UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

IN THE MATTER OF:	§	
	§	
RAM, INC.	§	
McAlester, OK	§	**Docket No. SWDA-06-2005-5301**
	§	
	§	
RESPONDENT	§	

COMPLAINANT'S POST-HEARING BRIEF

July 14, 2006

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I. PRELIMINARY STATEMENT

Now comes, Complainant, the Director of the Multimedia Planning & Permitting Division, United States Environmental Protection Agency ("EPA"), Region 6, by and through its attorney, and files this Post-Hearing Brief in accordance with § 22.26 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. Part 22 (July 23, 1999).

This matter arises under Section 9006 of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as "RCRA"), 42 U.S.C. § 6991e.

II. PROCEDURAL HISTORY

On August 19, 2005, Complainant filed a **COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING** ("Complaint") with the Regional Hearing Clerk and properly served Respondent. The Complaint alleged that Respondent, Ram, Inc., failed to comply with certain requirements of the authorized State Underground Storage Tank ("UST") regulations which are found under Title 165 of the Oklahoma Administrative Code ("OAC"), Chapter 25, cited as OAC 165:25 and codified at 40 C.F.R. § 282.86. (Government's Trial Exhibit ("CTX") 7)

Respondent filed its Answer and Request for Hearing on October 13, 2005. (CTX-18)

On January 10, 2006, Chief Administrative Law Judge, Susan Biro, issued an Order

Designation, designating Judge Spencer T. Nissen as the Presiding Officer for this matter.

On February 7, 2006, Judge Nissen issued a Prehearing Order establishing a schedule. Judge Nissen's Prehearing Order, established compliance dates for the Prehearing Exchange.

On May 9th, 10th and 11th, 2006, Judge Nissen presided over an administrative hearing in McAlester, Oklahoma, whereby the parties were allowed to present their respective cases.

III. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The record supports the facts and conclusions that follow.

1. Title 165 of the OAC (40 C.F.R. § 282.86) applies to owners and operators of all UST systems for which the Oklahoma Corporation Commission ("OCC") has been given regulatory responsibility by 27A O.S. (Supp. 1999) § 1-3-101(E)(5)(b) and 17 O.S. § 301 et. seq., which includes tanks that contain gasoline, kerosene, diesel or aviation fuel, including but not limited to tanks from which these materials are dispensed into vehicles, or tanks used in wholesale or bulk distribution activities as well as pumps, hoses dispensers, automatic gauging systems and other ancillary equipment.

2. 40 C.F.R. § 282.86 applies to owners and operators of all "UST systems" as defined in 40 C.F.R. § 280.12.

3. In its Original Answer and Request for Hearing (dated October 13, 2005), Respondent admitted that:

   (a) RAM, Inc., (herein "Respondent") is the Respondent in this case.

   (b) Respondent is a corporation and therefore, is a "person" as defined at OAC

§ 280.22], Respondent submitted documentation to the OCC, to register USTs at the facility.

(I) On February 16, 2005, a duly authorized EPA representative (the inspector or inspectors) conducted an inspection of USTs located at the above named facilities (paragraph 3.d above) and reviewed additional records concerning the USTs on February 17, 2005 at the office of RAM, Inc., 106 6th Street, McAlester, Oklahoma.

(j) The USTs which are the subject of this Complaint routinely contain "regulated substances" as defined in OAC 165:25-1-11 [40 C.F.R. § 280.12].

(CTX-18)

4. Notice of this action was given to the State prior to the issuance of this Complaint pursuant to Section 9006(a)(2) of the Solid Waste Disposal Act, 42 U.S.C. § 6991e(a)(2). (CTX-7 at 2) (Tr. at 64, 389)

5. In its prehearing exchange and during the May 9th, 10th and 11th, 2006 hearing ("the hearing"), Complainant acknowledged to the Court and Respondent that Counts 5, 6, 11, 13, 18 and 19 that were filed in the Complaint on August 19, 2005 were dropped. (Prehearing exchange, dated March 3, 2006, pages 7, 8, 9 and 10, paragraphs 7, 8, 12, 13, 15, 16, 20, 21 and 24) (Tr. at 14)

6. During the hearing, Respondent admitted liability to the following Counts alleged in the Complaint:

Count 1 - Failure to provide spill prevention for new tanks for three tanks at the

Citgo Quik Mart[1];

Count 2 - Failure to provide adequate spill prevention capacity for six tanks at the Citgo Quik Mart[2];

Count 3 - Failure to conduct monthly release detection monitoring of a tank during temporary closure at the Citgo Quik Mart[3];

Count 4 - Failure to conduct monthly release detection monitoring for five tanks at the Citgo Quik Mart[4];

Count 7 - Failure to operate cathodic protection system continuously for three tanks at the Citgo Thrif-T-Mart[5];

Count 8 - Failure to test automatic line leak detector annually for three tanks at the Citgo Thrif-T-Mart[6];

Count 9 - Failure to test pressurized lines annually or use monthly monitoring for

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[1]The three tanks consist of one 12,000-gallon unleaded, one 12,000-gallon premium, and one 12,000-gallon diesel. (CTX-7)

[2]The six tanks consist of one 12,000-gallon unleaded, one 12,000-gallon premium, two 12,000-gallon diesels, one 2,000-gallon dyed diesel, and one 4,000-gallon kerosene. (Id.)

[3]This tank is a 12,000-gallon diesel tank. (Id.)

[4]The five tanks consist of one 12,000-gallon unleaded, one 12,000-gallon premium, one 12,000-gallon diesel, one 2,000-gallon dyed diesel, and one 4,000-gallon kerosene. (Id.)

[5]The three tanks consist of one 10,000-gallon unleaded, one 6,000-gallon premium, and one 4,000-gallon diesel. (Id.)

[6]The three tanks consist of one 10,000-gallon unleaded, one 6,000-gallon premium, and one 4,000-gallon diesel. (Id.)

three tanks at the Citgo Thrif-T-Mart[7];

Count 10 - Failure to provide adequate spill prevention for one tank at the Goodwin's One Stop[8];

Count 12 - Failure to conduct stick readings as required for Inventory Control and Tank Tightness Testing, no release detection for three tanks at the Goodwin's One Stop[9];

Count 14 - Failure to conduct release detection for a tank in temporary closure at the Monroe's Service Station[10];

Count 15 - Failure to operate cathodic protection systems continuously for four tanks in temporary closure at the Monroe's Service Station[11];

Count 16 - Failure to test cathodic protection systems within six months of installation, then every three years thereafter for four tanks at the Monroe's Service Station[12];

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[7]The three tanks consist of one 10,000-gallon unleaded, one 6,000-gallon premium, and one 4,000-gallon diesel. (Id.)

[8]This tank is a 12,000-gallon premium tank. (Id.)

[9]The three tanks consist of one 12,000-gallon unleaded, one 12,000-gallon premium, and one 12,000-gallon diesel. (Id.)

[10]This tank is a 1,000-gallon premium tank. (Id.)

[11]The four tanks consist of one 8,000-gallon unleaded, one 1,000-gallon unleaded, one 1,000-gallon premium, and one 1,000-gallon midgrade. (Id.)

[12]The four tanks consist of one 8,000-gallon unleaded, one 1,000-gallon unleaded, one 1,000-gallon premium, and one 1,000-gallon midgrade. (Id.)

Count 17 - Failure to conduct an integrity test prior to installing a cathodic protection system for four tanks at the Monroe's Service Station[13]; and

Count 20 - Failure to conduct an integrity test prior to installing a cathodic protection system for four tanks at the Longtown Citgo Station[14].

(Tr. at 56)

7. During the hearing, Complainant mitigated the penalties associated with Counts 8 and 9 as discussed infra. (Tr. at 392-95)

8. EPA's proposed penalty before the Court's consideration is $175,062.75.

9. EPA's proposed penalty is consistent with 40 C.F.R. Part 22.

10. EPA's proposed penalty is in conformity with the "Penalty Guidance for Violations of UST Regulations OSWER Directive 9610.12." (CTX-12)

11. EPA properly applied its own penalty policy instead of the OCC penalty policy.

12. EPA's proposed penalty has taken into account the statutory considerations pursuant to 42 U.S.C. §§ 6991e(c) and 6991e(d).

13. EPA's proposed penalty is reasonable and conservative given the circumstances of this case.

14. EPA's proposed penalty is to be assessed against Respondent in its entirety.

15. Pursuant to 40 C.F.R. § 22.24, Respondent has the burden of proving his affirmative

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[13]The four tanks consist of one 8,000-gallon unleaded, one 1,000-gallon unleaded, one 1,000-gallon premium, and one 1,000-gallon midgrade. (Id.)

[14]The four tanks consist of two 1,000-gallon diesels, one 3,000-gallon premium, and one 8,000-gallon unleaded. (Id.)

defenses, and Respondent has not met his burden.

