a release from the inner pipe will therefore move into the interstitial space and flow by gravity to the sump. TR-7 at 79. The sump itself must be liquid tight so that it will contain leaking product but will not allow the infiltration of water, so that the only liquid in the sump will be losses from the double-walled pipe. TR-7 at 79-80. There must be an appropriate sensor which can detect a release into the sump. TR-7 at 80. Finally, the sensor must be located at or very near the bottom of the sump, otherwise releases may not be detected at all (if the sump is not sealed and liquid thus escapes), or may not be detected until long after the release begins. TR-7 at 89, 105-107.

While Euclid had some of the elements of a sump sensor system in place at some of its facilities, the evidence, accepted by the Presiding Officer, showed that these systems were not maintained in working order and that Euclid was not aware of or responsive to the alarms generated by these systems.

Respondent's own general manager, Mr. Buckner, testified on direct examination that Euclid's sump sensor systems do not work properly. TR-10 at 202, 203-204. Moreover, Euclid did not claim to be using sump sensor systems during the April, 2002, meetings, TR-4 at 49-51, and for almost all of the facilities where Euclid now claims to be utilizing interstitial line monitoring, Euclid did not list interstitial line monitoring on the notification forms submitted to state agencies. Complainant's Exs. F-6 at 0190, H-2 at 0346, H-3 at 0351, I-4 at 0377, I-5 at 0382, I-6 at 0388, J-3 at 0418, J-4 at 0423, K-2 at 0444, L-4 at 0491, O-4 at 0681, O-5 at 0687, P-3 at 0754, Q-11 at 0837, Q-12 at 0842, R-7 at 0871, S-3 at 0907. It would thus appear that Euclid itself was not even aware that elements of a sump sensor system were present at some of

its facilities until Mr. Beck conducted his site surveys in June, 2002. Given this, it is not surprising that Euclid did not establish a system to maintain such systems and operate them to ensure a response to alarms.

There is, indeed, substantial affirmative evidence that Euclid and its agents did not respond to alarms. At four different Euclid facilities, sump sensor systems were in alarm when EPA inspectors arrived to inspect the facilities, but the personnel at the facilities were unaware of the alarms and had taken no steps to respond to them. TR-4 at 156-157, 183, TR-7 at 61-66, 96-99, 109-113, 130-134, 139-144, Complainant's Exs. I-7 at 0390, O-11 at 0715, 0717, P-4 at 0759-0760, Q-9 at 0821, 0823. Moreover, at several facilities the operators specifically stated that their sole response when they heard an audible alarm was to press a button to silence the noise. TR-4 at 59-60, TR-7 at 66, 117, 133-134. Euclid complains that these station operators were not Euclid employees, or were "non-managerial personnel," *see, e.g.,* Respondent's Appeal Brief at 41, but these contractors were Euclid's only link to the sump sensor systems. There could be no response to an alarm if it was not reported by the personnel actually at the station, regardless of their job title.

It is also clear that Mr. Buckner did not himself know how to recognize an alarm. Mr. Buckner testified that he visited each station at least once per month, TR-10 at 125, yet on more than one occasion EPA documented a sump sensor systems had been in continuous alarm for more than a month (including one instance where the system had been in alarm for more than five months before an EPA inspector observed the system). TR-4 at 156-157, 183-185, TR-7 at

109-112, 143-144, Complainant's O-11 at 0717, Q-9 at 0823. In these instances apparently did not recognize the alarms during his monthly visit, or took no action in response to them.

Any type of alarm system requires human intervention to respond to alarms and take appropriate response actions. An interstitial system cannot be said to be operating to detect releases merely because an alarm goes off. Like a tree falling in a forest, if there are no human beings to recognize and respond to the alarms, then the system is not monitoring for releases in a meaningful way. The fact that alarms were ignored, some for extended periods of time, is strong evidence that Euclid had not trained its facility operators to treat alarms as suspected releases to which the operator must immediately respond.

Complainant documented many problems at Euclid's facilities which prevented the sump systems from recognizing a leak and issuing an alarm. At least one facility had a sensor which was found to be inoperable, meaning that it did not set off an alarm at the console even when tested by being submerged in water. TR-7 at 113-114. For the same tank, Complainant's expert was able to document that releases into the piping's interstitial space would not drain to the sump containing the sensor, and thus a release from the primary pipe into the interstitial space could not be detected even by a properly functioning sump sensor. TR-7 at 117-125.

At other Euclid facilities, sensors were found to have been raised well above the floor of the sump, so that a release would be detected, if at all, only after many gallons of product had filled the sump to the level of the sensor. TR-4 at 123-124, 128, 166, TR-7 at 87-90, 101-105, 107. For at least two facilities the sensor was raised above the level of standing liquid in the sump, including one instance in which the sensor was raised above approximately 6 inches of

fuel in the sump, TR-4-128, TR-7 at 107-108, and another instance in which it was particularly clear that the sensor had been raised above an opening in the sump which would prevent liquid from ever reaching the sensor. TR-7 at 102-104.

For many of the sump sensor systems examined by EPA, the sumps showed signs of chronic flooding such as standing water, streaks and rings (indicating repeated infiltration of water and mud) and corrosion of exposed metal equipment. TR-7 at 84-86, 96, 102-104, 108-111, 129-132, 138-143. When a sump is flooded with water, an operable sensor will already be in alarm, and a release of fuel will not cause any change in the status of the alarm. TR-7 at 96-97. Where sumps show signs of chronic flooding, it is evident that alarms are not heeded on an expeditious basis, if at all, and it is clear that there are repeated and significant periods of time during which the sump sensor system simply will not detect a release because the sensor is already tripped.

Finally, at a number of Euclid's facilities, it was documented that the "test boots" on the double-walled piping entering into the sump had been tightened. TR-3 at 33, 63-64, 72-74, TR-4 at 129, 166-167, TR-5 at 6, 12-13, 22-23, 25-26. When such a test boot is tight, the interstitial space is effectively sealed off, and a release into the interstitial space will not drain into the sump to be detected by the sump sensor. TR-3 at 33-35, TR-4 at 130-131, TR-7 at 81. Euclid's own contractor, Mr. Beck, opined that the tight boots observed at Euclid's facilities were "more than likely" tight since the installation of the tanks. TR-15 at 36-37. *See also* TR-14 at 163-163. While Euclid attempted to lay the blame on its contractors for the tight boots found at its

facilities, the bottom line is that a tight boot prevents a release from being detected. Where this was the case, Euclid did not have an operable system of interstitial line release detection.

