

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

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ENVIR. APPEALS BOARD

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In the Matter of: :
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EUCLID OF VIRGINIA, INC. : RCRA (3008) App. 06-05
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Docket RCRA-3-2002-0303 :
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1201 Constitution Avenue, NW
Washington, D.C.

Tuesday, September 18, 2007

The above-entitled matter came on
for oral argument at approximately 10:35 a.m.

BEFORE:

THE HONORABLE KATHY A. STEIN
THE HONORABLE ANNA L. WOLGAST
THE HONORABLE EDWARD E. REICH

2	<p>1 APPEARANCES:</p> <p>2 On behalf of Respondent Euclid of Virginia:</p> <p>3 THOMAS F. DeCARO JR., ESQUIRE</p> <p>4 DeCaro & Howell, PC</p> <p>5 14406 Old Mill Road, Suite 201</p> <p>6 Upper Marlboro, Maryland 20772</p> <p>7 (301) 464-1400</p> <p>8 On behalf of U.S. Environmental Protection</p> <p>9 Agency:</p> <p>10 BENJAMIN D. FIELDS, ESQUIRE</p> <p>11 A.J. D'ANGELO, ESQUIRE</p> <p>12 U.S. Environmental Protection Agency</p> <p>13 Region III</p> <p>14 1650 Arch Street - 3RC30</p> <p>15 Philadelphia, Pennsylvania 19103-2029</p> <p>16 (617) 556-0007</p> <p>17</p> <p>18 GARY JONESI, ESQUIRE</p> <p>19 U.S. Environmental Protection Agency</p> <p>20 Office of Enforcement of Compliance Assurance</p> <p>21 U.S. Environmental Protection Agency</p> <p>22 Washington, D.C.</p> <p>ALSO PRESENT:</p> <p>EURIKA DURR</p> <p>Clerk of the Board</p>	4
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3	<p>1 PROCEEDINGS</p> <p>2 MS. DURR: The Appeals Board of the</p> <p>3 United States Environmental Protection Agency</p> <p>4 is now in session for the hearing of oral</p> <p>5 argument in re: Euclid of Virginia, Inc.,</p> <p>6 Docket No. RCRA-3-2002-0303, RCRA (3008)</p> <p>7 Appeal Nos. 06-05 and 06-06, the Honorable</p> <p>8 Judges Anna Wolgast, Kathie Stein, and Edward</p> <p>9 Reich.</p> <p>10 Please be seated.</p> <p>11 JUDGE STEIN: Good morning,</p> <p>12 counsel. We are hearing oral argument this</p> <p>13 morning in the matter of in re: Euclid, as I</p> <p>14 understand it, pursuant to the Board's Order. ✓</p> <p>15 Each side has 45 minutes for argument, and</p> <p>16 Euclid may reserve five minutes of their time</p> <p>17 for rebuttal.</p> <p>18 I would like to begin by asking</p> <p>19 each party to state their names and who they</p> <p>20 represent.</p> <p>21 MR. DeCARO: My name is Thomas</p> <p>22 DeCaro, and I represent the Respondent, Your</p>	5
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<p>1 Honor.</p> <p>2 JUDGE STEIN: Thank you.</p> <p>3 MR. FIELDS: Benjamin Fields, EPA</p> <p>4 Region III. I will be arguing for</p> <p>5 Complainant. And at counsel table I also</p> <p>6 have A.J. D'Angelo from Region III, and Gary</p> <p>7 Jonesi from OECA.</p> <p>8 ORAL ARGUMENT OF THOMAS DeCARO</p> <p>9 ON BEHALF OF RESPONDENT</p> <p>10 JUDGE STEIN: Thank you.</p> <p>11 Mr. DeCaro, would you like to proceed? And</p> <p>12 will you be reserving five minutes for</p> <p>13 rebuttal?</p> <p>14 MR. DeCARO: Yes, Your Honor, I</p> <p>15 would like to reserve.</p> <p>16 If it please the Court, the first</p> <p>17 issue on your list is the contention that it</p> <p>18 was necessary for the Complainant to put on</p> <p>19 some kind of evidence that it notified the</p> <p>20 three jurisdictions as a jurisdictional</p> <p>21 prerequisite for bringing the complaint in</p> <p>22 this case.</p> <p>JUDGE STEIN: Am I correct that the</p> <p>first time this issue was raised was on the</p> <p>first day of the hearing?</p> <p>MR. DeCARO: Yes, that's correct,</p> <p>Your Honor.</p> <p>JUDGE STEIN: So how is it that EPA</p> <p>would have known in terms of putting on</p> <p>evidence that this was an issue in dispute?</p> <p>MR. DeCARO: Well, Your, Honor,</p> <p>several ways. Number one is if you read the</p> <p>Harmon case, and even though it has been</p> <p>watered down as far as necessity for a</p> <p>written notification, it is a statute and it</p> <p>is a jurisdictional prerequisite. As such,</p> <p>it is the sort of thing that one would have</p> <p>to plead and prove in order to establish your</p> <p>right as a sort of a prima facie matter.</p> <p>JUDGE STEIN: Is that the holding</p> <p>of the Harmon case?</p> <p>MR. DeCARO: It was the holding of</p> <p>the cases that were cited, yes. If I may --</p> <p>JUDGE REICH: That was the holding</p>

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<p>1 in the case? I don't even remember that 2 really being a significant issue in the case. 3 As I remember the case, the whole focus was 4 on overfiling, and I don't think whether the 5 notice was writing or not had any materiality 6 whatsoever.</p> <p>7 MR. DeCARO: Well, it was about 8 overfiling, and I think it does have 9 materiality.</p> <p>10 JUDGE REICH: It has materiality to 11 notice but not as to the form of notice.</p> <p>12 MR. DeCARO: Not as to the form of 13 notice, and we are not contending that a 14 written notice is required based on 15 subsequent developments in the law of which 16 I'm sure you are well aware.</p> <p>17 JUDGE STEIN: So it's your position 18 that oral notice is sufficient?</p> <p>19 MR. DeCARO: Well, it appears from 20 the case law that oral notice is sufficient, 21 provided that some evidence of that oral 22 notice is provided to the tribunal.</p>	<p>1 suggest that that discussion was taking place 2 before EPA initiated the action?</p> <p>3 MR. DeCARO: No, I think an equally 4 valid inference can be drawn from that sort 5 of language that the lead in the 6 investigation of the situation, which it was 7 an extensive investigation, as I'm sure you 8 are aware, and there was no indication that 9 EPA was taking the lead on any kind of 10 enforcement action in the record. I mean, it 11 just isn't there. I mean, if you read the 12 actual transcript excerpts. I'm sorry.</p> <p>13 JUDGE WOLGAST: Well, in your view 14 could you describe for us what actual notice 15 you think is required?</p> <p>16 MR. DeCARO: Yes. I think it would 17 have been sufficient if one of each of the 18 jurisdictions -- had one of the officials 19 from each of the jurisdictions, including 20 even the investigators or anyone who is in 21 any kind of official capacity, had simply 22 gotten up and testified that they had</p>
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<p>1 JUDGE REICH: And do you think that 2 the testimony below of each representative of 3 each of the three state jurisdictions 4 involved that talked about the 5 interrelationship and EPA taking lead 6 responsibility for the case, you don't think 7 that provides evidence that they must have 8 been on notice that this was going on?</p> <p>9 MR. DeCARO: Well, there you have 10 it, Your Honor. You say "Must have been on 11 notice." The notice as required is a notice 12 of the commencement of this enforcement 13 proceeding.</p> <p>14 I don't think you can draw an 15 inference that is evidentially sufficient. 16 If you take a look at the case of Holstrom, 17 the Supreme Court case, it says "Citizen suit 18 must be dismissed for lack of jurisdiction 19 for lack of notice."</p> <p>20 JUDGE REICH: If the record showed 21 that the discussion was initially in terms of 22 who will take the lead, then would that not</p>	<p>1 received notice that the Complainant was 2 going to be commencing this enforcement 3 action. And that just simply isn't in the 4 record.</p> <p>5 JUDGE REICH: Let me ask, I mean by 6 way of illustration, the testimony of 7 Mr. Berko I believe from D.C. in answer to a 8 question, he said:</p> <p>9 "It was our understanding that EPA 10 was going to take the lead role in 11 enforcement action, so basically we issued 12 the directive and then we adjust to see what 13 EPA was going to do."</p> <p>14 MR. DeCARO: That is EPA is going 15 to take the lead in enforcement action.</p> <p>16 JUDGE REICH: In enforcement 17 action.</p> <p>18 MR. DeCARO: But if Mr. Berko had 19 said, "And EPA informed me that they're going 20 to be filing an administrative complaint in 21 regard to that enforcement action," then we 22 wouldn't be arguing this issue as far as D.C.</p>