16. The north fill ports on three tanks at Respondent's Citgo Quik Mart did not have spill prevention devices at the time of the February 16-17, 2005 joint inspection by EPA and OCC ("the Inspection") and did not have any spill prevention devices at any time before the Inspection and since their installation on or about October 1, 1990. (CTX-7 at 4-6) (Tr. at 90-100)

17. The spill containment buckets in place on the six tanks at Respondent's Citgo Quik Mart were full of debris and/or product at the time of the Inspection such that the capacity of each spill bucket was significantly reduced and not capable of containing product from the transfer hose should product be released after the transfer hose was detached. (CTX-7 at 6-7) (Tr. at 100-105)

18. The 12,000-gallon diesel tank located at Respondent's Citgo Quik Mart was not empty at the time of the Inspection; and Respondent failed to conduct monthly release detection monitoring on the tank for a period beginning on or before February 16, 2004, and ending not before February 16, 2005. (CTX-7 at 7-8) (Tr. at 105-10, 113-17)

19. Respondent regularly used the 12,000-gallon diesel tank located at its Citgo Quik Mart for holding extra product from overloaded trucks. (Tr. at 614-15)

20. Respondent failed to conduct monthly release detection monitoring on the five tanks in addition to the 12,000-gallon diesel tank located at its Citgo Quik Mart for a period beginning on or before February 16, 2004, and ending not before February 16, 2005. (CTX-7 at 9-10) (Tr. at 110-18)

21. Respondent failed to operate the cathodic protection system continuously on the three tanks at its Citgo Thrif-T-Mart for a period beginning on or about March 19, 2004 (the date the last corrosion protection test was conducted indicating no corrosion protection) and ending not before February 16-17, 2005. (CTX-7 at 14-15) (Tr. at 118-27)

22. Respondent failed to perform an annual automatic line leak detector test on the three tanks at its Citgo Thrif-T-Mart by November 14, 2004—one year from November 14, 2003, the date of the last annual test—and did not perform said test until January 10, 2005. (CTX-7 at 15-17) (Tr. at 127-30) (Respondent's ("R's") Exhibit ("Ex.") 24)

23. Respondent failed to perform an annual hydrostatic line tightness test on the three tanks at its Citgo Thrif-T-Mart by November 14, 2004—one year from November 14, 2003, the date of the last annual test—and did not perform said test until January 10, 2005. (CTX-7 at 17-18) (Tr. at 130-32) (R's Ex. 24)

24. At the time of the Inspection, the spill containment device (spill bucket) on the premium tank fill port at Respondent's Goodwin's One Stop was severely cracked such that product would escape into the environment upon disconnecting a transfer hose. (CTX-7 at 18-19) (Tr. at 132-37)

25. Respondent failed to measure and record the amount of product remaining in the three tanks each operating day at its Goodwin's One Stop for a period beginning on or before February 16, 2004, and ending not before February 16, 2005. (CTX-7 at 21-24) (Tr. at 137-41)

26. Respondent failed to record each operating day the inventory volume measurement for the amount of regulated substance remaining in the three tanks at its Goodwin's One Stop for a period beginning on or before February 16, 2004, and ending not before February 16, 2005. (Id.)

27. The 1,000-gallon premium tank located at Respondent's Monroe's Service Station was not empty at the time of the Inspection, and Respondent failed to conduct monthly release detection monitoring on the tank. (CTX-7 at 25-26) (Tr. at 141-43)

28. Respondent failed to operate the cathodic protection system continuously on the four tanks at its Monroe's Service Station for a period beginning on or before August 17, 2001 (the date the tanks were last used) and ending not before February 16, 2005. (CTX-7 at 26-27) (Tr. at 143-51)

29. Respondent failed to test the cathodic protection system to ensure that the corrosion protection was adequate within six months of installation then every three years thereafter on the four tanks at its Monroe's Service Station for a period beginning on July 22, 1998 (the latest date the corrosion system had to be installed plus a minimum of six months after installation for the first test requirement) and ending not before February 16, 2005. (CTX-7 at 27-28) (Tr. at 151-57)

30. Respondent failed to conduct a structural integrity test on the four tanks at its Monroe's Service Station prior to the installation of the cathodic protection system for a period beginning on December 22, 1998 (the latest date said test could have been conducted before installing the cathodic protection system) and ending not before

February 16, 2005. (CTX-7 at 29-30) (Tr. at 157-64)

31. Respondent failed to conduct a structural integrity test on the four tanks at its Longtown Citgo Station prior to the installation of the cathodic protection system for a period beginning on December 22, 1998 (the latest date said test could have been conducted before installing the cathodic protection system) and ending not before February 16, 2005. (CTX-7 at 33-35) (Tr. at 164-66)

32. Respondent is a "person" as defined at 40 C.F.R. § 280.12.

33. Respondent is an "owner" and/or "operator" of the 20 "Underground Storage Tanks" located at the facilities described above in paragraph 3.d as those terms are defined at 40 C.F.R. § 280.12.

34. As a consequence of Respondent's admissions, Respondent's facilities are subject to the jurisdictional provisions of Section 9006 of the SWDA, 42 U.S.C. § 6991e, for purposes of complying with UST regulations, during the subject calendar years, for the subject USTs.

IV. STANDARD OF REVIEW

Pursuant to 40 C.F.R. § 22.24, Complainant has the burden of proof to present a prima facie case in regard to the violation and the appropriateness of the penalty. Respondent has the burden of presenting a persuasive defense against allegations set forth in the Complaint. The Presiding Officer shall determine the controversy upon a preponderance of the evidence.

For purposes of making a record of the agency action for judicial review, EPA must establish that in assessing a civil penalty against Respondent, the Agency used the statutory

factors and applied these factors to the facts of the case. The Presiding Officer may accept either EPA's or Respondent's interpretation of the statutory factors, or he may develop his own interpretation of the statutory factors. The Consolidated Rules require that "the Presiding officer shall set forth the specific reasons for the increase or decrease from the penalty proposed in the Complaint. 40 C.F.R. § 22.27(b). If the Presiding Officer's decision is arbitrary or capricious, his ruling is subject to reversal pursuant to Section 706(w)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(w)(A).

In making his decision on the appropriateness of a penalty, the Presiding Officer must use the statutory factors and apply them to the facts. The Presiding Officer may also refer to the Civil Penalty Policy. However, "the presiding officer has the discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where the circumstances warrant." In re DIC Americas, Inc., 6 E.A.D. 184, 189 (EAB 1995). Nevertheless, the presiding officer must "ensure that the penalty he or she ultimately assesses reflects a reasonable application of the statutory penalty criteria to the facts of the particular violations." In re Employers Ins. of Wausau and Group Eight Technology, Inc., 6 E.A.D. 735, 758 (EAB 1997).

V. POST-HEARING ARGUMENT

On May 9th, 10th and 11th, 2006, Respondent admitted liability to the Counts referenced in Section III above. (Tr. at 56) Having removed the issue of liability, Complainant believes the penalty in the amount of $175,062.75 is reasonable and appropriate pursuant to the statutory factors and the applicable penalty policy.

EPA'S PROPOSED PENALTY IS CONSISTENT WITH THE PENALTY POLICY, HAS TAKEN INTO ACCOUNT THE STATUTORY FACTORS, AND IS APPROPRIATE

EPA's authority for assessing civil penalties for violations of UST requirements is provided by Subtitle I of RCRA. Specifically, according to the penalty provision in Section 9006(d) of RCRA:

> (1) Any owner who knowingly fails to notify or submits false information pursuant to section 6991a(a) of this title shall be subject to a civil penalty not to exceed $10,000 for each tank for which notification is not given or false information is submitted.
> (2) Any owner or operator of an underground storage tank who fails to comply with -
> (A) any requirement or standard promulgated by the Administrator under section 6991b of this title;
> (B) any requirement or standard of a State program approved pursuant to section 6991c of this title; or
> (C) the provisions of section 6991b(g) of this title (entitled "Interim Prohibition")
> shall be subject to a civil penalty not to exceed $10,000 for each tank for each day of violation.

42 U.S.C. § 6991e(d). Pursuant to the Debt Collection and Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321(1996), and the regulations promulgated thereunder,[15] for violations occurring on and after January 31, 1997, the statutory maximum penalty for each tank for each day of violation shall be $11,000.

Additionally, Section 9006(c) of RCRA provides that EPA may assess a penalty "which the Administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements." To guide the Administrator in the calculation of civil penalties against owner/operators of USTs who are in

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[15] *See* 40 C.F.R. Part 19, Adjustment of Civil Monetary Penalties for Inflation (69 Fed. Reg. 7124, February 13, 2004).

violation of the UST technical standards and financial responsibility regulations, EPA has drafted the November 14, 1990 U.S. EPA Penalty Guidance for Violations of UST Regulations OSWER Directive 9610.12 (the "Penalty Policy"). (CTX-12) The two statutory penalty factors set forth in Section 9006(c) of RCRA are incorporated in the Penalty Policy. The methodology described in the Penalty Policy "seeks to ensure that UST civil penalties ... are assessed in a fair and consistent manner, and that such penalties serve to deter potential violators and assist in achieving compliance." (Id. at 2)

While the Penalty Policy has not been promulgated as a rule and is therefore not binding on Administrative Law Judges ("ALJs"), "the EAB has emphasized that the Agency's penalty policies should be applied whenever possible because such policies 'assume that statutory factors are taken into account and are designed to assure that penalties are assessed in a fair and consistent manner.'" *See* In the Matter of Norman C. Mayes, Docket No. RCRA-UST-04-2002-0001 (February 27, 2004) (*quoting* In re M.A. Bruder & Sons, RCRA (3008) Appeal No. 01-04, slip op. at 21, 10 E.A.D. __ (EAB, July 10, 2002); and citing In re Carroll Oil Co., 2002 WL 1773052 EPA, July 31, 2002).

1. The Penalty Is Consistent With The Penalty Policy

Pursuant to the Penalty Policy, EPA calculates a total penalty amount by adding together the "economic benefit" component and the gravity-based component of the penalty. The economic benefit component represents the economic advantage that a violator has gained by delaying capital and/or non-depreciable costs and by avoiding operational and maintenance costs

associated with compliance. The total economic benefit component is based on the benefit from two sources: (1) avoided costs (periodic, operation and maintenance expenditures that should have been incurred, but were not); and (2) delayed costs (expenditures that have been deferred by the violation, but will be incurred to achieve compliance).