The Presiding Officer properly found that the weight of the evidence clearly established that Euclid was not, at any facility, validly conducting periodic line release detection using interstitial monitoring, notwithstanding the presence of certain elements of such a system at some of Euclid's facilities.

c. *Corrosion Protection*

A number of the arguments raised in the "Corrosion Protection" section of Respondent's Appeal Brief were also raised earlier in Respondent's Brief, and have already been discussed above. These include Euclid's arguments regarding document retention, Euclid's attempt to blame its contractors for its violations, and Euclid's claims with regard to the coating and wrapping of metal piping components. Other of Euclid's arguments are discussed below.

(i) Expert Witnesses

Euclid attempts to argue that the Presiding Officer erred by crediting the testimony of John Cignatta, Complainant's corrosion and cathodic protection expert, instead of crediting the testimony of Euclid's expert, Thomas Mollica. Given Mr. Cignatta's impressive credentials and persuasive testimony, the Presiding Officer was well within his discretion in crediting his expert opinions. Euclid has not even come close to meeting the high burden it faces to justify overturning the findings of the Presiding Officer, who personally observed the testimony of both experts.

The obvious superiority of Mr. Cignatta's credentials when compared to those of Mr. Mollica is discussed at length in Complainant's Initial Post-Hearing Brief at 153-156. This discussion can be summed up thus in a single sentence: Mr. Cignatta is one of the leading experts in the field of corrosion and cathodic protection, while Mr. Mollica is at best a highly successful businessman whose family's contracting business is involved primarily in the installation of cathodic protection systems, but who has little training in or knowledge of the scientific and technical issues involved in either design and/or testing of cathodic protection systems. This contrast alone was sufficient reason for the Presiding Officer decision to credit Mr. Cignatta's expert opinions instead of those of Mr. Mollica.

Moreover, in instance after instance, Mr. Cignatta's cogent testimony proved far more persuasive than the conclusory opinions, unsupported by scientific reasoning, which were offered by Mr. Mollica. A detailed discussion of the general and facility-specific corrosion protection issues addressed by these experts is set forth in Complainant's Initial Post-Hearing Brief at 160-211. Respondent's disappointment at the Presiding Officer's findings is an adequate grounds for the reversal of those findings with regard to cathodic protection and other corrosion protection issues.

(ii) Piping in Contact with the Ground

Euclid argues that it should not be held liable for the failure to follow corrosion prevention requirements for metal piping components which were alleged to be in contact with

"the ground."[29] Euclid argues that the components in question were not in contact with "the ground" because they contacted only "pea gravel," a material which is used to fill the excavation in which an underground storage tank is placed. Respondent's Appeal Brief at 49.

Although Euclid promised in opening arguments that "our expert will discuss" this issue, *see* TR-1 at 79-81, in fact Euclid's corrosion expert, Mr. Mollica, stated that the issue of piping components was not within the scope of his normal work. TR-11 at 233-234. Under direct examination by Euclid's counsel Mr. Mollica repeatedly expressed a lack of expertise on the issue of piping components in contact with pea gravel. TR-11 at 232-236.

The plain language of the term "the ground" clearly includes include backfilled material such as pea gravel. While backfill may not be the same material as the original, native soil in that location, once it is filled into the hole in the ground left by the excavation, common sense would indicate that the backfill has now become part of the "ground." If backfill is not "the ground," then it hard to see how *any* tank would qualify as an *underground* storage tank.

In addition to being at odds with the plain language of the regulation, Respondent's interpretation is completely inconsistent with the purpose of the corrosion protection requirements. Mr. Cignatta, Complainant's corrosion expert, explained that pea gravel holds

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[29]The District of Columbia regulation substitutes the words "earthen materials" for "the ground," 20 DCMR §§ 5704.1, 5802.1-2. The District of Columbia language does not appear to mean anything different from the language in the federal and other state UST programs. Moreover, at the only facility in the District where piping corrosion protection violations are alleged, the installation date of the UST systems was between the cut-off date for "new" UST systems in the federal program and the cut-off date for the District of Columbia program, and therefore the USTs are subject to the federal regulations for new USTs, as referenced in the District of Columbia regulations. 20 DCMR § 5700.1(c).

moisture next to a tank or pipe, just as would native soil. TR-9 at 31-32, 126, TR-11 at 80-81. This moisture provides the electrolyte, one of the key elements of a corrosion cell, which allows the corrosion of the metal structure. TR-9 at 5. In addition, the moisture drawn into the pea gravel or other backfill will eventually have a chemistry similar to the adjacent local soils, thus introducing any corrosive elements of that soil into direct contact with the metal structure. TR-9 at 31, 126, TR-11 at 80-81. Excluding pea gravel or other backfill from the definition of "the ground" would be a huge loophole which would expose tanks as well as piping to "the same types of aggressive conditions that would have occurred if it had been put into contact with the local soils." TR-11 at 81.

(iii) Spotswood Trail Facility

There is no merit to Euclid's argument that it should not be penalized for the failure to provide cathodic protection for the USTs removed from the Spotswood Trail Facility in April, 1999. Respondent's Reply Brief at 52. Respondent admitted that these USTs, Tanks 29-3 and 29-4, and the associated piping, were steel with no cathodic protection. Answer, ¶ 105. *See also* Complainant's Ex. D-3 at 0190, TR-1 at 124-125. It appears that these tanks were taken out of service precisely because they were unprotected steel, and thus could not meet the requirement that all USTs have adequate corrosion protection by December 22, 1998. *See* 9 VAC 25-580-60.1, 60.2. Regardless of when these tanks were taken out of service, corrosion protection was required until such time as the systems completed formal closure. *See* 9 VAC 25-580-310.1. As discussed above, the record is clear that these unprotected tanks contained regulated substances

until they were removed from the ground in April, 1999. Answer, ¶¶ 90, 100, TR-1 at 191-196, Complainant's Exs. D-11, D-12.

(iv) Baltimore Avenue Facility

Respondent's arguments with regard to the waste oil tank at the Baltimore Avenue Facility, Respondent's Appeal Brief at 53, confuse the nature of the violation alleged in Count 45. The parties stipulated that this waste oil tank was steel, despite Euclid's initial representation to MDE that the tank was fiberglass. Stipulation 105. Complainant did *not* allege that this tank had insufficient cathodic protection, but instead alleged – and proved – that Euclid failed, for a number of years, to conduct required testing on the cathodic protection system for that tank. After an extended period of violation during which no testing at all was performed, Euclid finally arranged for testing to be performed, but Complainant nonetheless alleged – and proved – that the testing Euclid eventually performed utilized improper testing procedures. Initial Decision at 90-91. The violation thus continued until *Complainant's* cathodic protection expert properly tested the tank and determined that it passed the cathodic protection criteria.