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<p>1 goes. But Mr. Berko didn't say anything like 2 that, notice of an actual commencement of any 3 kind of particular form of enforcement. 4 JUDGE STEIN: Where in the statute 5 do you find the specificity for the kind of 6 notice that you are urging us to require of 7 the Agency? I mean, I don't see anything as 8 to the form or the content of the notice. I 9 see rather straightforward language that 10 seems to me silent as to what that notice 11 might look like. 12 MR. DeCARO: That's true. It says: 13 "The Administrator shall give notice to the 14 state in which the violation has occurred 15 prior to issuing an order to commencing a 16 civil action under this section." 17 Now, the notice, the record is 18 simply not clear whether the notice was 19 given, that's my point. In other words, 20 nobody testified we got the notice. And the 21 reason I'm -- 22 JUDGE STEIN: Well, why is it that</p>	<p>1 requirement? 2 MR. DeCARO: Well, if you take a 3 look at the -- I'm sorry, the Brenntag case, 4 Judge Charneski said that it provides a state 5 which has enacted its own hazardous waste 6 program an opportunity to participate in the 7 enforcement action to the extent that it 8 deems necessary. 9 This is not an overfiling case. 10 But if someone is an overfiling situation or 11 if the state has taken the position that is 12 consistent with the position the EPA is 13 taking, which we pointed out in a number of 14 those instances, the state can have some kind 15 of input into the enforcement action. 16 If the state has an approved, I 17 guess, underground tank regulation system, 18 which all these jurisdictions did by the time 19 the complaint was filed, then under 20 federalism they are given the opportunity and 21 they are given the express opportunity under 22 the statute to have this notice and have</p>
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<p>1 your client is the one that gets the notice 2 as opposed to the affected states? I mean, I 3 don't see this as akin to some of the 4 statutes where notice is given to both the 5 violator and the state. Here, I see that 6 notice is given to the state. 7 MR. DeCARO: Right. Notice is to 8 be given to the state. And under the Supreme 9 Court case that I just cited -- 10 JUDGE STEIN: A citizen suit case. 11 MR. DeCARO: Right, a citizen suit 12 case which said that the similar notice 13 language -- in fact the identical 14 language -- is a jurisdictional prerequisite. 15 JUDGE WOLGAST: I didn't think the 16 language was identical. 17 MR. DeCARO: I thought it was. But 18 I mean, I would ask the Panel to look into 19 that. I can dig the case out of my 20 materials. 21 JUDGE WOLGAST: In your view, what 22 is the purpose of the statutory notice</p>	<p>1 whatever input they may desire to have. 2 JUDGE REICH: In terms of the 3 notice, the actual wording in 906(a)(2) says 4 "The Administrator shall give notice to the 5 state in which such violation has occurred 6 prior to issuing an order or commencing a 7 civil action. 8 To me, that language speaks to a 9 point in time; that is, no later than the 10 point at which you do those things. It 11 doesn't explicitly say that they have to give 12 notice of an intention to issue an order or 13 initiate a civil action. It just says prior 14 to the time that they take any of those 15 actions, it shall have been given notice. 16 Are you suggesting that if they 17 give notice, but the notice doesn't 18 explicitly say "Not only are we planning to 19 take action, but we are going to issue this 20 particular order," that they have not 21 complied with that section? And is there a 22 case that suggests that?</p>

4 (Pages 10 to 13)

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<p>1 MR. DeCARO: Well, I mean, I guess 2 if you take a look at -- I think all of the 3 cases do suggest that.</p> <p>4 JUDGE REICH: Do they make that 5 distinction, or do they just focus on whether 6 notice was given prior to the time the order 7 was issued?</p> <p>8 MR. DeCARO: Well, I think if you 9 look at the language of the case, they are 10 talking about the content of the notice and 11 they are talking about a notice that the case 12 is going to be filed. I don't think there is 13 any other way to read that statute. I mean, 14 what kind of notice? If you're not giving 15 notice that the case is going to be filed, 16 then what kind of notice are you giving.</p> <p>17 JUDGE STEIN: Well, frankly, 18 looking at the testimony of Ms. Owen on I 19 believe January 14th, which describes a 20 number of meetings that took place between 21 EPA and the various states, it is hard for me 22 to envision a circumstance in which short of</p>	<p>1 the" --</p> <p>2 JUDGE STEIN: Well, if the 3 inference can reasonably be drawn from a 4 particular fact and if the ALJ draws that 5 inference, I don't see why it is that he is 6 compelled to draw the inference, an opposite 7 inference, simply because that possibility 8 exists. I mean, the ALJ conducted the 9 hearing; he heard the evidence.</p> <p>10 MR. DeCARO: Well, if you have a 11 specific requirement in the statute such as 12 this, then it's our view that the statute has 13 to be specifically complied with. And you 14 cannot in the absence of a simple statement 15 to the effect that the notice was given, I 16 don't think you can try to draw some kind of 17 conclusion out of testimony that had other 18 import.</p> <p>19 JUDGE STEIN: But if we were to 20 give deference to the ALJ's Findings of Facts 21 and Conclusions of Laws, I mean findings of 22 facts as to witness credibility, as is the</p>
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<p>1 written notice there would have been more 2 notice.</p> <p>3 There were a series of meetings; 4 there were a series of discussions. There 5 were discussions about why it is the states 6 wanted EPA to take the action. This thing 7 was something that they believed crossed 8 states lines. The states expressed concerns 9 about resource issues.</p> <p>10 I am really having difficulty 11 following your argument that in this kind of 12 a circumstance with this kind of a record 13 that the states were somehow surprised or 14 didn't get notice of this action.</p> <p>15 MR. DeCARO: Well, whether they got 16 notice or not, I mean, you can certainly draw 17 some kind of inference that they got notice, 18 but more than that is required to meet the 19 evidentiary standard.</p> <p>20 Ms. Owens has said, "And while they 21 were having one of these meetings, I told 22 them that we were in the process of preparing</p>	<p>1 practice of this Board, and if the ALJ found 2 that in fact notice was given, on what basis 3 would this Board overturn his findings on 4 this issue?</p> <p>5 MR. DeCARO: Well --</p> <p>6 JUDGE STEIN: How would it be clear 7 error for him to conclude that the evidence 8 in this record, as to which there was 9 testimony, is clearly erroneous?</p> <p>10 MR. DeCARO: Well, I think that the 11 ALJ does not come right out and say that 12 notice was given. I think the ALJ looks at 13 the testimony and comes up with an inference 14 that says that surely notice must have been 15 given. I don't think that meets the 16 requirements.</p> <p>17 I'm taking a look now through here 18 for his -- yes, page 6 of the initial opinion 19 it says -- page 7 actually -- "In that 20 regard," the second paragraph, "the record 21 shows that EPA and the states acted on 22 concert in bringing the enforcement action."</p>

1 However, there is nothing in the
2 record that says, and the ALJ never says that
3 notice was given, a notice that says "We're
4 going to bring an action."

5 And I think that is required, you
6 know, if you look at the cases, including the
7 Supreme Court case that talk about what a
8 notice actually is and what evidence is
9 required of that notice.

10 JUDGE STEIN: Okay. If you want
11 to, move on. Did anyone else have any
12 questions on the notice issue?

13 (No verbal response)

14 MR. DeCARO: Okay. With respect to
15 the second point to the Panel, "Elaborate on
16 the tank-by-tank requirement imposed by the
17 ALJ," I would simply point the Board to the
18 regulations, 40 CFR Section 280.12.

19 40 CFR Section 280.12, is a
20 definitional section, and it defines:
21 "Underground storage tank or 'UST' means any
22 one or a combination of tanks including

1 "the tank," you're talking about an
2 underground storage tank and "underground
3 storage tank" is defined as a multiple
4 tank -- you know, multiple tanks, number one.

5 Number two, it does not -- the
6 regulations, although they say "the tank,"
7 they don't say anywhere, "And you have to
8 perform a test discretely on each separate
9 tank." They just don't say that.

10 JUDGE STEIN: I want to come back
11 to the language of the regulations in a
12 minute. But how is it that measuring things
13 on a facilitywide basis would enable you to
14 detect small leaks, which is one of the goals
15 of the regulations as I understand it?

16 MR. DeCARO: Well, the tests that
17 were actually performed by the Respondent
18 came up with discrepancies as small as a
19 gallon. So, you know, the methodology that
20 they used actually did come up with that kind
21 of a level.

22 A facility, Respondent's facility,

1 underground pipes connected thereto that is
2 used to contain an accumulation of regulated
3 substances."

4 So there is no -- there is nothing
5 in the regulations that says
6 specifically -- I mean, if you have a
7 regulation that says "You have to perform
8 these tests on a tank-by-tank basis," there
9 is nothing in the regulations that says that.

10 The EPA guidance book provides a
11 method of detection that is not on a
12 tank-by-tank basis. But the regulations
13 themselves just don't have anything that says
14 that you have to go tank-by-tank.

15 JUDGE STEIN: How does 280.43(a)
16 relating to inventory control square with
17 your argument? What is the significance of
18 the language in some of the subsections of
19 that that deal with measuring things in "the
20 tank," which is in a number of places?

21 MR. DeCARO: Well, once again the
22 regulations, if you look at the definition of

1 has anywhere between two and four tanks for
2 sales of product. You know, two tanks, they
3 could have a premium tank and a regular tank
4 which are blended into four mid-grade. They
5 could have premium, mid-grade, super, and
6 diesel. That would be the largest facility.

7 So you have a situation where the
8 throughput for this organization is very
9 carefully controlled, if for no other reason,
10 they are buying the gasoline for resale.

11 They have a direct economic interest in
12 making sure that there is no product loss.

13 JUDGE STEIN: So you're saying that
14 there are a maximum of two to four tanks at
15 each of the 23 facilities?

16 MR. DeCARO: That's right. There
17 are a maximum of two. I mean, there have to
18 be at least two tanks because you have to
19 have mid-grade, if you are selling mid-grade
20 gasoline. You could have a maximum -- there
21 are a maximum of four product tanks. I'm not
22 talking about waste oil tanks. I'm talking