The gravity-based component is comprised of a "matrix value" derived from a table that provides a penalty amount for violations of the UST requirements based on the "potential for harm" and "extent of deviation" from the regulatory requirements. The matrix value is adjusted based upon violator-specific adjustments, which are the violator's cooperation/non-cooperation, willfulness or negligence, history of noncompliance, and other unique factors. The adjusted matrix value is then multiplied by (1) an "environmental sensitivity multiplier," taking into account local environmental conditions; and (2) a "days of noncompliance multiplier," based on the period of noncompliance. (CTX-12)[16]

The sum of the economic benefit component and the gravity-based component yields the initial penalty figure that is assessed in the administrative complaint. For cases involving more than one count, a separate penalty calculation is performed for each count, and the sum of these penalties will be the initial penalty figure assessed in the complaint. Once the complaint is issued, the Agency may enter into settlement negotiations with the owner/operator and may make

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[16]Under this methodology, the gravity-based component incorporates adjustments that reflect the specific circumstances of the violation, the violator's' background and actions, and the environmental threat posed by the situation.

appropriate downward adjustments in the penalty. *See* id. at 4. The outcome of such negotiations is the final penalty. *See* id.

(a) Economic Benefit Component

EPA has appropriately calculated the economic benefit component for each of the seven counts for which economic benefit was calculated (namely Counts 1, 4, 8, 9, 16, 17 and 20).[17] The testimony of John Cernero, EPA Region 6 Inspector and Enforcement Officer in the UST Compliance and Enforcement Program, provides a detailed account of how, pursuant to Chapter 2 of the Penalty Policy (CTX-12), the period of noncompliance was determined, how the tax rate and the interest rate were selected, and how the delayed and avoided expenditures for each count were arrived at using the most accurate cost estimates. (Tr. at 90-94, 100, 105-6, 110-11, 113-14, 118-19, 127, 130-31, 132, 137, 151, 153-54, 161-62, 164-65) Mr. Cernero's testimony is supported by EPA's Determination of Penalty which was used to calculate the revised penalties. (CTX-19) The proposed penalty amount achieves the purpose of recovering any economic gain that a violator might have accrued from failure to follow regulations.

Respondent provided evidence regarding Counts 8 and 9 that would call for mitigation of the economic benefit component associated with those two counts.[18] (R's Ex. 24) In EPA's Determination of Penalty (CTX-19), the economic benefit component was calculated based upon

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[17]The economic benefit component for Counts 2, 3, 7, 10, 12, 14 and 15 were considered insignificant and thus not included in the proposed penalty, consistent with the general exercise of enforcement discretion. *See, for example*, the final revised RCRA Civil Penalty Policy (June 23, 2003).

[18]Inadvertently, this adjustment was not made part of the record during the hearing.

94 days of avoidance, November 14, 2004 to February 16, 2005. The evidence presented showed that the respective test for each count was performed on January 10, 2005, which would reduce the days of avoidance to 57. This would in turn reduce the economic benefit component from $63.65 per tank to $38.60 per tank for Counts 8 and 9.

For all the forgoing reasons, the economic benefit component of the proposed penalty for each of Counts 1, 4, 16, 17 and 20 should be upheld in its entirety. The economic benefit component of the proposed penalty for Counts 8 and 9 should be reduced to not less than $115.80 for each count.

(b) Gravity-Based Component

As discussed below, EPA has appropriately calculated the gravity-based component for each of the fourteen counts. The testimony of Mr. Cernero provides a detailed account of how, pursuant to Chapter 3 of the Penalty Policy (CTX-12), the matrix value was determined, what values were assigned to the violator-specific adjustments, and how the environmental sensitivity multiplier and days of noncompliance multiplier were calculated. (Tr. at 94-105, 107-12, 114-17, 119-166) Mr. Cernero's testimony is supported by EPA's Determination of Penalty which was used to calculate the revised penalties. (CTX-19) The proposed penalty amount achieves the purpose of the gravity-based component which is to deter potential violators by penalizing Respondent's noncompliance and preventing Respondent from receiving a windfall resulting from the noncompliance.

Respondent provided evidence regarding Counts 8 and 9 that would call for mitigation of the gravity-based component associated with those two counts, specifically with respect to the days of noncompliance multiplier. (Tr. at 392-95) Details are discussed below.

For all the foregoing reasons, the gravity-based component for each of Counts 1, 2, 3, 4, 7, 10, 12, 14, 15, 16, 17 and 20 should be upheld in its entirety. The gravity-based component of the proposed penalty for Counts 8 and 9 should be reduced to not less than $4,500.00 for each count.

(1) Matrix Value

EPA has selected the most appropriate matrix value for each count based on the potential for harm and the extent of deviation from the regulatory requirements (hereinafter "extent of deviation").

For Count 1 (failure to provide spill prevention for three tanks at the Citgo Quik Mart), EPA determined that there was a major potential for harm and a major extent of deviation. (CTX-7) According to Mr. Cernero, "failure to have spill buckets is a major component of the Underground Storage Tank program; therefore, the deviation – or the potential for harm by not having such a piece of equipment in place, you can cause potential for harm because you can cause contamination over time, spill after spill after spill. And also, it is completely away from the deviation; you don't have any spill bucket there at all, so that's a major-major." (Tr. at 94) In response to the Court's inquiry, Mr. Cernero explained that because the three tanks have two drop ports, they must have spill prevention on each port. (Tr. at 96) Mr. Cernero further explained to the Court that the potential for harm could have been diminished had Respondent

installed "a permanent cap" or " a cap that's threaded that does not even appear to be as a regular cap." (Tr. at 98) Mr. Cernero noted that in the absence of a permanent cap, the possibility of a truck driver inadvertently using the north fill ports was high, particularly in light of the fact that there were no signs, bolted-down lids, or other indication for a driver to observe and know not to drop fuel there. (Id.). Moreover, given the high turnover rate with the truck drivers employed by Respondent who make the fuel deliveries (Tr. at 625), the likelihood of a spill at this location is magnified.

For Count 2 (failure to provide adequate spill prevention capacity for six tanks at the Citgo Quik Mart), EPA determined that there was a major potential for harm and a major extent of deviation. (CTX-7) According to Mr. Cernero, "there was so little capacity left, because of the debris and/or fuel in there [spill buckets], if there was a spill because the truck driver released a hose too soon, there would not be enough capacity to hold the minimal that's usually in a hose, even after they shut the flow of fuel to the hose. It would have caused an overfill. Which one of the reasons why EPA even requires spill and overfill is to prevent the continual spilling or overfilling of fuel." (Tr. at 103) Mr. Cernero further testified that the spill buckets were "almost completely full" and thus would not be able to contain the "typical excess in the hose after it's shut off." (Tr. at 103-104) (CTX-24, CTX-25) Mr. Cernero continued that "this case was so severe, it caught my attention. In my 17 years of inspections, I've never seen spill buckets filled to this capacity before, such that it was – they had rags and filth and, you know, just trash in there." In Mr. Cernero's opinion, he and the OCC inspector "both agreed that it was significant enough to – to say it was a violation." (Tr. at 104-105)

For Count 3 (failure to conduct monthly release detection monitoring of a temporarily closed tank at the Citgo Quik Mart), EPA determined that there was a major potential for harm and a major extent of deviation. (CTX-7) According to Mr. Cernero, "failure to do release detection is a very major potential for harm and a major deviation from the requirements." (Tr. at 107) Mr. Cernero testified that the extent of deviation was major "because the regs say you must have release detection. There was no release detection." (Tr. at 108) He further testified that the potential for harm was major "because no one was monitoring that particular tank with nine inches of product in it" and if there had been a release, "all that nine inches of product would have been released into the environment." (Tr. at 108, 107) Additionally, according to the testimony of Ms. Twilah Monroe, it was Respondent's regular practice to add product to the subject tank when a truck delivering product was overloaded, even though the tank was allegedly in temporary closure and was not being monitored for release detection. (Tr. at 614-15) Such use of this tank supports EPA's determination of major potential for harm and major extent of deviation.

For Count 4 (failure to conduct monthly release detection monitoring for five tanks at the Citgo Quik Mart), EPA determined that there was a major potential for harm and a major extent of deviation. (CTX-7) According to Mr. Cernero, "the fact that they were not doing a release detection that was allowable under the regs, there were major – major deviation from the regs." (Tr. at 111-112) Mr. Cernero further testified that there was a major potential for harm because the method of release detection that Respondent was using was "a temporary fix" not allowable under the regulations. (Tr. at 111-12)

For Count 7 (failure to operate cathodic protection system continuously for three tanks at the Citgo Thrif-T-Mart), EPA determined that there was a major potential for harm and a major extent of deviation. (CTX-7) According to Mr. Cernero, the potential for harm was major because "if you have an Underground Storage Tank that – that's metal and is not being protected from corrosion, it will continue to corrode; particularly, when it's an older tank, it's going to continue to corrode. It could cause a release. I didn't say it did cause a release, but it has potential, high potential for causing a release; therefore, the potential for harm would be considered major. (Tr. at 120) Mr. Cernero further testified that the "deviation from the requirements, again, was considered major, because one of the three things that have to be done or the three major components of an Underground Storage Tank requirements is (sic): One, release detection; spill and overfill; corrosion protection. This one was – did not have corrosion protection at the time of the inspection; therefore, the matrix was used, it was 1,500 which also was recommended in the – in the penalty policy." (Id.)