(v) 3800 Rhode Island Avenue Facility

With regard to the waste oil tank at 3800 Rhode Island Avenue, Respondent argues that it should not be penalized because the tank was represented to Mr. Yuen as being fiberglass when he purchased the station, and because MDE records showed that the tank was fiberglass. Respondent's Appeal Brief at 54. Respondent, however, could not even name the former owner who allegedly represented the tank as fiberglass, much less document the date and substance of the alleged representation. The only MDE record introduced into evidence in this case which

showed the tank to be fiberglass was submitted to the state agency by *Euclid*, not by a former owner. Complainant's Exs. Q-11 at 0835, Q-12 at 0840.

Mr. Yuen initially testified that he believed this tank was fiberglass because the *gasoline* tanks at the facility had been determined to be fiberglass, and "we simply used logical deduction that the waste oil is also fiberglass." TR-13 at 83-84. Only after this testimony, and after considerable prompting by his counsel, did Mr. Yuen testify that an unidentified prior owner had provided some unidentified documents to MDE which purportedly indicated that the tank was fiberglass. TR-13 at 84.

Mr. Yuen's "logical deduction," based upon the composition of the gasoline tanks at the facility, was at best no more than wishful thinking. It hardly shows due care for Mr. Yuen to conveniently assume, without further investigation, that a 1,000 gallon used oil tank would necessarily be constructed of the same material as three much larger gasoline tanks at the same facility.

Mr. Yuen's claim of reliance on unidentified documents submitted by an unidentified past owner is particularly suspect in view of the undisputed evidence that he did not make reasonable inquiries for the waste oil tank at the Baltimore Avenue Facility, discussed above. In its UST notification to MDE with regard to the Baltimore Avenue Facility, Euclid incorrectly represented the waste oil tank for that facility to be fiberglass, even though the *prior* owner's notification had very clearly indicated that the tank was a steel tank. *Compare* Complainant's Ex. O-2 at 0675 *with* Complainant's Exs. O-3 at 0677, O-4 at 0680, O-5 at 0685. When this was pointed out to Mr. Yuen on cross-examination, he was forced to admit that he did *not* exercise

due diligence when he represented to MDE that the Baltimore Avenue waste oil tank was fiberglass. TR-13 at 174-176. Given this admitted lack of due diligence with regard to the waste oil tank at the Baltimore Avenue Facility, the Presiding Officer correctly rejected Mr. Yuen's claims that his belief that the waste oil tank at the 3800 Rhode Island Facility was fiberglass was formed only after a diligent examination of unidentified documents. The Presiding Officer thus correctly imposed the full penalty requested by Complainant.

d. *Overfill Prevention*

Respondent makes a number of arguments with regard to the overfill violations in this case. Respondent's claimed reliance on its contractors has already been discussed at length. As noted above, where a particular UST was equipped with an improperly-installed drop tube overfill valve, Complainant's penalty calculation afforded Respondent the maximum "culpability" reduction allowed under the UST Penalty Policy. There are no grounds for a reductions.

At the Hearing, extensive testimony was elicited from Mr. Cignatta and Mr. Beck explaining their differing opinions as to the proper way to measure whether a float-activated drop tube overfill valve is installed at the correct 95% shut-off level. The differing opinions, though, affected very few tanks: for 17 of the 21 tanks for which overfill violations were proved, the two witnesses were in agreement that the overfill devices were not installed at the required 95% level. Complainant's Initial Post-Hearing Brief discussed this evidence at length, and argued that, where the witnesses differed, Mr. Cignatta was both the more qualified and the more persuasive on this issue, and that his calculations should thus be accepted. *See* Complainant's Initial Post-

Hearing Brief at 214-219. The Presiding Officer, after viewing the witnesses, in each instance accepted Mr. Cignatta's calculations. *See* Initial Decision at 95-105.

Given the deference which must be afforded to the Presiding Officer's decision to credit one testifying expert rather than another, Complainant sees no need to here repeat in full the discussion of the experts' positions set forth in its Initial Post-Hearing Brief. Complainant will, however, address certain of the arguments now raised by Respondent.

(i) Alternate Standard/"Accepted Industry Practice"

Respondent is completely wrong in claiming, without citation, that "Maryland regulations discuss an alternative method of overfill protection which provides that a method which prevents the delivered fuel from coming into contact with the top of the tank is an acceptable method." Respondent's Appeal Brief at 56. Respondent's counsel has clearly consulted neither the regulations nor the Transcript on this point, because Respondent's own overfill "expert," Mr. Beck, admitted that the Maryland UST program does *not* allow overfill valves to be set above 95%. TR-15 at 39-40, COMAR § 26.10.03.01.D(1)(b).

In a related argument, Respondent claims that "with respect to the ball float check valves, Complainant admits that the problems it identified with these valves resulted from an accepted industry practice which is now being reexamined." Respondent's Appeal Brief at 56. An examination of the passage cited by Respondent, Complainant's Initial Post-Hearing Brief at 221, demonstrates once again Respondent's lack of care in reading the language it cites.

The passage in question, which actually begins on Page 220 of Complainant's Initial Post-Hearing Brief, discusses Mr. Beck's speculation that Euclid's ball float valves, which he

admitted were set above the 95% level, might nonetheless have complied with the "alternate standard" discussed above, *i.e.*, the ball floats might have prevented the fittings at the top of the tanks from being exposed to product. TR-14 at 134. Mr. Beck did not claim any expertise on this matter. TR-14 at 134. On cross-examination, he admitted to having no specialized knowledge as to whether or not the ball floats would prevent tank fittings from being exposed, and he agreed that this compliance option was not allowed under the Maryland UST program, which in all cases requires overfill devices to shut off flow at or below the 95% level. TR-15 at 39-40.

In contrast to Mr. Beck's admitted lack of expertise on the subject, Complainant's Initial Post-Hearing Brief discussed Mr. Cignatta's detailed explanation of the original rationale behind the 95% rule and the emerging knowledge showing that the 95% level allowed in EPA's regulation is not *sufficiently* protective, that is, it will not prevent the fittings on the top of the tank from being exposed to product. Complainant's Initial Post-Hearing Brief at 221-222. In view of the emerging knowledge in the industry, the trend is toward lowering the shut-off level so that tanks are never allowed to be filled in excess of 90% full. TR-7 at 178-179. Given emerging knowledge, it is now becoming clear that the "alternate" regulatory option[30] does not in fact offer owners and operators an additional option because the conditions for the option can

[30]The only such option relevant to the overfill violations in this case is the option in the District of Columbia UST program allowing the setting of an overfill device so that it will shut off flow into the tank at a point so that none of the fittings located on the top of the tank are exposed to product due to overfilling. 20 DCMR § 5705.2 As noted above, this option is not allowed in Maryland.

never be met: setting the device above the 95% level will not, in any instance, prevent the fittings located on the top of the tank from being exposed to product.