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<p>1 about a tank for, you know, selling gasoline 2 to the public.</p> <p>3 So the reconciliation that the 4 Respondent came up with came within the 5 guidelines all but maybe once or twice during 6 the period. That reconciliation is used not 7 only to determine whether there is a leak, it 8 is also used to determine how much they are 9 getting from their supplier.</p> <p>10 I mean, the supplier comes and they 11 say, "Well, we just sold you 8,000 gallons of 12 gasoline."</p> <p>13 So, "Prove it." "Okay, well, here 14 is the proof."</p> <p>15 JUDGE STEIN: So then what you 16 would need to do, under your contention that 17 you can do it on a facilitywide basis, is 18 once you realize there is a discrepancy, you 19 would have to go to each of your tanks and 20 figure out which one is leaking; is that 21 correct?</p> <p>22 MR. DeCARO: If the discrepancy is</p>	<p>1 12,000-gallon tanks. They have 20,000-gallon 2 tanks, but, I mean, let's just say you're 3 using a 12,000-gallon tank.</p> <p>4 The discrepancy would exist -- in 5 other words, you would use the delivery, the 6 factory (sic) -- excuse me. The factor of 7 delivery would factor into the process, and 8 so you would know where the gasoline was 9 delivered and you would not have to check all 10 50 tanks.</p> <p>11 You would have at the most two or 12 three tanks that you would have to check 13 because there is no tank wagon large enough 14 to deliver gasoline to 50 different 15 underground storage tanks. There are only 16 two grades of gasoline, regular and super, 17 that are sold and they are blended together.</p> <p>18 JUDGE STEIN: Well, but when I look 19 at your argument as to what the regulations 20 mean, I'm just not looking at how it may 21 impact your particular case. I am looking at 22 if we are to adopt your interpretation of the</p>
23	25
<p>1 large enough, you would have to determine the 2 reason for the discrepancy and provided in 3 the regulations, and that would of course 4 require you going to each tank.</p> <p>5 JUDGE STEIN: Well, let's assume 6 that your facility, instead of having two to 7 four tanks, was a big station and it had 50 8 tanks. How would this system work under 9 that, that if the regulations permit you to 10 do facilitywide inventory control, then once 11 you think there is a discrepancy, you would 12 have to go teach of the 50 tanks to figure 13 out what the problem is?</p> <p>14 MR. DeCARO: Not at all. Because a 15 tank wagon -- you know, those trucks that you 16 see driving down the road with a tank on it 17 full of gasoline, hold a finite number of 18 gallons of gasoline. They hold somewhere 19 around 20,000 gallons of gasoline.</p> <p>20 So in an underground storage tank, 21 if you have a 50-tank facility, you are 22 probably looking at a minimum of</p>	<p>1 regulations that would allow for a 2 facilitywide approach, then I would assume 3 that it would apply to any tank facility, not 4 just yours. Is that correct?</p> <p>5 MR. DeCARO: Underground tank 6 facility, it would apply to an underground 7 tank facility storing regulated substances, 8 that's right. Unfortunately, the regulations 9 if they had wanted to say "You have to do it 10 on every single tank," then they would have 11 said that.</p> <p>12 So if you bring it back to our 13 specific example, I think this particular 14 respondent is entitled to rely on the actual 15 language in the regulations to justify the 16 method that it used.</p> <p>17 If the regulations have a problem, 18 which they do, by the way -- I mean, 19 I -- after going through this process, I 20 think there are a number of places where I 21 personally would like to tighten up the 22 regulations. But that's neither here nor</p>

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<p>1 there as far as this argument is concerned.</p> <p>2 JUDGE WOLGAST: Let me ask you a</p> <p>3 question about the regulations, again looking</p> <p>4 at the terms of 280.43(a), and it talks about</p> <p>5 the fact that monthly tests have to be</p> <p>6 conducted to detect a release of at least</p> <p>7 1 percent flow-through plus 130 gallons.</p> <p>8 Now, is it your contention that you</p> <p>9 must perform tests to that standard? That</p> <p>10 standard applies to the entire facility as</p> <p>11 opposed to a tank?</p> <p>12 MR. DeCARO: That standard applies</p> <p>13 to the entire facility because the</p> <p>14 flow-through for the entire facility -- and</p> <p>15 if you have four tanks in a facility, you</p> <p>16 have four tanks that are flowing through</p> <p>17 product and you have four tanks with their</p> <p>18 respective volumes and so forth. And so you</p> <p>19 could apply it on a facilitywide basis, yes.</p> <p>20 JUDGE STEIN: Are these tanks</p> <p>21 attached to each other?</p> <p>22 MR. DeCARO: The tanks are I</p>	<p>1 were in that situation so they are all,</p> <p>2 generally speaking, discrete. I think there</p> <p>3 are a couple that are manifolded.</p> <p>4 JUDGE STEIN: Your argument about</p> <p>5 280.12, was that raised below?</p> <p>6 MR. DeCARO: Yes, it was.</p> <p>7 JUDGE STEIN: And did the ALJ</p> <p>8 address that argument in his initial</p> <p>9 decision?</p> <p>10 MR. DeCARO: Well, I believe the</p> <p>11 entire discussion of the -- regarding the</p> <p>12 regulations governing -- you know,</p> <p>13 facilitywide basis addresses our argument.</p> <p>14 Because that was directed toward our</p> <p>15 argument. It was not -- it was directed</p> <p>16 toward our argument.</p> <p>17 JUDGE STEIN: I am still having</p> <p>18 difficulty understanding how 280.12 by</p> <p>19 itself, which allows for the possibility that</p> <p>20 there is more than one tank, somehow</p> <p>21 supplants the language in 280.43, which is</p> <p>22 very specific as to the tank.</p>
27	29
<p>1 believe -- with few exceptions, the tanks</p> <p>2 are, generally speaking, not attached to each</p> <p>3 other.</p> <p>4 JUDGE STEIN: Not?</p> <p>5 MR. DeCARO: No. No, they are</p> <p>6 separate. It's a separate tank, and they are</p> <p>7 blended at the surface. They are blended by</p> <p>8 a machine, a pump, underneath the -- you</p> <p>9 know, just below the surface of the</p> <p>10 dispenser.</p> <p>11 But they are not manifolded, which</p> <p>12 is a pipe that connects the two different</p> <p>13 tanks together. In other words, all these</p> <p>14 tanks, none of these facilities has more</p> <p>15 than a need for one tank containing each</p> <p>16 grade of product.</p> <p>17 So if you had, for example, a</p> <p>18 facility on a major highway, you may want to</p> <p>19 manifold two tanks together so you could have</p> <p>20 40,000 gallons of regular available as</p> <p>21 opposed to 20,000 gallons of regular</p> <p>22 available. But in this case, none of these</p>	<p>1 I mean, I understand how if you've</p> <p>2 got two tanks kind of manifolded together</p> <p>3 that you might have a different circumstance.</p> <p>4 But in those cases, which I guess is the</p> <p>5 majority where they are not, I'm having</p> <p>6 difficulty seeing how 280.12 trumps 280.43.</p> <p>7 MR. DeCARO: Well, I think you have</p> <p>8 to read them together, because we have plain</p> <p>9 language that doesn't require a separate</p> <p>10 tank-by-tank inspection. The definition of</p> <p>11 "tank," if you say "the tank," well, you have</p> <p>12 the definition section defining tank as the</p> <p>13 entire underground facility. So I think it</p> <p>14 is reasonable for a Respondent to read the</p> <p>15 regulations that way and conduct the kind of</p> <p>16 inventory control that they were conducting.</p> <p>17 JUDGE STEIN: Did your client ever</p> <p>18 ask any of the agencies whether its</p> <p>19 interpretation of a facilitywide inventory</p> <p>20 control was an improper interpretation?</p> <p>21 MR. DeCARO: I would say yes,</p> <p>22 because this Respondent has been in business</p>

8 (Pages 26 to 29)

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1 for decades. They have been inspected many
2 many times by all of the -- well, Virginia
3 less so because they only have a few
4 facilities there, but Maryland and Virginia
5 have inspected their facilities repeatedly
6 back into the '90s.
7 The issue first came up, and I was
8 in the meeting -- I don't mean to testify,
9 but I was in the meeting when the issue first
10 came up about the facilitywide
11 reconciliation.
12 They were providing documentation
13 regarding inventory reconciliation to the
14 other jurisdictions and nobody said anything
15 about, "You have to be doing this on a
16 tank-by-tank basis."
17 JUDGE STEIN: No, I'm looking for
18 evidence that's in the record already that
19 would show that your client made an
20 affirmative request to one of the states or
21 to EPA as to the interpretation that
22 facilitywide basis is permissible.

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1 Is that in the record?
2 MR. DeCARO: That's not in the
3 record. What is in the record is what I just
4 suggested, that the states had
5 actually -- not the EPA, the EPA's first
6 involvement was in the early 2000s -- but the
7 states themselves looked at these records and
8 didn't say, "Oh, you should be doing this on
9 a tank-by-tank basis, nor did they fine them
10 for not going on a tank-by-tank basis. So
11 it's sort of a negative request, if you will.
12 JUDGE STEIN: Okay.
13 MR. DeCARO: If I may -- I believe
14 if it's appropriate to move on -- an
15 automatic tank gauge is a very sophisticated
16 device. It is a computer analyzer that
17 analyzes sensors. The sensors are in the
18 tank and they can detect changes in the
19 characteristics of the liquid that is in the
20 tank. The various characteristics they try
21 to check, but the main thing is a leak.
22 If there is a leak, the automatic

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1 tank gauge will -- if you run a tank test it
2 will, theoretically the new ones will detect
3 a leak. They do that by measuring all of the
4 physical characteristics of the liquid in the
5 tank and they say, "Well, the volume of the
6 liquid has decreased by a certain amount,
7 indicating a leak."
8 I mean, in other words, heat, if
9 the stuff heats up, it expands; if it cools
10 down, it contracts, all those kind of things.
11 But all that, the latest version of the
12 automatic tank gauging system will do that
13 reliably, that the TLS-350.
14 JUDGE STEIN: Is that the system
15 that is in place here?
16 MR. DeCARO: Every facility now has
17 the latest and the greatest. But back in the
18 day, there was the previous model, which was
19 the TLS-250. The TLS-250 gave my client
20 problems by not providing, even in situations
21 where there was not like a, where the tests
22 were --

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1 JUDGE STEIN: I would really
2 appreciate it if you could confine what you
3 are telling us about to what's in this record
4 because I'm getting a little confused about
5 what's in the record and what -- you know,
6 problems that your client might be having
7 that may or may not be in the record.
8 MR. DeCARO: Well, what's in the
9 record, the testimony in the record does
10 discuss the use of a TLS-250 and the problems
11 that the Respondent had obtaining accurate
12 readings from the TLS-250. And so until the
13 350 came out, the client -- this is also,
14 everything I'm saying now is in the record,
15 okay.
16 JUDGE STEIN: Okay. Thank you.
17 MR. DeCARO: The client continued
18 to use the inventory control method because
19 they did not trust the TLS-250, I think. The
20 Respondent's experts talked about that quite
21 a bit.
22 JUDGE STEIN: So is it your

