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ENVIR. APPEALS BOARD

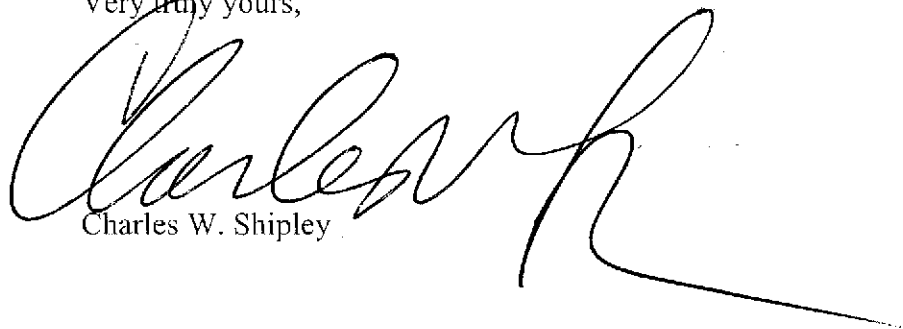
August 14, 2008

Clerk of the Board
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20005

To Whom It May Concern:

Enclosed please find and file the Notice of Appeal and Brief in Support, one original and one copy. Then there is one copy a Notice of Brief with without attachments. Please file and return the file stamped copy in the postage pre-paid envelope enclosed.

Very truly yours,



Charles W. Shipley

CWS: jef
Enclosures

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UNITED STATES ENVIRONMENTAL APPEALS BOARD BEFORE THE
ADMINISTRATOR

IN THE MATTER OF:
RAM, INC.

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ENVIR. APPEALS BOARD
Docket No. SWDA-06-2006-5301

NOTICE OF APPEAL AND BRIEF IN SUPPORT OF APPEAL

Respondent, Ram, Inc, (“Ram”) respectfully submits this Notice of Appeal and Brief in Support of same concerning the July 12, 2008 Initial Decision (“ID”) in this matter by the Honorable Spencer T. Nissen, (“Nissen”) Administrative Law Judge. The ID was received in the office of the undersigned on July 21st, 2008. The hearing before Nissen was held May 9, 10, and 11th, 2006. Ram is the owner of five gasoline convenience stores and only operates three of them.

The record before Nissen showed that this matter is an example of a powerful governmental agency deciding to punish a businessman by issuing an economic death sentence, in spite of the fact that Ram was only shown to have failed on paperwork errors or omissions. There was no evidence of spillage of any gasoline at any of the five service stations investigated. There was no damage to the environment, nor any credible threat of such damage.

The Agency issued a civil penalty of \$ 279, 752.00 for UST violations at these five service stations and only at the last minute before trial began on May 9, 2006 did the Agency acknowledge that it had overreached by dismissing many of its claims. Thus the three-day trial went forward with the Agency seeking \$ 175, 062.75 in civil penalties from Ram.

The Agency ("EPA") had delegated the UST program to Oklahoma before they had targeted Ram. The targeting of Ram is shown by, inter alia, EPA only inspecting Ram facilities, in all of 2005, in the state of Oklahoma. The Court below failed to prevent EPA from applying its own penalties and policies, rather than the Oklahoma Corporation Commission ("OCC") penalties and policies with respect to Ram. If OCC's program had been applied, \$2000.00 would have been more likely the fine assessed, if any.

The magnitude of this fine is shocking. The EPA's actions in this civil penalty action were shown to be arbitrary and capricious.

In an effort to placate EPA, Ram agreed to stipulate to all of the remaining violations at the 3-day trial- they were largely only paperwork violations-if they were violations at all.

In most instances the proof at trial showed that the required work had been performed, but the paper documentation could not be found since so much time had passed.

For instance (and there are several of these described in Nissen's ID), Ram was fined heavily for the inability to produce an integrity test prior to installing a cathodic protection system in 1998 (see ID paragraph 55). The proof did establish that a NACE certified consultant designed and installed that system that and it was proven that a subsequent integrity test was passed. Therefore, Nissen held that it must be presumed that such tank had integrity previously. Nissen held in that instance that EPA's testimony "overstates the gravity of the offense," and he reduced the fine from \$19, 595.34 to \$3, 945.36.¹

¹ Ram adopts and makes a part of this Appellate Brief and attaches hereto:

That is just one example of Nissen's finding that EPA's sworn testimony as to the facts and as to the application of EPA's penalty policy was not supported by the facts, Nissen also found EPA's testimony: overstates the deviation and potential for harm" (ID at Paragraph 53); "simply guessing" [that there was a violation] (ID at Paragraph 50); "overstates the seriousness of the violation" (ID at Paragraph 43); "emphasized ...implausibly" [that PVC pipe and pump manifolds were threatened by corrosion] (ID at Paragraph 39), "greatly overstates the potential for harm...by his own admission,...lined tanks did not need cathodic protection" (ID at Paragraph 39), and "testimony is misleading" (ID at Paragraph 22.)

Numerous times Nissen rejected the EPA application of their penalty policy because the record did not support any risk of harm-much less any actual harm to the environment (for example see ID at Paragraph, 27, 30, 33, etc.).