For Count 8 (failure to test automatic line leak detectors annually for three tanks at the Citgo Thrif-T-Mart), EPA determined that there was a major potential for harm and a major extent of deviation. (CTX-7) According to Mr. Cernero, "[i]f the Automatic Line Leak Detector was not checked, then it would be a potential for the fact that the Automatic Line Leak Detector would not function properly, could cause a catastrophic leak." (Tr. at 128-129) Concerning extent of deviation, Mr. Cernero testified, "It [the regulation] says that you must an Automatic Line Leak Detector checked at least once every 12 months," which did not occur here. (Tr. at 129)

For Count 9 (failure to test pressurized lines annually or use monthly monitoring for three tanks at the Citgo Thrif-T-Mart), EPA determined that there was a major potential for harm and a major extent of deviation. (CTX-7) According to Mr. Cernero, "the tightness tests on the pressurized line is to catch the small leaks. As a matter of fact, the regs say that you have to – it has to be able to detect a .1-gallon per hour leak with – with one and a half times the operating pressure. So it is extremely important that the test be done, and no later than 12 months. Therefore the potential for harm, although we are not saying it leaked, we are saying the potential for harm, if there was a problem with this line, was very high and would be a major." (Tr. at 131) Regarding extent of deviation, Mr. Cernero testified that "[t]he deviation from the requirements, again, is very high, because it says it has to be done within a 12-month period or use a monthly monitor," which Respondent failed to do. (Tr. at 132)

For Count 10 (failure to provide adequate spill prevention for one tank at the Goodwin's One Stop), EPA determined that there was a major potential for harm and a major extent of deviation. (CTX-7) According to Mr. Cernero, "[t]he reason why we said major potential for harm is because it would be very likely that you would actually get a release from this particular spill bucket. Again, it wasn't just a little crack, it was a gap that was in – in the spill bucket. And again, potential for deviation [from] the requirements, the requirements require that you have a spill bucket that will not allow releases into the environment." (Tr. at 133-134)

For Count 12 (failure to conduct stick readings as required for Inventory Control and Tank Tightness Testing, no release detection for three tanks at the Goodwin's One Stop), EPA determined that there was a major potential for harm and a major extent of deviation. (CTX-7)

According to Mr. Cernero, "they did not have a release detection system in place, according to the regulations, because they were not measuring every day that they were in operation." (Tr. at 137-138) Mr. Cernero further testified that, "failure to have a release detection is a major component of the Underground Storage Tank requirements. Therefore, failure to have a release detection system is a major deviation from the – from the regulations. And also major potential for harm. If you do not have the proper release detection in place, you could have a potential where you have a release and not know it because the recordkeeping, the information, is not sufficient to determine if there is a leak." (Tr. at 140)

For Count 14 (failure to conduct monthly release detection monitoring of a tank in temporary closure at the Monroe's Service Station), EPA determined that there was a major potential for harm and a major extent of deviation. (CTX-7) The rationale used for determining the matrix value for this count is essentially the same as the rationale applied in Count 3. According to Mr. Cernero's testimony, the tank contained eight or nine inches of product and thus required monthly release detection, which was not being performed. (Tr. at 142)

For Count 15 (failure to operate corrosion protection system continuously for four tanks in temporary closure at the Monroe's Service Station), EPA determined that there was a moderate potential for harm and a major extent of deviation. (CTX-7) The rationale used for determining the matrix value for this count is similar to the rationale applied in Count 7. Mr. Cernero explained that "[a]ccording to the regulations, if you are going to put a tank in temporary closure and it's empty, all the tanks are empty, you don't have to do release detection; however, it still requires that cathodic protection system stay on board, it has to be done, all the bells and

whistles for cathodic protection has to be – has to be taken care of. And the reason for that is a temporary closed tank assumes that sometime in the future, it's going to be placed or could be placed in operation. If you fail to keep the cathodic protection system on during that temporary closure, for however long it may be, maybe five years, 10 years, maybe three months, whatever it is, has to be maintained because corrosion will occur, regardless of whether there's product in the tank, whether you are using it; it's still going to deteriorate." (Tr. at 144-145)

For Count 16 (failure to test cathodic protection system within six months of installation, then every three years thereafter for four tanks at the Monroe's Service Station), EPA determined that there was a moderate potential for harm and a major extent of deviation. (CTX-7) According to Mr. Cernero, Respondent "had no records that we had that were sent to us showing that this system was ever tested; although, it had a cathodic protection system, we saw it, we saw the evidence that it had one, there was no indication that it was ever tested, that it ever worked from day one, when it was – even when it was before temporary closure." (Tr. at 152-153)

Counts 17 and 20 both involve the failure to conduct an integrity test prior to installing a cathodic protection system. Count 17 involves four tanks at the Monroe's Service Station; and Count 20 involves four tanks at the Longtown Citgo Station. For both counts, EPA determined that there was a moderate potential for harm and a major extent of deviation. (CTX-7) According to Mr. Cernero, "it was not as grievous as not having – no cathodic protection, but the fact is that we are still – we are in a quandary as to whether that tank was good enough to have cathodic protection put on it in the first place. You're making the assumption that well,

hopefully it's not leaking. If the leak detection is in place, at least we know it's not leaking. So we were able to reduce the matrix from – from normally 1,500, down to 750." (Tr. at 162)

(2) Violator-Specific Adjustments

EPA did not adjust the matrix values for any of the fourteen counts based on violator-specific adjustment factors. Respondent would like to see a downward adjustment to the matrix value based on certain examples of what Respondent considers "cooperative behavior." For instance, Respondent argues that making repairs or modifications to the items of noncompliance noted in the Inspection Report and Complaint demonstrates the level of cooperation that would justify a reduction in the matrix value. (Tr. at 577-604) However, as Mr. Cernero correctly points out, "fixing things after the fact" does not merit a downward adjustment to the penalty. (Tr. at 88) Mr. Cernero explained that "essentially, the policy says that when you go above and beyond what is required by the regulations, then you could give some – some leeway in reducing the penalty. But those would be something more like you decided to implement some kind of an auditing procedure where you're going to go above and beyond. Or you're going to add – say, for instance, you are going to tear out all your old piping and tear out all your old tanks and put in double-walled Fiberglass piping and state of the art tanks, that actually was going above and beyond what is required – the minimum requirement." (Tr. at 89) The actions taken by Respondent are minimum requirements imposed on all UST owners/operators rather than

behavior worthy of a reduction in the penalty. Regarding the degree of cooperation/non-cooperation, the Penalty Policy provides:

> In order to have the matrix value reduced, the owner/operator must demonstrate cooperative behavior by going beyond what is minimally required to comply with requirements that are closely related to the initial harm addressed. For example, an owner/operator may indicate a willingness to establish an environmental auditing program to check compliance of other UST Facilities, if appropriate, or may demonstrate efforts to accelerate compliance with other UST Regulations for which the phase-in deadline has not yet passed. Because compliance with the regulation is expected from the regulated community, no downward adjustment may be made if the good faith efforts to comply primarily consist of coming into compliance. That is, there should be no "reward" for doing now what should have been done in the first place. On the other hand, lack of cooperation with enforcement officials can result in an increase of up to 50 percent of the matrix value. (CTX-12 at 11)

None of the actions taken by Respondent approach this level of initiative or accelerated compliance. As a result, no reduction to the matrix value was given to Respondent.

The facts actually support an upward adjustment to the matrix value based on history of noncompliance. Prior to this matter, EPA issued a field citation to Respondent for previous UST violations. (Tr. at 316) Despite supporting evidence, Mr. Cernero chose not to make an upward adjustment to the matrix values for any of the fourteen counts based on history of noncompliance

because in his opinion, the overall penalty amount served as an adequate deterrent. (Tr. at 166, 316, 318)

(3) Environmental Sensitivity Factor

Mr. Cernero testified that "based on the fact that where those stations are in McAlester is in a commercial area, it's not where there's potable water or a situation where there's going to be some kind of wildlife, we use the minimal sensitivity factor of 1; again, trying to be as lenient as – as allowable under the penalty policy." (Tr. at 94)

(4) Days of Noncompliance Multiplier

The days of noncompliance multiplier ("DNM") was calculated using the multiplier that corresponds to the number of days Respondent was out of compliance for each count as provided in the DNM table in the Penalty Policy. (CTX-12)

As stated above, Respondent provided evidence regarding Counts 8 and 9 that would call for mitigation of the gravity-based component associated with those two counts. In EPA's Determination of Penalty (CTX-19), the penalty was calculated using a DNM of 1.5 reflecting 94 days of noncompliance from November 14, 2004 to February 16, 2005. Evidence was presented that shows the respective test for each count was performed on January 10, 2005. (R's Ex. 24) This would reduce the DNM to 1.0 reflecting a period between 0-90 days of noncompliance, from November 14, 2004 to January 10, 2005. Consequently, the matrix value would be reduced from $2,250 per tank to $1,500 per tank for Counts 8 and 9.

2. The Penalty Has Taken Into Account The Statutory Factors

Pursuant to Section 9006(c) of RCRA, 42 U.S.C. 6991e(c), EPA may assess a penalty that is "reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements."

(a) Seriousness Of The Violation

EPA has considered the seriousness of the violation for each of the fourteen counts alleged against Respondent. The potential for harm and extent of deviation that make up the matrix value of the Penalty Policy are direct measures of the seriousness of the violation. As discussed above, ten of the fourteen counts had a major potential for harm and a major extent of deviation. The remaining four counts had a moderate potential for harm and a major extent of deviation. Respondent's violations go to the very heart of the UST program, and the majority of the violations present a major potential of harm to human health and the environment. Since Respondent failed to even partially comply with the regulations at issue, the extent of deviation for each count is also major.