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1 position that you're not relying on automatic
2 tank gauging for any of the counts in this
3 complaint to show that you complied with,
4 your company -- your client complied with the
5 release detection?
6 MR. DeCARO: Not from beginning to
7 end, from beginning to end of the five-year
8 period involved in the complaint, there was a
9 transition from inventory control to
10 automatic tank gauging. But in the
11 beginning, they used inventory control. They
12 had an automatic tank gauge, but they did not
13 use that exclusively for leak detection.
14 JUDGE REICH: Is the statement that
15 the region makes that the ATG stores most
16 recent 12 passing test results, is that
17 essentially an accurate statement?
18 MR. DeCARO: That's an accurate
19 statement. Yes, it is.
20 JUDGE REICH: If an ATG shows no
21 passing test results, what does that suggest?
22 Does that suggest that there were no tests,

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1 or could there have been failed tests? What
2 reasonable inferences can you draw from the
3 absence of a stored past test?
4 MR. DeCARO: Well, if you have a
5 stored past test, you have a pass as far as
6 that ATG is concerned. If you don't have any
7 stored past tests or if you have fewer than
8 12, then you would have had a failed test.
9 Failed tests are not stored by the ATG.
10 So if you have a failed test, what
11 you have to do is determine, use whatever
12 method is promulgated to determine whether
13 there was an actual leak. Since there were
14 no actual leaks in this case, I guess that is
15 an inference.
16 JUDGE REICH: And then there is no
17 obligation to retest?
18 MR. DeCARO: Obligation to retest
19 could be, could exist. But if the test shows
20 a failed result and you determine that the
21 leak -- you determine from extrinsic
22 examination that there was no leak, then you

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1 test request requirements are -- that's the
2 end of your test requirements under the
3 regulations.
4 So, I mean, that's -- you know, the
5 procedure that was used. Once again that
6 procedure was not exactly blessed but
7 certainly not cursed by the jurisdictions
8 over the years leading up the filing of this
9 complaint.
10 JUDGE WOLGAST: If you don't have a
11 past test result that is stored, meaning you
12 don't have a test or you have a failed test,
13 then you are saying your fallback is a manual
14 test and the manual test is the inventory,
15 facilitywide inventory system?
16 MR. DeCARO: That's one of the
17 tests, that's one of the things that you can
18 do. That's one of the methods that you could
19 use to determine if there has been a leak.
20 JUDGE WOLGAST: And what other
21 methods did Euclid use?
22 MR. DeCARO: Well, I think they had

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1 some contractors on staff. I would imagine
2 that they would come out and they could
3 perform a tank tightness test to determine if
4 the tank is tight. I think that was done
5 rarely, but I think there were a few of
6 those.
7 JUDGE WOLGAST: And is that in the
8 record?
9 MR. DeCARO: Yes. Yes, it is. You
10 could perform a -- you could check -- you
11 know, perform a retest.
12 JUDGE STEIN: Am I correct in
13 understanding that there are seven counts for
14 which your client was held liable in which
15 you are claiming to base your release
16 detection on ATG? Is that a correct
17 understanding?
18 MR. DeCARO: Seven counts at least
19 partially on ATG. I don't remember the
20 number of counts, but yes.
21 (Simultaneous discussion)
22 JUDGE STEIN: When you say

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1 "partially," can you --

2 MR. DeCARO: Well, because the ATG

3 did not -- the ATG did not become I guess the

4 sole method of testing until some point, at

5 some point during the period at issue, and

6 so --

7 JUDGE STEIN: But you can't tell me

8 which counts?

9 MR. DeCARO: I could, Your Honor.

10 I could if you want me to take a minute and

11 take a look at the --

12 JUDGE STEIN: Sure, why don't you

13 take a minute.

14 (Pause)

15 MR. DeCARO: Let me see. Count 1

16 is a tank release detection, Count 6,

17 Count 9, Count 15, Count 22.

18 JUDGE STEIN: Are you just giving

19 me release detection or things where you're

20 relying on ATG?

21 MR. DeCARO: To give you the exact

22 counts that we relied on ATG, I would have to

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1 dig through the brief.

2 JUDGE STEIN: Okay.

3 MR. DeCARO: I'm sorry. I would

4 like to address that on rebuttal --

5 JUDGE STEIN: That's all right.

6 MR. DeCARO: If you would like. If

7 you don't mind, I wouldn't mind. You know, I

8 could easily do that.

9 To the extent that they did rely on

10 ATG we have -- essentially, if you have a

11 passing test result based on an ATG reading,

12 then the only reason to retain, there is a

13 one-year record retention requirement in the

14 statute.

15 So if you have a passing test

16 result, that means the tank, a tank, an

17 underground storage tank if it develops a

18 leak, the only thing you basically do is pump

19 the tank dry and dig it out of the ground.

20 You cannot -- because of the nature

21 of gasoline, you can't fix the leak in the

22 tank. And so if I go out there today and go

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1 to the same tank that existed in 1998 and I

2 pull a passing ATG test result, then that

3 indicates that that tank hasn't leaked from

4 that day to this, from the day it was

5 installed until today.

6 JUDGE STEIN: But looking at the

7 obverse of that, if I understand it, you have

8 stipulated or conceded that there were no

9 passing test results for the ATG, and that

10 the machine itself stores the most recent 12.

11 MR. DeCARO: Right.

12 JUDGE STEIN: So if there are no

13 passing test results, what is that? What

14 does that infer?

15 MR. DeCARO: Well, if there are no

16 passing test results and there is no leak,

17 that infers that the Respondent went out and

18 ensured that the failed test

19 result -- followed up on the failed test

20 result to determine if it was caused by a

21 leak.

22 JUDGE STEIN: How do we know that?

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1 I mean, is there evidence that that's exactly

2 what happened in this case, that upon getting

3 a failed test result, that your client -- you

4 know, did X, Y, and Z, or is this just

5 speculation on your part?

6 MR. DeCARO: Well, I don't think

7 there is -- there is not evidence as to every

8 single failed test result 12 to the year for

9 23 facilities -- you know, so speak.

10 However, there was evidence that

11 the Respondent had people that it hired to go

12 out and make sure that there was no leak, and

13 those people testified. And so to that

14 extent there is evidence in the record.

15 JUDGE REICH: I'm just a little

16 confused about -- and I admit I don't follow

17 all the technical stuff. But if you kept

18 getting failed results month after month that

19 caused you to go through a process of having

20 people come out and evaluate it, at some

21 point, is there not some way to address the

22 accuracy of the ATGs, whether by putting in a

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<p>1 newer version or something else, so you don't 2 repeatedly subject yourself to this, 3 presumably, unnecessarily? 4 MR. DeCARO: Absolutely. And 5 that's what happened during the course of 6 this period and after the period of course, 7 which is not germane. What happened was when 8 the 350 came out, they started installing 9 them in the various locations. 10 JUDGE REICH: And once you put the 11 350 in, you started getting passing results? 12 MR. DeCARO: Once you put the 350 13 in, you start getting a lot more data. They 14 did not always get passing results when they 15 put the 350 in. However, they followed up on 16 those failing results as well. They did get 17 some passing results from the 350. 18 JUDGE REICH: Do you know when they 19 got failing results where they turned out to 20 be valid? 21 MR. DeCARO: They did not turn out 22 to be valid because, I mean, the simple test</p>	<p>1 is faulty or whatever. But they say that 2 infers that that is prima facie evidence that 3 a release may have occurred. 4 Could you speak to that? 5 MR. DeCARO: Well, it does say that 6 if you have a failed test result, you have to 7 follow up on it, and so the way to get around 8 or prove that there was not a leak is to 9 perform some kind of additional check on the 10 failed test result. 11 JUDGE WOLGAST: Also, specifically 12 I'm asking about your position on the proper 13 allocation of burden. Because as I 14 understand it, the region is saying the 15 failed test would suggest prima facie 16 evidence of a potential release, and then 17 presumably I assume they are saying the 18 burden would shift to the company to show 19 that in fact a release hadn't occurred or 20 that they had tested properly and that a 21 release hadn't occurred. 22 MR. DeCARO: That's right, that's</p>
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<p>1 is a tank does not stop leaking. So if it 2 didn't leak -- you know, if you got a failed 3 test result, that would have indicated a 4 leak. You would have had a deteriorating 5 situation, which doesn't exist. 6 So -- you know, that is I guess the 7 most level of certainty you can get from any 8 of these various methods of testing a tank. 9 The method that is described in the 10 regulations is to actually check and see what 11 is causing the failed test result. There is 12 evidence in the record to the extent that the 13 Respondent did that. 14 JUDGE WOLGAST: Could I ask you to 15 speak to the regions' argument that a failing 16 result should be regarded as prima facie 17 evidence that a release may have occurred? 18 On that they rely, as I understand 19 it, on 280.50 that says that "Monitoring 20 results from a release detection method that 21 indicate a release may have occurred unless," 22 and then it talks about the monitoring device</p>	<p>1 right. I mean, because the regulations 2 simply say that if you have a failed test you 3 have to check it out. I have 34 seconds 4 left. 5 JUDGE REICH: I just want to make 6 sure when you say "that's right," are you 7 saying that's right, that's what they are 8 arguing; or that's right, that's a proper 9 interpretation? 10 MR. DeCARO: Well, that's a proper 11 interpretation. 12 JUDGE REICH: Okay. 13 MR. DeCARO: Yes. Thank you. I 14 mean, shall I continue or -- 15 JUDGE STEIN: Maybe just finish 16 your sentence, and then you will pick it up 17 on rebuttal, I think. 18 MR. DeCARO: Thank you very much. 19 ORAL ARGUMENT OF BENJAMIN FIELDS ON BEHALF 20 OF ENVIRONMENTAL PROTECTION AGENCY 21 JUDGE STEIN: Good morning. 22 MR. FIELD: Good morning. If I</p>

12 (Pages 42 to 45)

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1 may, Your Honors, I would like to start with
2 kind of a brief introduction and go very
3 briefly through each of the specific
4 questions tell EPA's overall position, and
5 then go back and talk about each issue in
6 detail.
7 Basically, Euclid is a company with
8 an empire of approximately 23 gas stations.
9 I understand they have been adding some
10 stations. Despite having all these gas
11 station, compliance with UST regulations was
12 not a priority.
13 They apparently made no effort to
14 understand how to comply and they made no
15 effort to understand how to use the proper
16 equipment. In some instances, they had
17 potentially proper equipment, but it was not
18 being used properly.
19 In addition, the violations
20 continued after numerous warnings from EPA
21 and the states after numerous meetings trying
22 to explain to Euclid how to use the equipment