EPA tried to fine Ram \$ 27, 413.94 for failing to install spill buckets on two tanks at a service station where those tanks could not be accessed by a fuel truck due to physical limitations. (The only reason for spill buckets is to catch spills from tank truck loading hoses.) Nissen found there was no evidence of any truck deliveries at those two tanks and further that there is "simply no evidence of any spill occurring at this station." (ID at Paragraph 22. Nissen reduced the fine to \$2,213.94, which is still amazingly high, and should not be upheld, but should be reduced to zero..

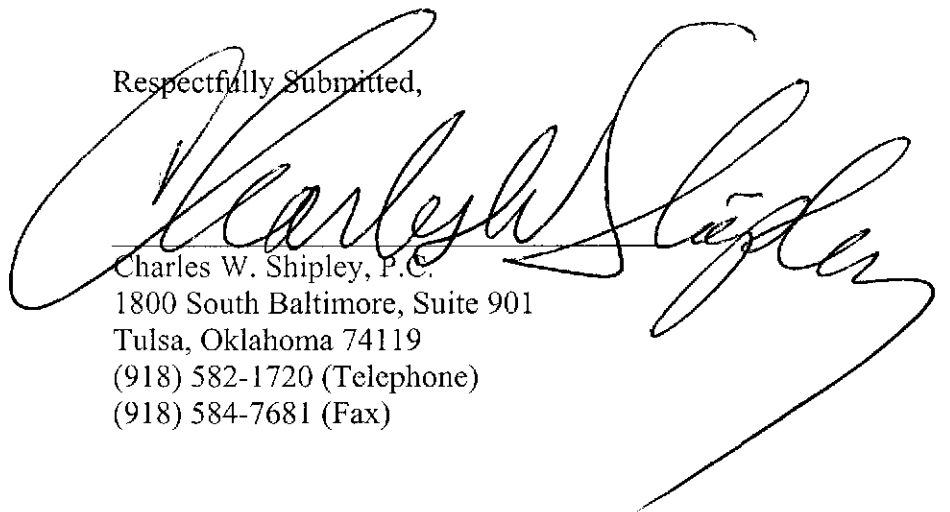
Nissen failed to uphold Ram's assertion that it had been denied substantive due process by the unjustifiable targeting of Ram, and by the outrageous size of the fines, and by the pattern of EPA's inaccurate factual assertions demonstrating a fundamental

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- 1) Initial Decision
 - 2) Respondent's Proposed Findings of Fact, Conclusions of Law and Brief in Support
 - 3) Respondent's Memorandum in Reply to Complainants' Post Hearing Brief

zero, the cost of all Ram's attorney fees is more than enough to encourage strict compliance with record keeping in the future.

Additionally, as pointed out in the attachments hereto, Ram is in direct competition with several Native American gasoline service stations, and there is no enforcement by EPA Region 6 against those stations. Due to the U.S. Constitution, the OCC is prevented from enforcing UST rules against those operations. Again, Nissen's failure to prevent Ram from being undercut in the marketplace by even-handed applications of the UST Rules and Regulations is shocking, unfair and violative of Ram's Constitutional rights to fair trial and hearing. Nissen should have required EPA to apply its' approved OCC UST policy, etc. The record below shows there are no other UST penalties for other service stations issued by EPA in the entirety of Region 6 which are even one-tenth the size of those penalties issued to Ram, which demonstrates further that EPA's treatment of Ram is arbitrary and capricious. Ram is not a Fortune 500 company and even those large companies are not treated like Region 6 is trying to treat Ram. Nissen should have over-ruled all of those civil fines on this record.

Respectfully Submitted,



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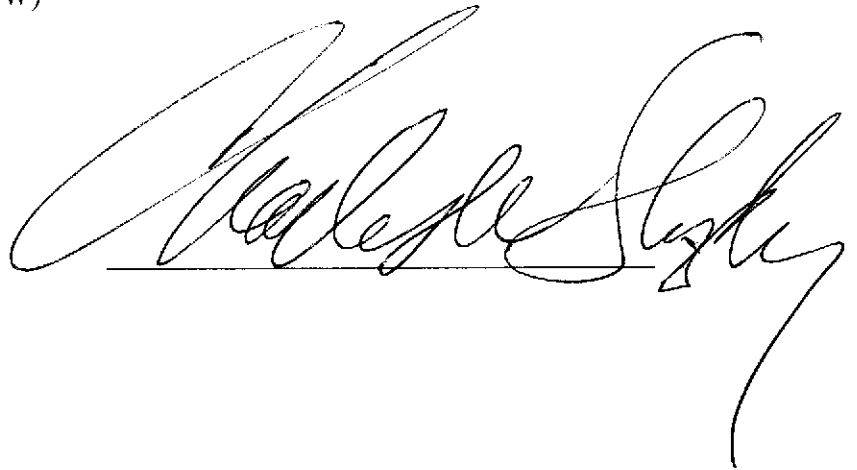
CERTIFICATE OF SERVICE

I certify that on this 15 day of August, 2008, I placed true and correct copies of the foregoing in the U.S. Mail, without attachments, which each recipient has already received, due to the volume, addressed to the following:

The Honorable Spencer T. Nissen
Administrative Law Judge, U.S EPA
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A large, stylized handwritten signature in black ink, appearing to read "Charles S. Stucky", is written over a horizontal line. The signature is highly cursive and extends significantly to the right of the line.