Contrary to Euclid's claim, Complainant did not in any way admit that Euclid's ball float valves were in accordance with an accepted industry practice. The record is clear that Respondent's ball floats were set well above the 95% level, while the emerging knowledge within the industry indicates that a shutoff even *lower* than 95% is actually necessary to meet the conditions of the "alternate" standard.

(iii) Lack of State Enforcement

Euclid claims that it is unfair to penalize it for overfill violations when those violations were not identified by the states during previous inspections. Respondent's Appeal Brief at 56-57. Euclid, however, has not actually identified a specific instance in which it relied to its detriment on a state finding. In addition, Euclid fails to understand that state agencies are regulators, not free technical compliance consultants. While EPA and state agencies endeavor to provide as much compliance assistance as possible to the regulated community, inspectors cannot be expected to take apart the entire gas stations at every inspection to identify and inform the owner/operator of every potential compliance problem.

Jackie Ryan, an inspector for the State of Maryland, described the tremendous caseload borne by state inspectors, TR-2 at 10-14, and explained why it was impossible for state inspectors to address every potential compliance issue in every inspection. TR-2 at 14-17. Ms. Ryan never gives any assurances to a regulated entity that she has found every existing violation,

and it would be unreasonable for any owner/operator to believe that her failure to identify a violation is an assurance of compliance. TR-2 at 18.

e. *Spill Protection*

Euclid speculates that the spill protection violation for which it was found liable was the fault of a "delivery driver," and also opines that the gap in its spill protection device was "a maintenance issue." Respondent's Appeal Brief at 57. Complainant agrees the violation was the result of poor maintenance, but this fact does not excuse Euclid's violation in the least. Euclid just does not seem to understand that it is responsible for its own compliance. If maintenance was necessary in order to remain in compliance, then it was Euclid's responsibility to ensure that such maintenance occurred.

In this instance, the equipment in question was installed at the Frederick Avenue Facility in Baltimore, Maryland, after Euclid paid a penalty to MDE for, among other things, the failure to provide spill prevention equipment. *See* Complainant's Exs. L-6 at 0499, L-6a, L-6b, L-6c. At the time of MDE's enforcement action, Euclid upgraded the Frederick Avenue Facility by installing catchment basins (also called "spill buckets") around each fill tube. Euclid chose at the time not to install the more reliable, but more expensive, mechanical connector catchment basin, and instead chose to install a cheaper "slip-on" type of catchment basin. TR-7 at 148-150. This type of spill protection device, while cheaper, is also less reliable, and requires vigilant maintenance. TR-7 at 148-150, 154. Mr. Beck, Euclid's own contractor, agreed that slip-on catchment basins were a cheaper retrofit, TR-15 at 26, which required more ongoing maintenance than the mechanical connector type of basin. TR-15 at 27.

Euclid chose the cheaper "high-maintenance" option, but did not bother performing the necessary maintenance. Under these circumstances there is absolutely no basis for reducing the penalty imposed by the Presiding Officer.

f. *Financial Responsibility*

Euclid's failure to obtain assurances of financial responsibility for its District of Columbia facilities, even after paying a $35,000 fine to Maryland for the exact same violation, demonstrated a singular obstinacy which serves only to highlight the need for a large penalty in this matter. Euclid's financial responsibility arguments fall apart for so many reasons that it is difficult even to list them all. Complainant has discussed Euclid's arguments at length in its Initial and Reply Post-Hearing briefs, *see* Complainant's Initial Post-Hearing Brief at 238-253, Complainant's Reply Post-Hearing Brief at 7-17, and the Initial Decision itself rebuts Euclid's arguments at length. Initial Decision at 107-116.

Euclid's liability and penalty arguments with regard to financial responsibility fail for six major reasons: (1) until confronted by EPA during the April, 2002 meetings, Euclid did not maintain insurance meeting the regulatory requirements for its District of Columbia facilities; (2) Euclid failed to obtain such insurance for its District of Columbia facilities with full knowledge that the general liability insurance it did maintain did not meet the requirements of the UST regulations; (3) Euclid could not "self"-insure because most of its claimed assets were held by trusts and limited liability companies which did not have direct obligations to provide funds in response to Euclid's environmental liabilities; (4) Euclid failed to comply with critical procedural requirements designed to ensure that the assets of a self-insuring entity are timely available in the

case of a release; (5) Euclid failed to comply with requirements for independent verification of its claimed net worth; and (6) Euclid did not provide persuasive evidence as to the net worth of the consolidated entities. The discussion below, while not as complete as the discussions set forth in Complainant's Post-Hearing Briefs, addresses Euclid's arguments with reference to these six major points.

(i) The Nationwide Insurance Policy

Euclid argues that it should be given a reduced penalty because of its claimed subjective belief that the District of Columbia financial responsibility requirements were met by an insurance policy it maintained with a company known as "Nationwide." Respondent's Appeal Brief at 57-58. The evidence does not support this argument, and instead demonstrates that Euclid was well aware that the Nationwide policy did not meet the UST requirements.

Euclid's policy with Nationwide was a general liability policy in effect since at least 1993. TR-13 at 22. Euclid's UST insurance broker, Eric Dana, testified that he discussed the Nationwide policy with Euclid's president, Mr. Yuen, as early as 1994, TR-11 at 127, and informed Mr. Yuen that the Nationwide policy "was not likely compliant with financial responsibility." TR-11 at 145-146. In addition, in 1997, while the Nationwide policy was in effect, Euclid was sued by MDE for failing to meet the financial assurance requirements for the USTs at its Maryland facilities, after which Euclid obtained an additional insurance policy specifically to provide UST coverage. Complainant's Exs. Y-9, Y-10 [31]. This case was settled in

[31]The insurance policy shown in Complainant's Ex. Y-10 is a renewal of the policy obtained in 1997 in settlement of the MDE action. The "retro date" listings on this renewal, however, show that the policy was originally obtained on June 24, 1997, *see* Stipulation(2d) 1,

January, 1998, with Euclid paying a $35,000 penalty. Complainant's Ex. Y-9a. It is simply impossible to believe that Euclid would pay a $35,000 fine for failure to demonstrate financial responsibility, obtain an additional UST insurance policy, and yet still fail to understand that its pre-existing general liability policy with Nationwide did not meet the UST financial assurance requirements.