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1 and explain how to follow EPA's regulations
2 and the state regulations.
3 Even after EPA filed this case,
4 Euclid appeared to be not willing to spend
5 the necessary money in obtaining the proper
6 equipment and the proper technical expertise
7 to come into compliance.
8 In the response, Euclid in their
9 brief and at the hearing tries to blame
10 everyone but themselves: the states; their
11 contractors, installation contractors; the
12 equipment manufacturers.
13 I would ask that the Board uphold
14 Judge Charneski's finding, that in fact
15 Euclid did violate the regulations, and
16 violated them in a somewhat -- with enhanced
17 culpability because of all these warnings
18 except for Count 47 and parts of Counts 54
19 and 57.
20 Judge Charneski made what appears
21 to be a relatively small mistake penaltywise,
22 but it's actually important in terms of

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1 correcting the record of Euclid's purported
2 inventory control methods.
3 JUDGE STEIN: May I ask you a
4 question about the cross-appeal. I'm a
5 little confused by your brief as to whether
6 you are seeking an increase in the penalty
7 amount or simply a correction of the
8 liability finding.
9 MR. FIELDS: All right. EPA is
10 seeking an increase in the penalty. In the
11 brief, we explain that even though the
12 penalty is already large and the increase is
13 small, the importance of the cross-appeal
14 exists even though it is only a small
15 additional penalty. But EPA did prove the
16 violations and feels it is entitled under the
17 penalty policy and under our guidances to the
18 additional penalties.
19 Now, in terms of notice, I can't
20 imagine a case in which the notice to the
21 states could have gone anything beyond this
22 case. There was a case involving unusually

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1 close cooperation and decision making between
2 EPA and three states.
3 JUDGE REICH: Can I ask, while
4 you're at that point, given that clearly
5 notice of the state is a statutory
6 requirement and therefore a requirement of
7 some significance, does the region have a
8 policy on how it documents how notice is
9 given?
10 For instance, if it is given orally
11 in the course of a conversation, is there a
12 requirement to document that in writing some
13 place as to the notice that was given and to
14 whom and what it said?
15 MR. FIELDS: Well, our region has
16 no formal written policy. Certainly, after
17 this case, we have made a specific point of
18 including a written document in the case
19 files telling the states EPA plans to file an
20 appeal.
21 JUDGE REICH: So, as to this
22 particular case, there were no written

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<p>1 documents in the case file --</p> <p>2 MR. FIELDS: There were no written</p> <p>3 documents specifically telling a person.</p> <p>4 JUDGE REICH: To give notice?</p> <p>5 MR. FIELDS: There were certainly</p> <p>6 documents documenting the meetings. There</p> <p>7 were people's notes documenting things that</p> <p>8 were talked about. But in this case, it just</p> <p>9 appeared to us that there was no issue. The</p> <p>10 states were cooperating all along. You knew</p> <p>11 the states were cooperating.</p> <p>12 In the case of D.C., we held</p> <p>13 meetings with Euclid in D.C.'s office. There</p> <p>14 were no documents saying this is the</p> <p>15 statutory notification had been created, but</p> <p>16 EPA clearly gave multiple</p> <p>17 explanations (sic) -- no, multiple</p> <p>18 notifications to the state.</p> <p>19 And the testimony at the trial by</p> <p>20 three different state employees said that</p> <p>21 they, in fact, stopped their enforcement</p> <p>22 actions because it was their understanding</p>	<p>1 case.</p> <p>2 Certainly, in this instance, the</p> <p>3 people who were at these meetings included</p> <p>4 high-level people and even office heads. As</p> <p>5 was pointed out on Euclid's argument, they</p> <p>6 specifically wanted EPA to bring this case</p> <p>7 because it was a resource drain and it was a</p> <p>8 multistate case.</p> <p>9 JUDGE STEIN: With respect to the</p> <p>10 series of questions that Judge Reich just</p> <p>11 asked, I believe he focused on any kind of a</p> <p>12 regional policy. And I'm wondering whether</p> <p>13 there is any kind of a national policy, or</p> <p>14 whether you are aware of regions that do give</p> <p>15 notice in writing as opposed to orally?</p> <p>16 MR. FIELDS: Well, our region now</p> <p>17 does give a formal notice in writing.</p> <p>18 However, by the time that notice is given,</p> <p>19 the states have really been notified.</p> <p>20 Because EPA works -- I mean, certainly in the</p> <p>21 UST Program I can speak to EPA and the states</p> <p>22 discuss the inspections that are happening.</p>
51	53
<p>1 that EPA was going to be taking over.</p> <p>2 I believe on cross-examination,</p> <p>3 there was a specific question Mr. DeCaro</p> <p>4 asked, "How come you didn't follow up if you</p> <p>5 thought these violations were so serious?"</p> <p>6 And each of the state witnesses</p> <p>7 said "We did think they were very serious,</p> <p>8 but EPA assured us they were doing something</p> <p>9 about it by filing an action."</p> <p>10 JUDGE REICH: Also, was there at</p> <p>11 the time any policy as to whom within the</p> <p>12 state you had to notify, and at what level?</p> <p>13 Was it an inspector, or did it have to be</p> <p>14 somebody at a supervisory level? Was there</p> <p>15 any guidance as to the appropriate level for</p> <p>16 making this notification?</p> <p>17 MR. FIELDS: I don't think that</p> <p>18 there is any guidance whatsoever. I think</p> <p>19 that our general policy is to make sure that</p> <p>20 the proper enforcement authorities, usually</p> <p>21 at the branch chief level or higher, are</p> <p>22 aware of the fact that EPA plans to bring a</p>	<p>1 They discuss violations found. Each month,</p> <p>2 each state and EPA have a conference call</p> <p>3 talking about the status of any enforcement</p> <p>4 actions being taken by EPA.</p> <p>5 But in response to any concerns,</p> <p>6 EPA makes sure that a formal written notice</p> <p>7 is given. But I don't believe that that</p> <p>8 notice is necessary at that point to satisfy</p> <p>9 the otherwise clear statutory guidelines that</p> <p>10 notice must be given, but in no particular</p> <p>11 specified form.</p> <p>12 JUDGE WOLGAST: And in your view,</p> <p>13 what is the best-case precedent to look to</p> <p>14 resolve this question of what notice is</p> <p>15 sufficient for purposes of the statutory</p> <p>16 requirement</p> <p>17 MR. FIELD: Well, I think that the</p> <p>18 ALJ opinion in Brenntag is certainly on</p> <p>19 point. Now, obviously it's not binding on</p> <p>20 the Board.</p> <p>21 But I think in Brenntag the case is</p> <p>22 very similar, that the evidence showed that</p>

14 (Pages 50 to 53)

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1 EPA and the states cooperated, and that the
2 states asked EPA to take some action.
3 In that case, it was ruled that
4 giving an additional notice seems to be just
5 surplus. The states clearly knew EPA was
6 going to act because they asked them to do
7 so.
8 Now, in terms of other actions, I
9 don't believe this issue has been litigated.
10 In some instances, there have been
11 questions -- there have been citizens with
12 cases in which no notice had been given. And
13 if no notice had been given, that is
14 certainly a problem.
15 But generally citizens who are
16 plaintiffs don't work cooperatively with EPA,
17 and EPA does not ask private citizens to file
18 a suit so that any of those cases are
19 completely off point.
20 JUDGE STEIN: Is there any
21 legislative history in RCRA which would bear
22 on the purpose of the notice requirement?

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1 MR. FIELDS: I believe there is
2 some history talking about the need for
3 states who have authorized programs to be
4 aware of. And I am not prepared to cite it
5 right now.
6 JUDGE STEIN: Additionally, are you
7 aware of whether any other federal
8 environmental statutes besides RCRA require
9 that the notice that we're talking about here
10 be given in writing to a state? Are you
11 aware of other statutes where that might -- I
12 realize it's not specific as to that point
13 under RCRA.
14 MR. FIELDS: I am not aware of any
15 one that specifically does. I mean, I
16 haven't really examined all of them. I do
17 know that some of the citizen suit provisions
18 do specifically require the notice to EPA to
19 be in writing.
20 JUDGE STEIN: Thank you.
21 MR. FIELDS: With regard to the
22 inventory control questions raised, I believe

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1 the regulations clearly show that that was
2 intended to be tank-by-tank. I think that if
3 you have a combination of tanks, as claimed
4 by Euclid, then EPA has made it clear that
5 combinations, not aggregations but
6 combinations of tanks, tanks that are liked
7 together so that the contents cannot be dealt
8 with separately, EPA's own guidance says that
9 those tanks but only those tanks can be
10 combined for purposes of inventory control.
11 On the cross-appeal issues, just
12 real briefly and then I can --
13 JUDGE STEIN: Before you go to the
14 cross-appeal, what about 280.12? How do you
15 respond to their argument?
16 MR. FIELDS: Well, I think 280.12,
17 as I said the word "combination" of tanks is
18 clearly addressed in the EPA guidance and
19 also in the American Petroleum Institute
20 guidance that is specifically cited in the
21 regulations talks about tanks in which the
22 tanks are joined together so that product

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1 flows between those tanks. I think that
2 would constitute a combination of tanks.
3 Euclid is talking not about a
4 combination but an aggregation. It just
5 feels it would like to take a bunch of tanks
6 and do them all together because it is easier
7 that way.
8 And it is also important to point
9 out that inventory control is a method used
10 by gas stations to do things other than
11 release detection. One of the key issues is
12 just being able to predict when to send
13 deliveries of gasoline. It is also used for
14 economic accounting on cash flows between
15 lessees and lessors.
16 And the fact that a system of some
17 sort of inventory control is in place does
18 not mean that that system was intended for an
19 actually used to comply with EPA's
20 regulations.
21 I would also remind the Board that
22 in most instances for most periods of time

15 (Pages 54 to 57)

1 inventory control was not an allowable
2 tank-release protection method. It was
3 specifically set up as a method that was to
4 expire.