The environmental sensitivity multiplier ("ESM") is another measure of the seriousness of the violation. The ESM allows for an increase to the gravity-based component when a violation presents a unique level of harm given the environmental conditions found at the site. As discussed above, the lowest ESM was used in each of the fourteen counts.

(b) Good Faith Efforts To Comply

EPA has also considered any evidence of Respondent's good faith efforts to comply and has found none. As explained above, simply coming into compliance with UST regulations does not constitute good faith efforts to comply.

3. The Penalty Is Appropriate Under The Circumstances Of The Case

EPA is assessing a total penalty against Respondent in the amount of $175,062.75, which incorporates the reductions discussed above regarding Counts 8 and 9. EPA calculated this penalty amount by taking into account the statutory factors, the statutory maximum, and by correctly applying the Penalty Policy to all fourteen counts. As a result, the total penalty amount assessed against Respondent is reasonable and appropriate.

Given the circumstances of this case, the penalty amount is conservative. For example, in regards to Counts 3, 4, 12, and 14, an additional four counts could have been added for failure to maintain the records related to the failure to perform the release detection monitoring alleged in the included counts. (Tr. at 389-92) Also, with respect to Count 14, the days of noncompliance should have been twelve months[19] instead of one day. (Tr. at 142-43) Further, in calculating the days of noncompliance for each of the twelve counts excluding Counts 8 and 9, Mr. Cernero only calculated the days through the day of the Inspection. He could have rightfully extended the days of noncompliance until the actual date compliance was achieved. Additionally, as discussed above, the facts supported increasing the gravity-based component on the basis of Respondent's history of noncompliance.

In summary, the facts of this case support EPA assessing a penalty amount against Respondent of a significantly higher amount. The actual penalty amount of $175,062.75 is

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[19]As Mr. Cernero explained at the hearing, he only extended the days of noncompliance back 12 months from the date of the Inspection since Respondent would have only been required to maintain records demonstrating compliance for the previous 12 months.

therefore reasonable, consistent, and conservative. For all the foregoing reasons, a reduction in the total proposed penalty amount discussed herein is not justified.

VI. AFFIRMATIVE DEFENSES

In its October 13, 2006, Original Answer and Request for Hearing, Respondent raised sixteen affirmative defenses. (CTX-18) Among its affirmative defenses, Respondent asserts that: (1) the Administrator lacked authority to bring an administrative action to assess and collect penalties under 42 U.S.C. § 11045(c); (2) the court lacked subject matter jurisdiction over the State of Oklahoma claims; (3) Respondent has the right to a jury trial; and (4) the Doctrines of *Res Judicata* and Latches apply.

In response, EPA points to the statute which provides: "If a violator fails to comply with an order under this subsection within the time specified in the order, he shall be liable for a civil penalty of not more than $25,000[20] for each day of noncompliance." 42 U.S.C. § 6991e(a)(3). EPA also cites Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837 (1984), in arguing that Congress' intention in the statute was clear with respect to the administrator's ability to assess a civil penalty. *Quoting* Morton v. Ruiz, 415 U.S. 199, 231 (1974).

Based upon the above, it is clear that Congress not only authorized civil penalties in administrative actions but intended that civil penalties be collected. Notwithstanding the clear intent of Congress, Respondent has failed to show that EPA has exceeded its authority by

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[20]This amount has been adjusted for inflation to $32,500. *See* 40 C.F.R. Part 19, Adjustment of Civil Monetary Penalties for Inflation (69 Fed. Reg. 7124, February 13, 2004).

initiating administrative proceedings to assess and collect civil penalties. Moreover, the Court in Chevron notes that the proper time to challenge the validity of regulations delegating the Administrator's authority to issue administrative [*7] orders through agency proceedings is prior to promulgation of such regulations.

Therefore, based on the above, Respondent's arguments on this issue are unpersuasive and of little merit.

With respect to Respondent's subject matter jurisdiction argument, it is a well established principle in administrative law that it is inappropriate for ALJs to decide questions of constitutional law regarding statutes and regulations. *See* Califano v. Sanders, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures...."); In re United States Air Force Tinker Air Force Base, Docket No. UST-6-98-002-AO-1, 1999 WL 362884, at *7 (EPA May 19, 1999)("...questions as to whether or not a provision of a statute or regulation is constitutional cannot be entertained in administrative enforcement proceedings") *citing* Public Utils. Comm'n Cal. v. United States, 355 U.S. 534, 539 (1958)).

In response to Respondent's argument regarding the Doctrine of *Res Judicata*, EPA responds that the Doctrine of *Res Judicata* is inapplicable in the present case. The doctrine of provides that a final judgement on the merits bars further claims by the same parties based on the same cause of the action. Essentially, the doctrine prevents a litigant from getting yet another day in court after the first lawsuit is concluded by giving a different reason than he gave in the first recovery of damages for the same invasion of his right.

The Doctrine of *Res Judicata* does not apply in the instant case. Specifically, there has been no prior action filed by Complainant or the OCC against Respondent for the alleged violations of OAC 165:25 [40 C.F.R. § 282.86]. Therefore, Respondent's argument is without merit.

The Doctrine of Latches is an equitable defense to liability that was raised by Respondent as an affirmative defense in its Answer. Although Respondent did not produce any evidence at the hearing to support this argument, Complainant responds that the Doctrine of Latches cannot prevent EPA from prevailing in this matter.

The Doctrine of Latches cannot be asserted against the Government when it acts in its sovereign and governmental capacity to protect public health and safety. Chesapeake & Delaware Canal CO. v. United States, 250 U.S. 123, 125 (1919); United States v. Weintraub, 613 F.2d 612 (6th Cir. 1979), cert. denied, 447 U.S. 905 (1980).

In the present case, this is an enforcement action, brought by Complainant based upon information gathered during a legal inspection by a duly authorized EPA representative to determine Respondent's compliance with the applicable rules and regulations that protect public health and safety. Thus the instant action was brought by Complainant acting within its sovereign and governmental authority and is not barred by the Doctrine of Latches. *See* Connecticut Fund for Environment, Inc. v. Upjohn Co., 660 F. Supp. 1397, 1413 (D. Conn. 1987).

Finally, Respondent argues that it has a right to a jury trial. Respondent's position is flawed. The right to a jury trial in suits seeking to enforce civil penalties assessed in

administrative proceedings is governed by Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 430 U.S. 442, 97 S.Ct. 1261, 51 L.Ed. 2d 464 (1977). In Atlas, the Supreme Court held that in cases in which the government sues in its sovereign capacity to enforce public rights created by statutes within Congress' power to enact, Congress may assign the adjudication of those rights to an administrative agency without a jury trial. Id. at 1269. Where Congress has provided a special procedure for collection of a civil penalty, the Seventh Amendment does not apply. *See* United States of America v. Hahn Vo Xuan. Civ.A.No. 92-2138 (1993).

In the instant case, the creation of the Solid Waste Disposal Act, 42 U.S.C. § 6901, et. seq., was within Congress' power to enact. In the creation of the statute, Congress specifically set out the special procedures to be followed in the adjudication, enforcement and collection of civil penalties. Congress assigned the adjudication of the rights to the Administrator of EPA without a right to a jury trial. EPA, a governmental agency, has sued Respondent for violations found while acting in its sovereign capacity to enforce public safety rights created under the Solid Waste Disposal Act. EPA's actions are consistent with the statute and the special provisions assigned to EPA by Congress and does not afford Respondent the right to a jury trial.

For these reasons, and because Respondent has failed to demonstrate that Complainant does not have a right to relief, Respondent's affirmative defenses are without merit.

VII. AFFIRMATIVE DEFENSES ON PENALTY

Respondent has raised several affirmative defenses with respect to EPA's penalty assessment which in sum dispute the appropriateness of the penalty. Specifically, Respondent

argues that EPA should have applied the State penalty policy in lieu of EPA's own penalty policy. (CTX-18)

The Consolidated Rules, which are the regulations governing this administrative proceeding, state the following:

> Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses. 40 C.F.R. § 22.24(a) (emphasis added).
>
> Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence. 40 C.F.R. § 22.24(b) (emphasis added).

Accordingly, EPA bears the burden of production and persuasion for establishing the elements of its *prima facie* case. After EPA establishes the elements of its *prima facie* case, however, the burden of production and persuasion shifts to Respondent to establish, by a preponderance of the evidence, the applicability of any affirmative defenses he may choose to raise.[21]

Not only has EPA established its *prima facie* case, Respondent has removed that issue by stipulating to liability at the hearing. (Tr. at 56) Accordingly, Respondent bears the initial burden of production and the ultimate burden of persuasion on its affirmative defenses.[22]

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[21]The preponderance of the evidence standard is generally met when the fact finder is satisfied that a fact is more likely true than not true. 29 Am. Jur. 2d, Evidence § 57.

[22]*See* In re New Waterbury, Ltd., TSCA Appeal No. 93-2, 5 E.A.D. 529, 540 (EAB 1994)(Citing 2A Moore's Federal Practice Manual 8-17a (2d ed. 1994). Decisions by the EAB show that Respondent, as the party seeking to invoke exceptions to the statute or regulations, effectively raises affirmative defenses, and bears the initial burden of production and the ultimate burden of persuasion on those affirmative defenses. In re Globe Aero Ltd., Inc., 27 Envtl. L. Rep. 47157, 47161 (CJO 1996) (citing In re Standard Scrap Metal Co., 3 E.A.D. 267, 272 n.9 (EAB 1990); 5 C. Wright &

Respondent has failed to meet its burden of production and persuasion. Respondent has provided no legal authority to support its affirmative defenses on penalty and has presented no evidence that demonstrates that EPA's penalty is inconsistent with statutory and regulatory authority.