Even if Euclid had not been specifically informed by Mr. Dana and by MDE that the Nationwide policy did not meet the UST financial assurance requirements, Euclid should have also been able to determine this fact on its own. The UST financial responsibility regulations are very explicit as to the *exact* language which must be included in an insurance policy in order for such policy to meet the UST regulatory requirements. *See* 40 C.F.R. § 280.97(b), 20 DCMR § 6707.3 and Appendices D and E. While the details of insurance policy language may in some instances be difficult for a layperson to understand, in *this* instance even a layperson could read an insurance policy to determine if it contains *the exact required language set forth in the UST regulations*. Euclid did not introduce the Nationwide policy into evidence, and made no showing that the language in the Nationwide policy was confusing.

Even Mr. Yuen's own testimony provides little support for the claims regarding his mental state made in Respondent's Appeal Brief. Respondent claims that Mr. Yuen testified to his belief that the Nationwide policy met the UST requirements, Respondent's Appeal Brief at 58, but in fact Mr. Yuen did not so testify. Despite his attorney's bests attempts at leading him, Mr. Yuen essentially testified that he did not have any belief one way or another with regard to

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more than one month *after* Euclid was sued by MDE, as shown in Complainant's Ex. Y-9.

the UST regulatory status of the Nationwide policy. TR-13 at 23-27. Mr. Yuen, instead, testified he did not obtain insurance for his District of Columbia facilities after the MDE enforcement action because he did not believe that financial assurances were required in the District of Columbia at all. TR-13 at 26, *see, also,* TR-4 at 37. Mr. Yuen testified that the District of Columbia was not "proactive" on this requirement, TR-13 at 22, 26, and that therefore "it really kind of slipped my mind and never really inquired with Mr. Dana about a requirement for the District of Columbia." TR-13 at 22-23.

Having already been sued and fined by Maryland, Mr. Yuen's testimony amounts to a claim that he did not think that financial responsibility was required in the District of Columbia because he had not been sued by and fined by the District of Columbia as well. This claim defies common sense. At the very least it would be negligence of the highest degree for Euclid not to even investigate whether the District of Columbia required the same financial responsibility demonstration as did Maryland. A much more reasonable inference from this evidence its that Euclid deliberately chose to save money on insurance premiums by ignoring the District of Columbia financial responsibility requirements, believing that the District of Columbia was not going to closely investigate Euclid's compliance with this requirement.

In fact, it appears that Euclid and Mr. Yuen attempted to affirmatively mislead the District of Columbia with regard to Euclid's compliance with the financial responsibility requirements. As discussed above, there can be little doubt that Euclid and Mr. Yuen were aware that the Nationwide policy did not comply with the financial responsibility requirements, at least after the 1997 Maryland enforcement action. Nonetheless, on several District of Columbia UST

notification forms, which Mr. Yuen signed and submitted *after* the conclusion of the Maryland enforcement action, Mr. Yuen certified that Euclid's District of Columbia gas stations met "the financial responsibility requirements in accordance with 40 CFR Subpart H" by means of "Commercial Insurance." Complainant's Exs. A-3 at 0024, M-3 at 0558, R-7 at 0868, S-3 at 0904.

When one of these certifications was shown to Mr. Yuen during the Hearing, he offered the explanation that he checked off "commercial insurance" under the "financial responsibility" section of the notification form merely because he did have *some* form of commercial insurance, and claimed that he had not meant to imply that such commercial insurance met the UST financial responsibility requirements set forth in 40 C.F.R. Part 280, Subpart H. TR-13 at 205-207. This explanation is simply not believable. Even a cursory examination of the District of Columbia UST notification forms would make it clear that the list of financial mechanisms in Section VII of the form refers to the UST financial responsibility mechanisms set forth in the UST regulations. Mr. Yuen's conduct, in checking off "commercial insurance" as Euclid's method of financial responsibility in the District of Columbia, can only be interpreted as a deliberate attempt to mislead the District of Columbia regulators.

Kofi Berko, of the DCDOH, confirmed that Euclid's false certifications did in fact prevent the DCDOH's from learning earlier of Euclid's failure to obtain financial assurances. Dr. Berko testified that, due to limited resources, DCDOH does not normally investigate an owner's claims that it has a financial responsibility mechanism, but would have requested

documentation of Euclid's compliance with the financial responsibility requirements if Euclid had not checked a financial mechanism on its notification forms. TR-3 at 78-79.

(ii) Self-Insurance Using "Consolidated" Entities

Respondent also argues that it *de facto* met the requirements for financial responsibility by means of self-insurance. Euclid has never been clear as to exactly which entity or combination of entities are involved in its "self"-insurance calculation of net worth. Euclid's first explanation of its self-insurance claim, in Euclid's Supplemental Prehearing Exchange, stated only that "Respondent's properties are owned by partnerships or limited liability companies under common control. The combined tangible net worth of these entities exceeds $10,000,000, for the real estate values alone." Complainant's Ex. Y-24 at 1799. As the Hearing in this matter approached, Euclid eventually provided to EPA an expert report from an accountant, Ed Davis, dated November 14, 2003, which purported to enclose a combined balance sheet for Euclid and the Patricia Yuen Insurance Trust ("Patricia Trust"), TR-6 at 58.[32] The inclusion of the Patricia Trust in this document appeared to indicate that Euclid was claiming the Patricia Trust as a guarantor, and was also combining the Patricia Trust's assets with Euclid's for purposes of meeting the test of self-insurance required of guarantors. TR-6 at 58. Later, however, Euclid modified these claims to indicate that the information shown on the

[32]The actual expert report, Respondent's Ex. X-9, was claimed at the hearing to be confidential business information ("CBI"), although this claim had not been made at the time of its submission to EPA. TR-1 at 18-22. Euclid agreed that its CBI claim was for non-RCRA CBI, which is not subject to the full procedures applicable to RCRA CBI. TR-6 at 111-112. However, those portions of the Transcript referring to the report have apparently *not* been claimed as CBI. Complainant will limit its discussion of this document and its contents to the non-CBI facts as set forth on the non-CBI transcript.

combined balance sheets in Ed Davis' report actually were the combined assets of Euclid, the Patricia Trust, and two other trusts, the Koo Yuen Insurance Trust and the Yuen Children's Trust (the three trusts will be collectively referred to as the "Trusts"). TR-6 at 58, TR-13 at 37-38.