5 It was allowed in the initial
6 regulations because there was a need to get
7 regulations out quickly and to order people
8 to begin doing something immediately.

9 And it was impossible in 1987 or
10 '88 to immediately have gotten ATGs at every
11 facility and so EPA rushed the regulations
12 out and said, "Do this now for the next 10
13 years. And then after that, only if you have
14 a new tank can it be used and only for a
15 certain period of time."

16 Now, on the cross-appeal, part of
17 the thing we point out is that after Judge
18 Charneski ruled that Euclid was not doing a
19 tank-by-tank inventory control, he pretty
20 much stopped and didn't address the other
21 arguments one way or another.

22 There were two very critical

1 guidance document that came out in 1993 from
2 EPA, and this example is very similar to the
3 example in the API document that was cited in
4 the regulations.

5 Essentially, at the bottom here
6 each month, EPA recommends adding up a daily
7 inventory, and at the end, you get totals for
8 a suspected loss. That loss on the bottom
9 line here has to be compared to that month's
10 throughput, that month's sales, to determine
11 if it is within the regulatory standard of
12 1 percent of throughput plus 130 gallons, or
13 in Maryland half of 1 percent.

14 On Euclid's inventory sheets, there
15 was absolutely no calculation showing a
16 comparison of Euclid's calculated losses to
17 the monthly standard. In fact, as was
18 discussed at length in the brief, in the
19 post-hearing brief and the appeal brief, the
20 actual documents in Complainant's
21 Exhibit Y-30 show strange anomalies that
22 shows something completely different from the

1 problems with Euclid's inventory. First of
2 all, the inventory was not comparing any
3 results to the monthly standard. In
4 addition, Euclid's inventory control was not
5 actually being done monthly. It was being
6 done on a cumulative basis. And I will get
7 back to that as I get to that.

8 JUDGE WOLGAST: Could you explain
9 the first --

10 MR. FIELDS: Well, I mean, I can
11 just skip the introduction and actually go
12 directly into it. Euclid's inventory control
13 was being performed on a particular sheet. I
14 will put up a copy of this here, if I can get
15 it to work here. This is on Complainant's
16 Exhibit Y-30.

17 JUDGE STEIN: I think we're going
18 to need some technical assistance from -- I
19 mean, I think we can get that assistance for
20 you, if you could put it back on the screen.

21 MR. FIELDS: What I would like to
22 do first is put on the screen an example in a

1 type of inventory control contemplated by the
2 regulations.

3 For instance, if you look up here
4 at the Rhode Island Avenue book amount, which
5 is the amount calculated to be in the tank,
6 the amount is actually negative.

7 Now, any way you do inventory
8 control you are not going to get a negative
9 book amount. That is the amount that is
10 calculated to be in there. It is hard to
11 understand what Euclid was actually doing
12 with these documents.

13 But when EPA asked repeatedly many,
14 many times, "Show us your inventory control
15 documents," for two or three years when EPA
16 and the states asked, they got nothing.

17 Eventually, this is what Euclid
18 came up with and said, "This is it. This is
19 what we do." These documents are, in effect,
20 incomprehensible, and they clearly do not
21 show a comparison of any result to the
22 monthly standard.

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1 Now, in addition, Euclid's General
2 Manager, Mr. Buckner, was very clear that the
3 monthly calculated amount did not start with
4 the on-hand in the previous month. The
5 monthly calculated amount was a calculation
6 based on all the inputs and all of the sales
7 since the beginning of a tank being put into
8 service.

9 If you are doing that, you are not
10 doing any monthly reconciliation. All of the
11 guidances, all of the documents shown, cited
12 in the regulations, and all of the logical
13 industry practices have to be that if you are
14 calculating your loss for month, you have to
15 start with the amount that you measured in
16 the tank at the beginning of the month.
17 Euclid admitted that it did not do that.

18 So basically what it is getting
19 here is gobbledygook. It is getting
20 something that on the face of Complainant's
21 Exhibit Y-30 is showing huge shortfalls that
22 are clearly beyond the regulatory standard

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1 for declaring a leak. But somehow in
2 Euclid's own mind, for whatever purposes it
3 did inventory control, it was not concerned.

4 I think that Euclid's President,
5 Mr. Yuen, testified very clearly that he
6 thought his method, however it was being
7 done, was just better than anything EPA
8 required and the regs. So that's what he
9 did, despite anything in EPA's regs.

10 JUDGE STEIN: One of the things we
11 are particularly interested in hearing about,
12 Mr. Fields, is ATG. We are struggling with
13 trying to understand what is required, what
14 is the relationship between not having
15 passing results and not monitoring, what is
16 the significance of not having recorded
17 results, and how you can use it to show
18 testing?

19 So keeping mind the questions that
20 we asked Euclid's counsel, if you could
21 elaborate on that point, those points for us,
22 that would be appreciated.

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1 MR. FIELDS: I could just put up an
2 exhibit here, if I can, just showing you what
3 an ATG looks like.

4 An "ATG" is basically a computer,
5 and it can be used for many purposes. The
6 ATG main unit or the "head unit," as it's
7 called, sits on the wall and is hooked up to
8 whatever probes you want to hook up to it.

9 Now, as contemplated by the EPA
10 regulations, the ATG will run a specific
11 test. But in fact, ATG's are commonly used.
12 In fact, Euclid's personnel admitted on the
13 record in the transcript that they used to
14 take inventory readings.

15 Essentially, as was explained, it's
16 a machine that tells you how much gasoline is
17 in the tank at that moment. It will take a
18 tank level and it will convert that to
19 gallons and it will tell you at that moment
20 "Here's how much is in there."

21 If you are doing a standard ATG
22 test to comply with the EPA rules, the ATG

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1 has to have a period of time -- depending
2 upon the size of the tank, it can range from
3 two to four hours, two to five hours -- in
4 which it measures the tank level to adjust
5 for minor changes in pressure and temperature
6 and sees if that level is going down in any
7 significant amount.

8 Euclid in a lot of instances had
9 ATGs on the wall. They were apparently using
10 them to, I'll call it, "stick the tanks" to
11 find out the inventory level at the end of
12 the day, but they were not getting any test
13 results because it was not programmed to run
14 those tests.

15 Once EPA confronted Euclid's on
16 Euclid's contract, who they hired only after
17 EPA started to really put the vices on,
18 attempted to program them and to get results.

19 But to run this kind of a standard
20 test, you need to have two to five hours
21 where the tank is not being filled and it is
22 not being pumped out of. In fact, most of

66	<p>1 Euclid's stations were operated 24 hours, and 2 so they were unable to validly do this.</p> <p>3 Also, in the record, Euclid's 4 contractor then explained that he finally, 5 when the case was getting close to going to 6 hearing, instituting a system where he would 7 go to each station once a month and shut down 8 the station and try to get a valid test.</p> <p>9 But in fact that didn't work, 10 because to get a valid test you need the 11 right conditions. You need to have the tank 12 be filled to a certain level. You need to 13 have stable temperature conditions.</p> <p>14 For instance, if you deliver 15 gasoline shortly before a test, that gasoline 16 coming out of the truck is going to be a very 17 different temperature than the ground 18 temperature.</p> <p>19 Then, it will change in temperature 20 during the course of the test and the machine 21 will say, "That's too much of a temperature 22 change. I can't calculate that." The test</p>	68	<p>1 shorter periods, 15-minute periods, where the 2 tank is not being used and aggregate them.</p> <p>3 At some point in the month, if enough of 4 these periods are present, the machine says, 5 "Now we've aggregated enough, used a 6 statistical model, and determined the tank 7 for this month is not leaking."</p> <p>8 At the time of the hearing only one 9 of Euclid's stations had been outfitted with 10 CSLD, and I believe it was in September 2003, 11 shortly before the hearing. Lo and behold, 12 from September through December that facility 13 had valid results.</p> <p>14 None of the other facilities had 15 been outfitted with CSLD. In fact, Euclid's 16 contractor testified that he was under orders 17 to try to do anything other than spend the 18 money, try to find some other way to do it 19 without installing CSLD, and only install 20 CSLD if there was no other way to do it.</p> <p>21 Now, to the extent that CSLD has 22 been installed, this is far too little, far</p>
67	<p>1 comes out invalid.</p> <p>2 In other facilities, and there was 3 expert testimony that at other facilities' 4 ATGs could be made to work if they were used 5 appropriate to the facilities. If you are 6 trying to do a standard test and you have a 7 station that is not open 24 hours, you have 8 to run the test multiple times during the 9 course of a month so that on at least one of 10 those days you are going to get the right 11 conditions for the test to be valid instead 12 of invalid.</p> <p>13 Euclid finally attempted to run a 14 test once a month. They weren't getting 15 consistent results doing it that way. The 16 other method you can use to deal with this 17 problem is installing a particular type of 18 software that is relatively expensive, it's a 19 couple of thousand dollars for a chip, to do 20 what is called "continuous statistical leak 21 detection." 22 The same machine is able to take</p>	69	<p>1 too late. Euclid had --</p> <p>2 JUDGE WOLGAST: But you saying that 3 CSLD isn't a regulatory requirement; correct?</p> <p>4 MR. FIELDS: CSLD is a way to get a 5 valid ATG result. Getting some sort of valid 6 result in one of the enumerated methods is 7 required by the regulations. Euclid was not 8 getting any valid result under any of the 9 various choices and their response is, "Well, 10 the ATGs don't work."</p> <p>11 Well, the ATGs could have worked 12 for their facility. But there are some 13 facilities where even CSLD doesn't work. The 14 throughput is too high. Those facilities are 15 required to find another method in the 16 regulations and implement that method. There 17 are plenty of choices, double-wall tanks with 18 probes between the tank is one choice.</p> <p>19 Euclid would have had to retrofit 20 several of its facilities to do that. In 21 fact, at Euclid's facilities using CSLD would 22 have gotten them a valid result in most</p>

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1 instances and would have complied with the
2 regulations.

3 JUDGE REICH: Does a valid result
4 mean either a passing or a failing result?

5 MR. FIELDS: Well, a fail, I would
6 argue, yes, is a valid result, but it
7 triggers a whole bunch of other requirements.