As discussed in detail above, EPA's proposed penalty is appropriate, reasonable, and consistent with the statute and the Penalty Policy. Moreover, pursuant to Section 9006(d) of RCRA, EPA's proposed penalty does not exceed $11,000 for each tank for each day of violation. Concerning the application of EPA's Penalty Policy as opposed to the State penalty policy, Section 9006(d) of RCRA expressly provides that EPA's penalty authority extends to any failure to comply with "any requirement or standard of a State program approved pursuant to section 6991(c) of this title."[23] Further, in EPA's final rule approving the State Program for Oklahoma, EPA expressly states:

> The Agency retains the authority under sections 9005 and 9006 of subtitle I of RCRA, 42 U.S.C. 6991d and 6991e, and other applicable statutory and regulatory provisions to undertake inspections and enforcement actions in approved states. With respect to such an enforcement action, the Agency will rely on federal sanctions, federal inspection authorities, and federal procedures rather than the state authorized analogs to these provisions. Therefore, the approved Oklahoma enforcement authorities will not be incorporated by reference. Section 282.86 lists those approved Oklahoma authorities that would fall into this category.
>
> The public also needs to be aware that some provisions of the State's underground storage tank program are not part of the federally approved state program. These non-approved provisions are not part of the RCRA Subtitle I program because they are "broader in scope" than Subtitle I of RCRA. *See* 40 CFR 281.12(a)(3)(ii). As a result, state provisions which are "broader in scope" than the federal program are not incorporated by reference for purposes of enforcement

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Miller, Federal Practice and Procedure, Civil § 1271 (2nd Ed. 1990)(exemption from statutory coverage has been held to be an affirmative defense).

[23] 42 U.S.C. § 6991e(d)(2)(B)

> in part 282. Section 282.86 of the codification simply lists for reference and clarity the Oklahoma statutory and regulatory provisions which are "broader in scope" than the federal program and which are not, therefore, part of the approved program being codified today. "Broader in scope" provisions cannot be enforced by EPA; the State, however, will continue to enforce such provisions.

61 Fed. Reg. 1220-1223.[24] Included among the provisions of the State UST program that are not incorporated by reference into the RCRA Subtitle I program are the provisions regarding State Inspections, Penalties, and Field Citations. Thus Respondent has no proper basis for prevailing on its argument that the State penalty policy should be applied in this matter, neither has Respondent provided any legal authority to support such argument.

VIII. ADDITIONAL AFFIRMATIVE DEFENSES

Respondent raised additional affirmative defenses at the hearing. Complainant asserts that because these defenses were not included in its answer, Respondent should be precluded from asserting any such defenses at this time. Moreover, because Respondent has utterly failed to provide any facts or evidence regarding the affirmative defenses either through pleadings or at the hearing, Respondent should not be indulged the opportunity to later unearth what it has conspicuously abandoned. *See* In the Matter of Borden Chemicals & Plastics Company, EPCRA-003-1992 (February 18, 1993); *See also* Harper v. Delaware Valley Broadcasters, Inc., 743 F. Supp. 1076, 1090 (D. Del. 1990), affirmed, 932 F. 2d 959 (3rd Cir. 1991); and Ortiz v. Eichler, 616 F. Supp. 1046, 1059 (D.C. Del. 1985), on reargument, 616 F. Supp. 1066, affirmed,

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[24]61 FR 1220-1223 January 18, 1996 (Volume 61, Number 12) 40 CFR Part 282 [FRL-5304-3] Underground Storage Tank Program: Approved State Program for Oklahoma

794 F. 2d 889. Notwithstanding, Complainant has addressed Respondent's affirmative defenses raised for the first time at the hearing below.

EPA'S COMPLIANCE EVALUATION INSPECTION

(1) RESPONDENT'S FAILURE TO CHALLENGE THE LEGALITY OF EPA'S INSPECTION IN ITS ANSWER CONSTITUTES AN ADMISSION

Pursuant to 40 C.F.R. § 22.16(d) - *Failure to admit, deny, or explain.* Failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation. In its Complaint, Complainant alleges that a duly authorized EPA representative conducted the Inspection at Respondent's facilities. (CTX 7)

In its Answer, Respondent did not raise a challenge to the legality of the Inspection. (CTX-18)

Thus because Respondent failed to challenge the legality of the Inspection in its Answer, Respondent should be deemed to have admitted that the Inspection was proper.

(2) THE STATUTE DOES NOT IMPOSE A LEGAL REQUIREMENT TO GIVE NOTICE TO THE STATE PRIOR TO AN EPA INSPECTION

The pertinent part of 42 U.S.C. § 6991d - Inspections, monitoring, testing, and corrective action - provides: "[F]or the purposes of enforcing the provisions of this subchapter, such officers, employees, or representatives are authorized to enter at reasonable times any establishment or other place where an underground storage tank is located; to inspect and obtain samples from any person of any regulated substances contained in such tank; to conduct

monitoring or testing of the tanks, associated equipment, contents, or surrounding soils, air, surface water or ground water; and to take corrective action. Each such inspection shall be commenced and completed with reasonable promptness."

The statute is clear that it does not require EPA to give the state notice prior to an inspection. Thus Respondent's argument relies upon the Memorandum of Agreement ("MOA") between EPA and the State.

Respondent's reliance on the MOA is misplaced. The MOA is not law. The applicable law is found at 42 U.S.C. § 6991d. As explained above, the plain language of the statute does not impose a legal requirement on EPA to give notice to the state prior to an inspection.

Further, the very inspection that Respondent alleges is improper under the MOA was a **joint** inspection between EPA and OCC. As stated numerous times during the hearing, this was a joint inspection that the OCC had full knowledge of, was in agreement with, and participated in with EPA. Specifically, Mr. Cernero testified as follows:

Q: Were you alone in your inspection of these facilities?

A: No. There was a representative from the Oklahoma Corporation Commission along with me.

Q: Who was the representative?

A: John Roberts.

Q: Was this a joint inspection?

A: Yes, it was. It was planned together and coordinated together. In my opinion, the only difference is that - - - that I did take the lead, as EPA. (Tr. at 63)

Cross Examination of Mr. Cernero.

A: I met –I met Mr. Roberts at the time, and we started conducting inspection. We had a very short period of time, so we really moved on getting the inspections done as quickly as possible.

Q: All right. Now, you - - said you met Mr. Roberts, and you gestured towards the audience. Is Mr. Roberts present here today?

A: Yes. (Pointing:) This is Mr. Roberts, right there. (Tr. at 174) *See* Government's trial exhibit CTX-1, bate stamps 000003, 000016, 000025,000034, and 000048. *See also* Complainant's response to the Court in its prehearing exchange that it was Mr. Roberts, the OCC inspector, who actually discovered one of the violations cited in the Complaint. (Complainant's Prehearing Exchange at page 9, Paragraph 17).

Additionally, Ms. Twilah Monroe's testimony corroborates that the Inspection was a joint inspection. Ms. Monroe testified as follows:

Q: Going back to 2005, what was your first information about the fact that EPA was coming to inspect some of Ram's facilities?

A: John Roberts had called me the day before and made an appointment with me, because I had – he knows I have the records in different places, I have to gather them up. And also, I'm not in the office a lot, and he had to make sure I'd be there.

Q: All right. And did he tell you anything other than what you have just described?

A: He said there was an EPA inspector coming, and he wanted these five stations, records. (Tr. at 573)

Thus because the statute does not impose a legal requirement upon EPA for prior notice to be given to the state prior to an inspection and because the Inspection was a joint inspection between EPA and OCC prior notice to the state was not required.

(3) NOTICE WAS GIVEN TO THE STATE OF OKLAHOMA PRIOR TO THE EPA AND OCC FEBRUARY 16 AND 17, 2005 JOINT COMPLIANCE EVALUATION INSPECTION

Although, as demonstrated above, Notice was not required prior to the Inspection, EPA gave notice to the State prior to inspecting Respondent's facilities.

The testimony provided by Mr. Cernero clearly demonstrates that the notice provisions of the MOA were followed. Mr. Cernero's sworn testimony was as follows: "I - - would not say that. I think there had to be a lot of verbal. EPA just doesn't come in and say, 'we're going to do inspections in your state, whether you like it or not.' It has been a cooperation between all of our states. We have never come into a state, at least in the UST program, without cooperation with the state. There was no need to do that." (Tr. at 304) "Well, and I - - and I - - I will have to add this, though; I will say that the state was well aware that we were going to do an inspection, because we had asked them for the registration forms and the information to conduct an inspection." (Tr. at 305) Mr. Cernero concluded, "EPA cooperates very well with its state partners, and if there was a 10-day requirement one would assume that either it was complied with or waived." (Tr. at 302)

Mr. Cernero's sworn testimony was based upon his more than 17 years of experience as an UST enforcement officer for EPA, his knowledge regarding internal EPA issues and policies, specifically as it pertains to cooperation with EPA's state counterparts. (Tr. at 60) Thus there was direct evidence at the hearing, Mr. Cernero's sworn testimony, to demonstrate that the notice provisions of the MOA were complied with or, in the alternative, waived by the state.