Further complicating matter, the properties claimed to be the assets of the Trusts were actually owned by a number of limited liability companies or limited partnerships (as had originally been stated in Respondent's Supplemental Prehearing Exchange), which Euclid eventually claimed were all somehow involved in providing financial assurances for each other. TR-10 at 47, TR-13 at 226-229. Complainant's financial expert, Joan Meyer, compiled a chart showing that more than 20 different entities, as shown in publicly-available sources, had ownership interests in the various properties which Euclid is claiming as assets to support its "self"-insurance assertions. S*ee* TR-6 at 56-58, Complainant's Ex. Y-41.

The most egregious flaw in Euclid's self-insurance argument is that Euclid has not provided any documentation whatsoever that the multiple entities involved had actually exposed their assets to liability for clean-ups. As noted above, Euclid has never submitted financial information to support a self-insurance argument using solely its own assets, but instead has submitted statements purporting to show that its assets, when combined with the assets of a murky combination of affiliates, are sufficient to support a self-insurance claim. Thus, despite its claims to the contrary, Euclid is clearly relying on *guarantees* from affiliates instead of its own financial resources. Euclid's argument thus falls apart right from the start, because it has never obtained formal guarantees of any kind.

Euclid's President, Mr. Yuen, has opined that there was no need for formalities, because the Trusts and the partnerships were all under "common control" and had a "common business purpose." TR-10 at 47-48, TR-14 at 8. As the individual exerting this purported common control, Mr. Yuen stated that *he* considered the combined assets of all of the Trusts and the LLCs to be available to cover any liability arising out of the ownership of the USTs. TR-13 at 229, TR-14 at 9-11. However, an informal agreement to help out in the case of an UST release is not even remotely akin to a binding assurance of financial responsibility. Euclid's arguments about "common control" appear to be no more than an invitation to EPA to "pierce the veil" of the Trusts and the LLCs to reach money which has flowed from Euclid's gas station operations to those other entities. The potential ability of a regulatory agency to pierce the veil to reach assets held by related entities is a far cry from the type of guarantee set forth in the mandatory guarantee language found in the UST regulations, which requires, among other things, (1) an *explicit* guarantee, (2) to *the regulatory agency*, (3) to fund an *already existing* standby trust fund, (4) *immediately* upon notice to the guarantor. DCMR § 6706.3, 40 C.F.R. § 280.96(c). Euclid presented no evidence that the Trusts and partnerships provided guarantees to anyone,[33] much less the District of Columbia regulatory agency, and Euclid stipulated that no standby trust fund has ever been established. Stipulation 11.

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[33]An additional issue is raised by the purported use of multiple guarantors, which does not appear to be allowed by the UST regulations, which speak in the singular of "a guarantee," DCMR § 6706.1, 40 C.F.R. § 280.96(a) from "the guarantor." DCMR § 6706.2, 40 C.F.R. § 280.96(b). An explanation of the practical problems with multiple guarantors by Joan Meyer, Complainant's financial assurance expert, TR-6 at 53-54, was quoted in the Initial Decision at 112.

The requirement that the beneficiary of the guarantee be the regulatory agency is clearly concerned with expeditious and uncomplicated access to clean-up funds. This purpose is further reflected in the requirement that a standby trust fund be established at the time that self-insurance and/or a guarantee is established as a means of financial assurance, DCMR § 6711.1, 40 C.F.R. § 280.103(a), so that the standby trust fund is ready to accept funding from the self-insurer or guarantor immediately upon receipt of notice from the regulating agency that the owner or operator has failed to perform corrective action. DCMR Chapter 67, Appendix C (Complainant's Ex. Y-15 at 5796-5797), 40 C.F.R. § 280.96(c)(3).

Joan Meyer, accepted by the Presiding Officer as an expert on financial assurances, TR-6 at 30, explained, from the standpoint of an economist and financial assurance expert, how Euclid's claimed informal guarantees frustrate the purposes of the UST financial responsibility requirements. Noting that affiliated companies are often separately incorporated or organized "specifically to limit liability," Ms. Meyer explained that the "the whole purpose of the guarantee is to ensure that the regulator has instant and immediate access to the money when it becomes needed." TR-6 at 46. According to Ms. Meyer, the specific mandatory language of the guarantee is necessary to promote this expeditious access to cleanup funds: "the reason the wording is so carefully worked out is to minimize, to the extent practical, any barriers a guarantor might raise when a regulator comes to the guarantor to require the funding. The guarantee is there to prevent these lengthy piercing the corporate veil proceedings that occasionally are required in order to access funds." TR-6 at 46. If a release had occurred at a Euclid facility, the regulatory agency would have at least faced significant delays in obtaining funds from Euclid's affiliates:

> If Euclid had been unwilling or unable to pay for the cleanup, the regulator would have been at the good graces of these affiliates to come through and to contribute the money necessary for the cleanup. The regulator would have faced the possibility of having to pierce the corporate veil, and no matter how easy or how good the facts are to support a piercing case, piercing cases take time and resources to carry through with.

TR-6 at 55.

Respondent's Brief, however, argues that Euclid is not relying on guarantees, but is instead relying on a "commitment to utilize the resources of the trusts to pay for any required remediation of the sites," which it claims is "the equivalent of including the net worth of the trusts in Euclid's net worth for purposes of meeting the applicable regulatory requirements." Respondent's Appeal Brief at 60. It is difficult to see how a "commitment to utilize the resources of the trusts to pay for any required remediation of the sites" differs from a financial guarantee. Regardless of what Euclid calls it, the "commitment" must be actual, demonstrated and legally binding.

Moreover, the presentation of the financial resources of a "consolidated entity" in this case is in contravention to financial principles. There is no evidence that the finances of the twenty or more entities which own the properties which are the basis of Respondent's net worth claims (*see* TR-6 at 56-58, Complainant's Ex. Y-41) are normally consolidated with Euclid's for purposes of taxation or financial statements or reporting to Dun & Bradstreet or for any reason other than for Euclid's claim of self-insurance. Consolidation is not acceptable for purposes of a financial statement unless the entities are normally consolidated for accounting purposes, which

usually occurs only where a parent owns more than 50% of a subsidiary. TR-6 at 63. There is no evidence that this is the case with Euclid and its related entities.