8 JUDGE REICH: But can you have a
9 situation, as Mr. DeCaro seemed to suggest,
10 where you could have a failing result which
11 is a valid result that would lead to an
12 investigation that would not then lead to a
13 retest showing a passing result?

14 MR. FIELDS: No. If you have a
15 fail, you must either get some sort of result
16 showing that it is not leaking, or you have
17 to treat it as if it is a leak. Generally,
18 what happens is that if you -- well, under
19 the regs, you don't have to declare a
20 suspected release if within the reporting and
21 investigation period you find a specific
22 malfunction, correct the malfunction, and

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1 then additional testing does not show a
2 release.

3 So if you knew that there was a
4 malfunction, for instance, if you pumped gas
5 during the test and could point to that and
6 say, "Oh, gee, that's probably the reason,"
7 you then have to run the test without pumping
8 gas and get a passing result; if not, then
9 you have to declare, or investigate.

10 In general, there are false
11 positives because people do stupid things
12 like pumping gas during a test. If you
13 cannot correct that, in general what EPA and
14 the states require is what is called a
15 "tightness test." The tank is pressurized
16 and any pressure decay during the period of
17 the test is analyzed to see if it is leaking.

18 There is no evidence that Euclid
19 did that in response to any fails. In fact,
20 at the beginning of the case, the EPA had
21 planned to charge Euclid with failing to
22 investigate failed results.

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1 Because EPA's inspectors and the
2 state inspectors by themselves went to these
3 facilities and found failed tests in the test
4 history. Euclid had been asked to provide
5 records, but did not provide even those.

6 EPA, after meeting with Euclid,
7 decided that that was not the proper
8 violation because Euclid didn't know whether
9 it had passes, fails, or invalids at all. It
10 had no idea what the results, if any, were on
11 any of those tests.

12 So we concluded that, "Well, you
13 can't be required to report a suspected
14 release if you have no idea that it happened.
15 But if you don't have any idea whether it
16 happened, you haven't been doing any release
17 detection at all.

18 JUDGE STEIN: But can you -- I'm
19 having difficulty finding where in the
20 regulations you are looking to to find the
21 requirement to have passing results?
22 When I look at 280.43, it describes

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1 methods of release detection, and under (d)
2 it talks about automatic tank gauging,
3 but -- it talks about being able to detect a
4 leak rate and to be done in combination with
5 some other method. But where is the
6 specificity in the regs that you are
7 suggesting is there?

8 MR. FIELDS: Well, under 280.41, it
9 says you must monitor the tanks every 30 days
10 to determine if they are leaking, and you are
11 not monitoring if you are getting results
12 that don't tell you if it's leaking or not.
13 Some human being has to see or hear or be
14 told of some results saying "Is this leaking
15 or not."

16 If you get an invalid result, you
17 don't know one way or another, so you cannot
18 be said to have monitored that tank. All can
19 be said is that you've got the unit on the
20 wall, you've got probes in the tank, but
21 you're not monitoring.
22 Certainly, if someone designed a

1 machine that ran tests but had no readout at
2 all, that would no be monitoring. Even
3 though the machine knows whether it is
4 leaking or not, no one else does.

5 JUDGE STEIN: Is there a definition
6 of monitoring in the tank regulations?

7 MR. FIELDS: No, I don't believe
8 so. I believe it is a common sense
9 interpretation that you are not monitoring if
10 you don't know whether or not it is leaking.

11 JUDGE STEIN: That monitoring to
12 determine it is leaking is a specific
13 requirement for ATG, or is a more general
14 requirement?

15 MR. FIELDS: No, that is in 280.41,
16 all petroleum USTs must have some sort of
17 monitoring. In 280.43, it gives several
18 options as to how you monitor. But in each
19 instance, you have to have some system that
20 can detect a leak within 30 days so that you
21 can monitor to find whether or not that tank
22 is leaking.

1 JUDGE REICH: Does ATG store only
2 passing results?

3 MR. FIELDS: I believe the ATG will
4 store the last test, be it passing or invalid
5 or fail, and in addition it will store the
6 last 12 months of passing results. Now, I
7 say the "last 12 months," the testimony is
8 clear that if there is no passing result in a
9 month, it will store prior months.

10 JUDGE REICH: Other than the last
11 test, if there are no previous tests stored,
12 can you tell whether there was a failed test
13 or a not a valid test?

14 MR. FIELDS: I believe it varies
15 from ATG to ATG. I believe some ATGs will
16 store several failed tests and others will
17 not. In other instances, I mean, the ATGs,
18 most of the particular brand here, the
19 Veeder-Root ones, when it runs a test, it
20 will kick a test a tape out. It will print
21 out a tape, and it will drop on the floor.

22 At one facility, I believe Jackie

1 Rian of MDE found a bunch of these on the
2 floor or in the office and asked the people
3 at the facility, "What are these?"

4 And they said, "I don't know, it
5 just came out of the machine."

6 And she found several failed
7 results on these tapes. But I don't think as
8 a rule that the machine will store fails. I
9 believe it will store up to three alarms.
10 And generally if you get a fail, the machine
11 will, internally at least, give off an alarm.

12 The evidence was very clear at all of
13 Euclid's facilities any alarms that happened
14 were being ignored.

15 But once again, if Euclid is asked,
16 "Show us your records, show us what you're
17 doing," they said, "We don't know." In fact,
18 when Euclid did it, they said, "Well,
19 everything is probably at the facility."

20 But the people at the facilities
21 said "No, all we use these for is just to get
22 inventory. Euclid must have it."

1 Well, whether the machines were
2 doing anything or not, no one was actually
3 looking at the results. When EPA in many
4 instances tried to pull up past results, it
5 was very clear that no test had ever been
6 done.

7 JUDGE WOLGAST: As to the facility
8 that you say became equipped with CSLD and
9 then performed valid results, as you said,
10 what was indicated by those results? Were
11 they passing? Failing?

12 MR. FIELDS: Yes. If you have a
13 CSLD result, it will specifically say: "CSLD
14 Test Result," and then "pass," or "fail." By
15 the time that happened, EPA had actually
16 worked very closely with a contractor who
17 Euclid eventually hired.

18 EPA actually worked well with them.
19 He knew what had to be done. He just didn't
20 have authorization to go out and do it early
21 on, but he was keeping very close records.
22 Each month he would be out there and he would

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1 collect the actual tape and it would say
2 "test performed/test passed."
3 JUDGE WOLGAST: And they had
4 passing results at the time?
5 MR. FIELDS: They had passing
6 results. Mr. DeCaro is correct that EPA has
7 not identified any specific leak from these
8 tanks, but I think that that goes only to the
9 question of did the corrective action rules
10 kick in.
11 Euclid in fact was going blind on
12 this in that they did not have any idea if
13 tanks were leaking or not, and the
14 regulations are designed to be ready so that
15 when a tank leaks it can be dealt with.
16 Inventory control had been used in
17 some method prior to EPA's regs coming in,
18 and at that point EPA calculated
19 approximately 300,000 underground tanks had
20 been leaking in 87.
21 So it is not clear that any given
22 tank will leak at any particular time, but

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1 the environment can be very seriously harmed
2 if a tank release is not found. And so
3 Euclid was very blithely ignoring very
4 important prophylactic rules.
5 JUDGE STEIN: Am I correct in
6 understanding that in order to use ATG, it
7 must be used in conjunction with inventory
8 control or tank tightness testing, or am I
9 incorrect in that understanding?
10 MR. FIELDS: Well, in the
11 regulation, it says that in addition to doing
12 ATG, you have to use inventory control or
13 some equivalent message in addition. In some
14 states, particularly in Maryland and in D.C.,
15 they very clearly require inventory control
16 to be done at every facility.
17 As I understand it, the Office of
18 Underground Storage Tanks has been a little
19 unclear about if EPA requires inventory
20 control to be there in addition to an ATG.
21 From our standpoint, we are not
22 arguing that. In other words, if the had a

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1 valid ATG result for the purposes of our case
2 here, EPA considered that to be a passing
3 test for that month.
4 JUDGE STEIN: I want to ask to ask
5 you the same question I asked Euclid's
6 counsel, which is, am I correct in
7 understanding that there are seven counts
8 that depend on this ATG issue? Are you in a
9 position to answer that question?
10 MR. FIELDS: I'm not really sure.
11 I mean, I think that our evidence showed that
12 in every instance in which tank release
13 detection was claimed as a violation, there
14 was an ATG eventually installed at that
15 facility but that there were no results until
16 sometime in late 2003, just prior to the
17 hearing. So I really don't --
18 JUDGE STEIN: You don't know how
19 many counts were release detection?
20 MR. FIELDS: I believe it was 15,
21 but that's just off the top of my head.
22 JUDGE STEIN: I believe your co-,

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1 not your co-counsel, but Mr. DeCaro may have
2 the answer.
3 MR. DeCARO: I counted up 13, and
4 I'm going to give this to Mr. Fields.
5 JUDGE STEIN: Okay.
6 MR. FIELDS: Well, Your Honor, as I
7 understand, in the stipulations, Euclid
8 raised ATG testing as a possible defense at
9 every facility in which an ATG was present,
10 so I'm not quite sure I understand.
11 But I do believe that at least as
12 of the hearing Euclid's own general manager
13 was testifying that he had never seen a valid
14 passing result from any of these ATGs, and he
15 didn't care because they were doing their own
16 method of inventory control and that was good
17 enough for them.
18 JUDGE STEIN: Okay.
19 JUDGE WOLGAST: Could you speak to
20 Euclid's argument that as to tank-release
21 detection and line-release detection, that
22 the Region's prima facie case is in essence a

1 lack of records?
2 MR. FIELDS: I think -- certainly
3 for tank-release detection, the primary thing
4 in the prima facie case is a lack of records,
5 but it's a lack of records that goes back
6 forever.

7 In other words, if within the
8 entire period of keeping records for all the
9 tanks, both in D.C. and in Maryland, and of
10 course D.C. has a three-year period and
11 Maryland has only a single year and
12 essentially Euclid had no passing results in
13 that entire period, the ALJ then properly
14 inferred that if they weren't doing anything
15 for three years at any tank, they probably
16 were not doing anything back to five years.