Finally, Respondent seems to imply that there is a requirement for notice to be in writing. However, neither the MOA nor the statute require EPA to provide notice in writing prior to an inspection. In fact, Mr. Cernero testified that it is the common practice of EPA that such notice is not made in writing. (Tr. at 304-5)

Based upon the above, the evidence presented by Complainant demonstrates that although Notice was not required, the MOA notice provisions were complied with.

(4) NO THIRD-PARTY RIGHTS EXTEND TO RESPONDENT FOR THE ALLEGATION OF FAILURE TO PROVIDE NOTICE TO THE STATE

Respondent argues that Complainant did not give the State ten days notice prior to inspecting the facilities and therefore should be allowed to stand in the shoes of the State. This argument is without merit.

The notice provisions found in the MOA do not confer any rights on Respondent. The notice provisions Respondent relies upon are agreements between EPA and the OCC; they do not create third-party benefits for any failure of EPA or the State to act.

Further, Respondent has failed to demonstrate that it has standing to enforce the specific provision. Waterford Citizens' Preservation Assn'n v. Reilly, 970 F.2d 1287, 1290, establishes

the two prong test required to demonstrate standing. The Waterford test requires that 1) a harm be suffered and 2) the harm can be redressed by the court. Id. Applying the test to the case at hand, Respondent has failed to meet the requirements.

First, Respondent has not shown that it has suffered harm for EPA's alleged failure to comply with the MOA. In fact, it is clear that the only party that could suffer any harm from the alleged failure to notify would be the State.

Second, Respondent cannot demonstrate that a favorable decision by the Court would redress any such injury because Respondent has not suffered any harm.

Additionally, the notice provisions found in the MOA does not provide any enforcement options to the State or EPA. The silence of enforcement options is significant because it demonstrates the intent of the authors at the time the MOA was written. The Court can reasonably conclude that neither EPA nor the State intended that a civil action commence based upon a failure to act. Given this, it would be a stretch of the imagination to think that the authors intended that such a right exist for Respondent.

Thus because Respondent has not met the two prong test established in Waterford Citizens' and because no enforcement rights attach to the provision, this argument is without merit.

NOTICE TO THE STATE OF OKLAHOMA PRIOR TO THE ISSUANCE OF THE AUGUST 19, 2006 COMPLAINT

(1) RESPONDENT'S FAILURE TO DENY OR EXPLAIN THE FACTUAL ALLEGATION CONTAINED IN THE COMPLAINT CONSTITUTES AN ADMISSION

Pursuant to 40 C.F.R. § 22.16(d) - *Failure to admit, deny, or explain.* Failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation.

In the Complaint filed on August 19, 2005, Complainant alleged that Notice of the Complaint was given to the State prior to the issuance of the Complaint pursuant to Section 9006(a)(2) of the Solid Waste Disposal Act, 42 U.S.C. § 6991e(a)(2). (CTX 7)

Respondent's Answer failed to deny or explain this allegation. (CTX 18)

Therefore, because Respondent's Answer failed to deny or explain Complainant's factual allegation that notice had been provided to the State prior to filing of the Complaint, Respondent should be deemed to have admitted that notice was provided.

(2) NOTICE WAS GIVEN TO THE STATE PRIOR TO THE COMPLAINT BEING ISSUED

Respondent asserts that pursuant to the MOA, Complainant was required to provide Notice to the OCC prior to filing of the Complaint. Complainant responds that Mr. John Cernero provided direct evidence during his sworn testimony that the Notice provision was complied with. (Tr. at 64)[25]

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[25] Complainant also notes that neither the MOA nor the statute requires notice to the state to be in writing. 42 U.S.C. § 6991e; (R's Ex. 52)

(3) RESPONDENT DOES NOT HAVE STANDING

Notwithstanding that the Notice provisions were complied with, Respondent does not have standing to base a claim on this issue. As discussed above, Waterford Citizens' establishes the two prong test required to demonstrate standing. Applying the two prong test to the case at hand, Respondent has failed to meet the two prong test.

First, Respondent has not shown that it has suffered harm for EPA's alleged failure to comply with the MOA or the statute. As discussed above, it is clear that the only party that could suffer any harm from the alleged failure to notify would be the State.

Second, Respondent has not met the second prong of the standing test. Specifically, Respondent has not demonstrated that a favorable decision by the Court would redress any such injury. In fact, Respondent has not suffered any harm, and there is nothing to redress.

Finally, it is clear that the neither the notice provision found in the MOA or the statute extend to Respondent. The provisions are clear that the State and EPA are the only parties who have a duty to each other, and the State and EPA are the only parties that could possibly suffer any harm from any failure of EPA to provide prior notice to the State.

In addition to above, the notice provision does not provide any enforcement options to the State or EPA, regarding this provision. As stated above, the silence of enforcement options is significant because it demonstrates the intent of the authors at the time the MOA and the Statute was written. Based upon the above, the Court can reasonably conclude that neither EPA or the State intended that a civil action commence based upon a failure to act. Given this, it would be a stretch of the imagination to think that the authors intended that such a right exist to Respondent.

Based upon the above, Respondent does not have standing and Respondent's interest are not within the zone of interest provided by the notice provisions found in the MOA or the Statute. Therefore, this argument is without merit.

PRIOR EPA CASES

(1) THE PRIOR EPA CASES RELIED UPON BY RESPONDENT ARE DISTINGUISHABLE

Throughout the hearing, Respondent presented testimony and documents to the Court regarding prior EPA settlements with various facilities located throughout the state of Oklahoma.

In response to the Court's rulings admitting the testimony and documents, Complainant made several objections and a standing objection that the solicited testimony and documents were immaterial, irrelevant and had little to no probative value.

While Complainant continues to argue that both the testimony and documents relating to prior EPA cases are immaterial, irrelevant and have little to no probative value, Complainant now demonstrates through its post-hearing brief that the exhibits relied upon by Respondent are distinguishable from the present case.

All of the prior cases brought before the Court during the hearing are distinguishable from the case at bar. Specifically, the prior cases represent settlements between EPA and various companies. The cases are nothing more than summaries compiled by EPA. (R's Ex. 57-60, 68)

The summaries are distinguishable from the present case in as much as some reference different regulations and statutes, the majority of the prior cases are a result of field citations as opposed to an administrative order, and all the prior cases before the court were settlements.

Comparing the case at hand to the prior case summaries is like comparing apples and oranges. Specifically, the summaries do not contain initial penalty amounts nor the facts surrounding the violations or the particular circumstances surrounding the settlements. Additionally, the rationale for assessing each of the penalties is not given. Thus there is no indication from the summaries what the Agency considered (i.e., size of business, history of compliance, Agency resources, type of violations noted, relevant information that pertain to such violations, the duration of violations or the degree of violations) in the final settled penalty amount.

Complainant looks to Titan Wheel Corporation of Iowa RCRA(3008) Appeal No. 01-3, June 6, 2002, 2002 WL 1315600 (E.P.A.) in support of its position. Specifically, in Titan, the Respondent sought to admit exhibits relating to penalty assessments in other enforcement actions, as support for its affirmative defense that the amount of the civil penalty requested by the Region was unreasonable, arbitrary and capricious and an abuse of discretion. Titan at 530.

The Titan Court found that the exhibits offered did not establish the existence of any significant inconsistencies in penalty assessments by either EPA or the State of Missouri because they were simply brief violation summaries...and that there was no indication of the duration of or other details concerning the violations or the particular circumstances attending the settlements. The Titan Court noted that the summaries, for the most part, cited different RCRA statutory and/or regulatory sections than those cited in the litigation, that some summaries did not even identify the type of violation involved and only gave descriptive information that a payment was made for a violation of a state environmental law. The court concluded that "[I]t is highly questionable whether penalty settlements are material for comparison to a penalty litigated case."

Id. [*Citing*, In Re School Craft Construction, Inc., 8 E.A.D. 476, 494 (EAB 1999) (inquiry into other cases is inappropriate where proceedings involved prosecutorial discretion in settlement and in the decision to bring an action)]. *Titan* at 533.

Applying the Titan rationale to the case at bar, the prior case summaries does not account for the multiplicity of factors that impacted Mr. Cernero's penalty determination in assessing his penalty against Respondent. At the hearing, and as discussed above, Mr. Cernero explained in detail his rationale in using the statutory factors in assessing penalties, the variation between field citations and administrative orders and the rationale for deciding to issue an Administrative Order against Respondent. (Tr. at 65-90) Mr. Cernero also explained in detail how he used the statutory factors in assessing Respondent's penalty in the instant case. (Tr. at 90-169)

Based upon the above, Respondent's reliance on prior EPA cases to compare EPA penalties to demonstrate inconsistency and/or that EPA acted arbitrarily in its penalty calculation is misplaced. Thus this argument is without merit.

(2) PENALTIES ASSESSED IN OTHER ENFORCEMENT ACTIONS

Even if the Court finds that the proposed penalty is more than those assessed in prior EPA cases, that fact alone does not render the proposed penalty invalid. In the Titan case, the Supreme Court stated, "[t]he employment of sanction within the authority of an administrative agency is ***not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases." Id. at 532 (*citing*, Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973), reh'g denied, 412 U.S. 933 (1973). *See also* Newell Recycling Co., Inc., v. United States Environmental Protection Agency, 231 F.3d 204, 210 n.5 (5th Cir. 2000) (an administrative

penalty need not resemble those assessed in other cases); Cox v. United States Dept. of Agric., 925 F. 2d 1102, 1107 (8th Cir. 1991) (where a sanction is warranted in law and fact, it will not be overturned simply because it is more severe than sanctions imposed in other cases). Titan at 532-533.