Indeed, the nature of these affiliated entities – trusts and limited liability companies – clearly indicates an original intention to shield the assets of these entities from Euclid's liabilities. Euclid's claim now appears to be an admission that the separate entities are not in fact separate entities, but are in fact all part of a single business enterprise controlled by Mr. Yuen. TR-10 at 48-49, TR-14 at 8-9. Euclid's claim, that these entities are a common enterprise under common control of one person, is in effect an admission that the purported limited liability nature of these separate entities is a sham, and these entities – and perhaps Euclid itself – are mere "alter egos" for Mr. Yuen. This admission may allow the veil of these entities to be pierced through litigation, but an after-the-fact invitation to pierce the veil of these multiple entities is no substitute for the direct and streamlined financial assurance procedures required by the regulations, including formal guarantees and standby trust funds.

(iii) Lack of Proof of Assets

Even the assets of these numerous entities *could* properly be consolidated for purposes of the financial test of self-insurance, Euclid has not provided a sufficient basis upon which to determine that the consolidated assets meet the financial tests. Euclid's claim as to the net worth of the consolidated entities depends entirely on Mr. Yuen's valuation of real property owned (or in one instance leased) by various of the consolidated entities. Mr. Yuen valued the properties at fair market value instead of using the purchase price, in contravention to generally accepted accounting principles ("GAAP"). TR-6 at 71-72. When Euclid's properties are valued using the

purchase price, as required by GAAP, the net worth of the combined entities appears to be less than $10 million for each year claimed. TR-6 at 63.

Euclid claims that its accountant, Ed Davis, testified that "there are acceptable deviations from GAAP, permitting Euclid to value the real estate at its fair market value, and that these exceptions applied in this case." This claim misstates Mr. Davis' testimony. Mr. Davis admitted that his original "compiled" financial statements contained a notation explaining that the use of fair market value for real estate was *not* in accordance with generally accepted accounting principles ("GAAP") for financial statements. TR-10 at 48, *see also* TR-6 at 71. While Mr. Davis testified that "there are times when the fair market value of assets are acceptable," TR-10 at 45, the only specific example he offered was for a statement of the personal net worth of an individual, TR-10 at 45, which is clearly *not* the situation in this case. Joan Meyer, Complainant's financial expert, confirmed that personal net worth may be a situation in which fair market value can be used, but opined that fair market value was *not* acceptable for an entity such as Euclid and its claimed consolidated affiliates. TR-6 at 72.

Even with regard to fair market value, Euclid has not provided credible evidence as to the fair market value of the properties owned by the various consolidated entities. Euclid's only evidence of the value of the properties consists of a two-page document prepared by Mr. Yuen containing conclusions, without explanation, as to the values of the properties at issue. Respondent's Ex. X-13 at 3591-3592.

Respondent complains that the Presiding Officer did not give sufficient weight to Mr. Yuen's testimony as to the value of the properties, but the very case Euclid cites in support of

this position makes it clear that the trier of fact does not need to give any weight at all to the testimony of a property owner as to the value of his property. In *Brannon v. State Roads Commission*, 305 Md. 793, 506 A.2d 634 (1986), the court noted that the testimony of a property owner "is draped with no cloak of expertise," 305 Md. at 802, and noted that the trier of fact "may give his opinion as much or as little weight as it deems appropriate." 305 Md. at 802.

Moreover, the court in *Brannon* also noted that the owner's evaluation of the property "is of little utility to the trier of fact without an explanation of the reasons supporting it." 305 Md. at 803. Mr. Yuen, who is neither a certified real estate appraiser nor a disinterested party, did not explain his valuation in relation to any of the three analytical methods used by certified appraisers: (1) cash flow generated by such properties, (2) comparable property sales or (3) replacement value. TR-6 at 72-74. In fact, in at least two instances Mr. Yuen's report placed values on properties which were substantially greater than the purchase price paid by Euclid or its affiliates only a few months prior to the purported valuation date. TR-6 at 141-146. Mr. Yuen offered no explanation as to why he ignored the nearly contemporaneous purchase price for some properties, an obvious indicator of the properties' market value, nor did he explain how the value of the property could have increased so dramatically in only a few months. In fact, Mr. Yuen offered no explanation at all as the methods, if any, he used to derive the values on his summary, and presented no facts from which to determine if his evaluations were reasonable.

Euclid has simply not provided a reliable basis from which to determine that the tangible net worth of the "consolidated" entities met the financial test of self-insurance. The Presiding Officer admitted Mr. Yuen's property valuations into evidence, TR-13 at 35-36, but, in the

absence of any explanation of these valuations, the Presiding Officer appropriately declined to give Mr. Yuen's valuations any weight. Initial Decision at 114.

(iv) Lack of Independent Verification

This is not to say that Mr. Yuen's claims of vast assets are necessarily wrong. Complainant cannot affirmatively disprove Mr. Yuen's claim that he and his family have amassed net assets far in excess of $10 million as a result of Euclid's empire of gas stations. The UST regulations, however, require more than mere claims or suppositions as to the net worth of the self-insuring entity. In drafting its financial responsibility regulations, EPA sought to avoid taking on the responsibility for a detailed verification of the financial claims made by companies choosing to self-insure, and therefore, as explained in the preamble to the final financial responsibility regulations, included requirements "meant to ensure that the information used to support a financial test would be publicly available and therefore easily verified by EPA or state regulators." 53 *Fed. Reg.* 43322, 43341 (October 26, 1988). *See also* Complainant's Ex. Y-19 at 1630. The regulations for the first alternative test therefore require that self-insuring entities either file annual financial statements with the SEC or submit tangible net worth information annually to Dun and Bradstreet and obtain a Dun and Bradstreet financial strength rating of 4A or 5A. 40 C.F.R. § 280.95(b), 20 DCMR § 6704.

In the preamble to the proposed financial responsibility rule, EPA expressed the view that each of these alternative requirements would provide sufficient verification. With regard to SEC filings, EPA noted that "firms that file annually with the SEC must be independently audited to meet the SEC's requirements." 52 *Fed. Reg.* 12786, 12808 (April 17, 1987). While Dun and

Bradstreet does not strictly require audited financial statements, the Agency noted that about 75% of the firms which obtain a rating of 4A or 5A do submit audited financial statements to Dun and Bradstreet, and noted that Dun and Bradstreet will not assign financial strength ratings to firms believed to have submitted questionable data. 52 *Fed. Reg.* at 12808.

In the preamble to the final UST financial responsibility regulations, EPA noted the inclusion of the alternative financial test in the final rule – Alternative II, which incorporates by reference 40 C.F.R. § 264.147(f)(1) – but noted that for this test "the reporting and certification requirements are stricter. Specifically, Alternative II requires that the financial statements of an owner or operator using the financial test be independently audited." 53 *Fed. Reg.* at 43343. The particular information required by the Alternative II test requires auditing to verify, 53 *Fed. Reg.* at 43343, and thus the Alternative II test is stricter because it does not allow the option of submitting unaudited statements to Dun and Bradstreet.