17 At that point, I believe EPA has
18 established a prima facie case, that the
19 evidence speaks for itself. Euclid is
20 welcome to come in and explain that they were
21 actually doing something just before the
22 cutoff period but that's kind of a -- that's

1 an argument that's kind of hard to believe.
2 And Euclid did not make any attempt to do
3 that. In fact, they testified that they had
4 never gotten a proper ATG result.

5 Now, on line-release detection, it
6 is a little bit different. I can actually
7 turn to my notes on that here. The
8 line-release detection counts, some of the
9 evidence shows that when EPA did ask for
10 annual tightness testing results and annual
11 line-leak detector results, for some
12 facilities, Euclid had at that time test
13 results; for some facilities, it did not.

14 In almost every instance, the test
15 result was greater than a year old, and so it
16 was clearly in violation. There was a
17 combination of inferences that led EPA and
18 the judge in the case below to conclude that
19 the only line-tightness test, and line-leak
20 detector test performed by Euclid are the
21 ones in which Euclid retained the records.

22 First of all, in the extensive

1 meetings in April 2002, Euclid told the EPA
2 that the boxes of records it was bringing in
3 was everything that they had, and they had no
4 reason to believe that anything had been
5 removed from those records and also told EPA
6 that there was no record destruction policy,
7 that they couldn't understand why anything
8 would not be there.

9 In addition, in those records,
10 there were tightness tests going back to
11 1995, but again very sporadic. It was not on
12 any kind of annual basis; it was not for
13 every facility; and there were other
14 maintenance records going back to the
15 mid-1980s.

16 In addition, it was very clear
17 based on a number of pieces of evidence that
18 Euclid did not have a formal annual testing
19 program, that tests were being done
20 sporadically. And, again, Mr. Buckner could
21 only testify that from time to time he would
22 order a test.

1 In addition, the state
2 notifications given before the period of
3 violation had a box to check off methods of
4 tank- and line-release detection. And for
5 most of the notifications, line-release
6 detection was not listed even for facilities
7 that at some point or another had had a test.

8 And, finally, in the face of all
9 this evidence, Judge Charneski followed EPA's
10 suggestion to draw the inference that Euclid
11 in fact kept records of the tests that had
12 been done.

13 And so even if we asked in 2001 for
14 test results and Euclid had a 1999 test,
15 Judge Charneski agreed that prior to 1999 by
16 a preponderance of evidence EPA had proved
17 that Euclid had not done a test.

18 In the face of this, Euclid could
19 have called witnesses, either a store
20 operator or the particular person, Charlie
21 Pyle, who you could claim did any tightness
22 test done.

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1 They could have called this person
2 to say, "Well -- you know, I have other
3 records, or I remember doing a test that is
4 not included in these records." Euclid did
5 not call any witness, and so therefore did
6 not rebut these very strong inferences based
7 on all of this evidence.
8 Now, in the face of all this, the
9 judge agreed that based on the credibility
10 and the testimony, that EPA was correct and
11 that Euclid in fact did have records of any
12 tests that was actually done at any time.
13 Now, if I could speak real briefly
14 to the questions on Count 31, the Frederick
15 Avenue facility in Baltimore. The evidence
16 at trial was very clear that there were no
17 sump sensors and the test boots were tight.
18 You could have made some argument
19 that you wouldn't have tight test boots if
20 you didn't have sensors. That argument makes
21 no sense to me. If you have double-walled
22 pipes, you always have some boots on them,

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1 someone tightened.
2 And if you have tight boots, you're
3 not going to have a flow of a release into
4 the sump that's not going to be detected by
5 sensors. If you don't have sensors, it can
6 be closed or open, you're still not going to
7 have any detection.
8 The interesting thing, though, here
9 is that EPA in its First Amended Complaint
10 did make a mistake. In the penalty
11 calculation in the first amended complaint,
12 we mistakenly believed that that was one of
13 the facilities that had partial elements of a
14 sump sensor system and that actually had
15 sensors.
16 At trial, this mistake was
17 discovered. The evidence was very clear, and
18 the evidence was introduced and witnesses
19 testified that there were not sensors there.
20 Euclid's technical contractor did not
21 contradict this.
22 At that point in the post-hearing

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1 brief, EPA recalculated the penalty and said
2 that the break that we gave Euclid for
3 facilities which had some semblance of a
4 system is not going to be included for this
5 facility.
6 Now, in the penalty policy, this
7 break isn't even in there. EPA gave that
8 break, but only at the facilities which
9 actually had some sort of a sump sensor
10 system.
11 Any other questions?
12 JUDGE STEIN: Thank you.
13 REBUTTAL ARGUMENT OF THEODORE F. DeCARO
14 ON BEHALF OF RESPONDENT
15 MR. DeCARO: May it please the
16 Court, I guess the sensors and boots go
17 together. The complaint said there were
18 sensors. I guess if there were some
19 testimony at trial that there weren't any
20 sensors, then I guess there is a variance
21 between the complaint and the evidence. That
22 is the only point that could be made there.

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1 I don't have anything further to say, unless
2 you have any questions.
3 Okay. As far as financial
4 responsibility, I would just like to clarify
5 that. There are several ways of meeting the
6 financial responsibility requirements, and
7 one of them is to have a guarantee. We don't
8 have a guarantee in this case. We have
9 actual, what we are claiming, Respondent is
10 claiming that there is an actual net worth.
11 There is no guarantee, and so I'm
12 not going to sit here and contend that the
13 guaranteed requirements were somehow
14 satisfied, because they weren't -- okay,
15 there is no documentation of a guarantee.
16 Euclid is saying the gestalt of its
17 operation has a large enough net worth to
18 meet the self-insurance requirements. And so
19 we're not saying that the lack of a guarantee
20 means they failed the requirements. We're
21 just saying --
22 JUDGE WOLGAST: I understood that

90	<p>1 the ALJ as to that point both found that it</p> <p>2 lacked formal guarantees but also the</p> <p>3 financial resources on which Euclid was</p> <p>4 relying went to its affiliates and not to the</p> <p>5 company itself.</p> <p>6 MR. DeCARO: All these -- most of</p> <p>7 the financial resources are owned by limited</p> <p>8 liability companies under common ownership, I</p> <p>9 mean, common ownership to a certain extent, I</p> <p>10 guess. The testimony of the Respondent,</p> <p>11 Mr. Koo Yuen, is that this is available.</p> <p>12 There was nothing agreed about that.</p> <p>13 I mean, the ALJ wants to look at</p> <p>14 the -- I mean, we presented -- we presented</p> <p>15 the fact that the limited liability company</p> <p>16 memberships are owned by three trusts, three</p> <p>17 different trusts.</p> <p>18 Euclid is a member of some of the</p> <p>19 limited liability companies, but Euclid</p> <p>20 doesn't own the real estate. However, the</p> <p>21 stations where the facilities are located are</p> <p>22 very valuable. I think there was plenty of</p>	92	<p>1 data and passed it on to Koo Yuen, who</p> <p>2 performed the conforming analysis, and he</p> <p>3 testified to it. Mr. Yuen testified as to</p> <p>4 that. So that was where even though</p> <p>5 Mr. Buckner did not every month perform a</p> <p>6 conforming test, the test was being performed</p> <p>7 and it would have had --</p> <p>8 JUDGE WOLGAST: Only by Mr. Yuen,</p> <p>9 you're saying?</p> <p>10 MR. DeCARO: Mr. Yuen, right.</p> <p>11 JUDGE WOLGAST: How would he do it?</p> <p>12 MR. DeCARO: Well, he would get</p> <p>13 these sheets from Mr. Buckner and he would</p> <p>14 take a look at them. He had the inventory</p> <p>15 readings from the station and he had the</p> <p>16 previous month's inventory reading from his</p> <p>17 records and that was put into the record at</p> <p>18 the hearing.</p> <p>19 JUDGE STEIN: Were they done on a</p> <p>20 real-time basis, or is there evidence in the</p> <p>21 record as to that point?</p> <p>22 MR. DeCARO: He testified that they</p>
91	<p>1 evidence of that. That was what we presented</p> <p>2 on that point.</p> <p>3 The other thing I would like to</p> <p>4 point out is in the record, the documents</p> <p>5 that Mr. Fields presented regarding the</p> <p>6 inventory control used by Euclid are not all</p> <p>7 of the documents that Euclid presented.</p> <p>8 There are daily sheets that roll up</p> <p>9 into that sheet that Mr. Fields presented,</p> <p>10 which is actually the least attractive, the</p> <p>11 least readable of the sheets. So I would ask</p> <p>12 the Panel to take a look at the record when</p> <p>13 evaluating Euclid's compliance with respect</p> <p>14 to inventory control.</p> <p>15 MR. WOLGAST: Was Mr. Fields</p> <p>16 correct that the manner in which Euclid</p> <p>17 performed the monthly tallies did not begin</p> <p>18 with existing inventory at the beginning of</p> <p>19 any given month?</p> <p>20 MR. DeCARO: Not at the Leon</p> <p>21 Buckner level. Leon Buckner is the general</p> <p>22 manager of Euclid. He did not -- he gathered</p>	93	<p>1 were done on a monthly basis. There was</p> <p>2 evidence in the record that the CSLD, those</p> <p>3 are very, very accurate right now, but there</p> <p>4 is evidence in the record that at the time</p> <p>5 they were not always so accurate and that's</p> <p>6 why the retrofit came later in the process.</p> <p>7 Then, we're talking about</p> <p>8 Count 31 -- I'm sorry, I already addressed</p> <p>9 that.</p> <p>10 Thank you. Thank you very much.</p> <p>11 JUDGE STEIN: Any further</p> <p>12 questions?</p> <p>13 (No verbal response)</p> <p>14 JUDGE STEIN: Thank you.</p> <p>15 MS. DURR: All rise.</p> <p>16 The hearing stands adjourned.</p> <p>17 (Whereupon, at approximately</p> <p>18 12:08 p.m., the HEARING was</p> <p>19 adjourned.)</p> <p>20 * * * * *</p> <p>21</p> <p>22</p>

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