Euclid also admits that the financial statements provided to Complainant are not complete. In its Second Supplemental Prehearing Exchange, Euclid claimed that Euclid and the Trusts had other substantial assets which were not included in the financial statements: "Euclid always maintains an inventory of readily saleable petroleum products and a cash reserve. These assets are not counted in this computation. In addition, the trust has other investments the nature of which are confidential but the value of which would double the net worth as reported." TR-6 at 77. There is no way to verify the value of those undisclosed assets, and in fact these "assets" may have attendant liabilities. TR-6 at 77-78. No audited financial statement could purport to represent only select parts of an entity's finances.

Mr. Yuen and his family may indeed be worth tens of millions of dollars, but Euclid has provided no evidence of an independent verification of this claim. Euclid made no attempt to comply with the independent verification requirements of the financial responsibility requirements. There is no evidence that Euclid has ever submitted financial statements to the Securities and Exchange Commission ("SEC"), nor has Euclid ever reported its tangible net worth to, or received any financial strength rating from, Dun and Bradstreet, as set forth in DCMR § 6704.5(b) and 40 C.F.R. § 280.95(b)(4)(ii). TR-6 at 67. In fact, Dun and Bradstreet would not have assigned a financial strength rating to these combined entities for at least three separate reasons: (1) Dun and Bradstreet will not assign such ratings to trusts which do not themselves operate a business, TR-6 at 62-63, 69-70, (2) Dun and Bradstreet will not assign such ratings to consolidated entities which are not required to consolidate their financial statements because of direct ownership of subsidiaries, TR-6 at 70, and (3) Dun and Bradstreet will not assign such ratings to entities which do not disclose all of their assets and liabilities. TR-6 at 79.

Euclid claims that it did not need to have audited financial statements, offering a tortured interpretation of 40 C.F.R. § 280.95(c)(2) and 20 DCMR § 6705.2. Euclid claimed that the "accountant's report," which is the result of the independent financial examination required by 40 C.F.R. § 280.95(c)(2) and 20 DCMR § 6705.2, need only be the "compiled financial statement" submitted by Euclid. TR-10 at 26. A compiled statement is the lowest level of review of a financial statement, TR-6 at 117-118, TR-10 at 38-40, and essentially involves assembly of unverified information submitted by the company into the form of a financial statement, the information submitted by the company accepted at face value with no further

inquiry. TR-6 at 113, TR-10 at 38-39. The use of this level of review, or any level of review less than an audit, would render meaningless the very next subsection of the regulation, which states that the firm's statements cannot include "an adverse auditor's opinion, a disclaimer of opinion, or a 'going concern' qualification," 40 C.F.R. § 280.95(c)(3), 20 DCMR § 6705.3. The prohibition on an "adverse auditor's opinion" clearly indicates that there *will be* an auditor's opinion, not a mere compilation of unverified information.

This interpretation is supported by both the preamble to the regulations, discussed above, and also by the language in a document entitled *Financial Responsibility for Underground Storage Tanks: A Reference Manual*, dated January, 2000, which EPA published to assist the regulated community. Complainant's Ex. Y-19. This manual discusses an example of a "disclaimer of opinion" which clearly demonstrates that an opinion is not to be given when the underlying documentation cannot be examined by the examiner. Complainant's Ex. Y-19 at 1638. This same manual repeatedly emphasizes, in bold or underlined text, the requirement that users of the Alternative II test obtain an audit of their financial statements. Complainant's Ex. Y-19 at 1632, 1634. While the manual and the preamble by themselves do not have the force of law, they are nonetheless clear evidence of EPA's consistent interpretation of the regulatory language. EPA's consistent interpretation of the language in 40 C.F.R. § 280.95(c)(2) and 20 DCMR § 6705.2 is a very reasonable interpretation, whereas than Euclid's strained interpretation – allowing the use of a "compiled" statement to verify net worth – would completely frustrate the purposes of the independent verification requirement.

Euclid complains that the Presiding Officer relied on the testimony of Complainant's financial expert, "while rejecting, out of hand, the testimony of Ed Davis." Respondent's Appeal Brief at 62. It is not clear, however, that the Presiding Officer rejected Mr. Davis' testimony at all. It appears, instead, that there was simply nothing in Mr. Davis's testimony which helped Euclid's case. The Presiding Officer's findings are supported by the law and by the overwhelming weight of the evidence, and should not be overturned.

IV. Compliance Order

Respondent suggests that it should be Complainant's responsibility to detail for the Board exactly what measures still need to be undertaken to comply with the Compliance Order set forth in the Initial Decision. Complainant has already proved that Respondent was in violation of Subtitle I of RCRA and should not be required to prove its case again at this stage in the proceedings. To the extent that Euclid has brought its facilities into compliance with the UST regulations since the conclusion of the Hearing, this will make it that much easier for Euclid to fulfill the requirements of the Compliance Order. To the extent that Euclid's facilities are not in compliance, then EPA will be entitled to enforce the Compliance Order in a new proceeding through any of the means set forth in Section 9006 of RCRA.

It should be noted, as well, that the penalties in this matter were assessed only for violations prior to the start of the Hearing in this matter, and thus Euclid may be liable for additional penalties if it continued in noncompliance after the conclusion of the Hearing. Such additional penalties, if any, will be sought in a separate proceeding.

V. Conclusion

For the foregoing reasons, the Environmental Appeals Board should reverse the Initial Decision insofar as it denied liability for Count 45, and denied liability for portions of the period of violation alleged for Counts 54 and 57. In addition, the Board should assess a penalty of $50,339 for the violations alleged in Count 47, an additional penalty of $16,899 for the violations alleged in Count 54 and an additional penalty of $12,024 for the violations alleged in Count 57. In all other respects the Board should affirm the Initial Decision.

Respectfully submitted,

_____ _____

Date

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CERTIFICATE OF SERVICE

I hereby certify that on the date below I served the original and copies of the attached Complainant's Brief on Cross Appeal and Brief in Opposition to Respondent's Appeal as follows:

Original via Federal Express, copy via CDX Electronic Submission:	U.S. Environmental Protection Agency Clerk of the Board, Environmental Appeals Board 1341 G Street, N.W., Suite 600 Washington, D.C. 20005
Copy via Hand Delivery:	Lydia Guy, Regional Hearing Clerk U.S. Environmental Protection Agency – Region III
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Date Benjamin D. Fields
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