Although Respondent has alleged that Complainant's penalty is unfair, Complainant notes that Respondent has failed to identify one comparison case. As the Titan Court discussed, absent this showing, the issue turns upon the facts presented at the hearing. Id.

Applying that rationale to the present case the evidence clearly supports that Complainant's sanction is warranted. Specifically, both Mr. Pashia and Mr. Cernero testified concerning the justification behind deciding to inspect and ultimately issue an administrative order in the present case. (Tr. at 32, 33, 337, 374-384) Mr. Cernero also explained in detail his penalty analysis for this case. Mr. Cernero testified that he took into account the following factors in calculating the penalty:

1) A multi-day component was assessed in a number of the violations alleged in the Complaint based upon a records review of when the violation first occurred and when based upon documents presented it was believed to have been corrected (Tr. at 373);

2) The number of violations and the trend of violations at all of the USTs owned by the Respondent (Tr. at 373);

3) The Inspection of the five facilities took place months after Mr. Pashia's inspection, giving Respondent time to come into compliance at his other facilities. (Tr. at 52);

4) The seriousness of violations observed during the Inspection (Tr. at 376);

5) The sizes of Respondent's facilities (Tr. at 374, 650);

6) The nature of Respondent's company (Tr. at 374, 650); and

7) Based upon the violations noted during the Inspection and records review, Mr. Cernero applied the EPA penalty policy using the statutory factors as guidance to assess a fair and reasonable penalty.

The evidence clearly demonstrates that the prior EPA summaries are distinguishable from the case at bar, that Respondent did not produce any evidence that would demonstrate a wide disparity in EPA's proposed penalty in the case at bar, and that the proposed penalty is warranted, consistent and fair.

INDIAN OWNED AND OPERATED UST FACILITIES

Throughout the hearing, Respondent presented testimony and documents to the Court regarding EPA's Indian Policy. In response to the Court's rulings admitting the testimony and documents, Complainant made several objections and a standing objection that the solicited testimony and documents were immaterial, irrelevant and had little to no probative value.

While Complainant continues to argue that both the testimony and documents relating to EPA's Indian Policy are immaterial, irrelevant and have little to no probative value, Complainant now demonstrates through its post-hearing brief that the exhibits and testimony relied upon by Respondent are distinguishable from the present case.

EPA's Indian Policy is based upon longstanding laws, Executive Orders, treaties, statutes, Federal-Tribal Trust Responsibilities and the Constitution of the United States. It is well known that the United States Government has a unique legal relationship with Native American tribal

governments. This relationship is one of government-to-government and recognizes the right of Tribes as sovereign governments to self-determination and acknowledges the federal government's trust responsibilities to Tribes.

On January 24, 1983, the President of the United States published a Federal Indian Policy supporting the primary role of Tribal Governments in matters affecting American Indian reservations. That policy stressed two themes: 1) that the Federal Government will pursue the principle of Indian "self-government" and 2) that it will work directly with Tribal Governments on a "government-to-government" basis.

By several executive orders, most recently Executive Order 13175, entitled Consultation and Coordination with Indian Tribal Governments, issued in 2000 by George W. Bush, EPA, along with the head of each executive department and agency, was directed to ensure to the greatest extent practicable and as permitted by the United States law that the agency's working relationship with federally recognized tribal governments fully respects the rights of self-government and self-determination due tribal governments. It is with this understanding and directives that EPA's Indian Policy was developed and continues to be implemented.

EPA's objective on Indian reservations, consistent with the Federal Indian Policy, is to protect human health and the environment. In doing so, EPA has developed a number of internal procedures to follow recognizing Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace. This does not mean that EPA has not or will not take an enforcement action on Tribal Land to protect human health and the environment where the case is warranted.

Comparing the case at bar with facilities owned and operated by Tribal Governments, EPA knows of no reason why Respondent should receive the rights and recognition of a sovereign government. EPA has received no directives from Government Heads, Executive Orders from the President, nor does it know of any case law that requires or even implies that an owner or operator similarly situated as Respondent should be treated on a government-to-government basis.

In the present case, EPA's obligation to Respondent is to apply the rules and regulations of the UST program as it pertains to Respondent's facilities consistent with the mandate of the UST statute. Applying that mandate to the case at hand, EPA conducted the Inspection at Respondent's facilities; determined that based upon the regulations, Respondent was in violation of several UST regulations; assessed penalties following the statutory guidelines and UST penalty policy; and properly served Respondent a Complaint based upon the alleged violations discovered during the Inspection. Respondent was given an opportunity to file an Answer and dispute Complainant's allegations. Beyond this, EPA owes no other legal obligations to Respondent and is not required under the statute to provide any other rights to Respondent.

Thus because Respondent is not similarly situated as a Tribal Government, because Respondent was treated the same as similarly situated UST owners and operators, and because EPA fulfilled its legal obligation to Respondent pursuant to the applicable rules, regulations and statute, Respondent's reliance on EPA's Indian Policy to demonstrate inconsistency is without merit.

NEITHER THE MOA NOR THE STATUTE BARS EPA FROM TAKING AN ENFORCEMENT ACTION IN AN AUTHORIZED STATE

(1) RESPONDENT'S INTERPRETATION OF THE STATUTE AND MOA IS FLAWED AND INCONSISTENT

Section 9006 of the Solid Waste Disposal Act refutes the interpretation of the MOA provided by Respondent. The relevant statue provides in part:

> (1) Except as provided in paragraph (2), whenever on the basis of any information, the Administrator determines that any person is in violation of any requirement of this subchapter, the Administrator may issue an order requiring compliance within a reasonable specified time period or the Administrator may commence a civil action in the United States district court in which the violation occurred for appropriate relief, including a temporary or permanent injunction.
>
> (2) In the case of a violation of any requirement of this subchapter where such violation occurs in a State with a program approved under section 6991c of this title, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section. 42 U.S.C. § 6991e.

The clear language of the statute does not read to disable EPA from issuing orders under section 9006 regardless of whether EPA has found that the authorized State has taken appropriate enforcement.

Respondent's argument implies that the MOA policy supersedes the statute and prevents EPA from taking an enforcement action against Respondent. This argument is without support.

Notwithstanding the above, Respondent suggests that the following language found in the MOA supports its position that the Complainant's enforcement action is improper.

"With regard to Federal enforcement, it is EPA's policy not to take such action where a State has taken appropriate enforcement action." (R's Ex. 52 at 10)

Respondent has clearly misinterpreted the MOA. As Mr. Cernero explained in his testimony, what "EPA essentially is saying here, generally speaking, if you, OCC, is going to –is involved in an enforcement action, EPA normally will not get involved in that to–to double – to double team an owner/operator. If the state agency determines they want to take an enforcement action against an owner/operator, normally – this is basically saying EPA will not take an enforcement action, so that the owner and operator is not hit with both state and federal enforcement action." (Tr. at 307) This interpretation of the MOA is consistent with the language of the MOA.

In support of its position, Complainant points to the unambiguous language of the MOA. The MOA states the following: "Nothing in this MOA shall be construed to restrict in any way EPA's authority to fulfill its oversight and enforcement responsibilities under Subtitle I of RCRA. Nothing in this MOA shall be construed to contravene any provision of 40 C.F.R. Parts 280 and 281." (R's Ex. 52 at 1) "The Regional Administrator may take enforcement action against any person determined to be in violation of Subtitle I of RCRA in accordance with section 9006. EPA also retains its right to issue orders and bring actions under Section 9003(h) or 9006 of Subtitle I of RCRA or any other applicable Federal statute." (R's Ex. 52 at 10)

Based upon the above, it is clear that Respondent's interpretation of the MOA is flawed and his position is inconsistent with the clear meaning of the statute and the MOA.

Thus this argument is without merit.

RESPONDENT UNREASONABLY RELIED ON THIRD PARTIES

Pursuant to the OCC and EPA regulations OAC 165:25-1-21 [40 C.F.R. § 280.10], owners and/or operators are responsible for compliance. Neither the Statute nor the regulations allow for transfer of liability. *See* 42 U.S.C. § 6991b(h)(6)(C) - Effect on liability. In the case at hand, after reviewing the relevant information available, Complainant determined that Respondent was the party responsible for liability at the five facilities.

Respondent implies that he is due mitigation of the penalty based upon his reliance on third parties. Complainant disagrees with Respondent's position. Neither the statutory factors nor the penalty policy allow for a reduction for the type of mitigation that Respondent urges the Court to make.

Further, Respondent's actions do not reflect those of a diligent UST owner/operator. When an operator decides to enter the business, he takes on a risk. He is required to make sure he complies with the regulations. In doing so, he takes upon himself all the advantages and disadvantages of operating the business; he cannot simply decide to pass the buck.

In the instant case, the testimony establishes that Respondent has done just that. He has tried to pass on the buck. Respondent has demonstrated a total lack of concern for ensuring that his contractors adequately perform the requirements of the regulations. Specifically, Respondent did not even go out and check the contractors' work after completion.

Q: We – you mentioned the fact that product that was left in one of your tanks, and you had instructed your drivers to remove all that product. At any time, did you

ever go out or have anyone else go out to see if they had, indeed, removed all that product?

A: Well, I assumed that it was all –

Q: But you never actually checked?

A: I didn't go personally and check it. (Tr. at 664)

To ensure that the job was done, all Respondent had to do was simply put a stick down a tank to see if product remained in it. This was a simple act that would have taken less than five minutes, similar to having brake pads installed on a car and the owner pressing the brakes to test them before leaving the station. Complainant brings to the Court's attention that it is this total lack of regard of being an owner/operator of these USTs that the Court should take into consideration. Respondent's attitude towards his obligations constitutes a complete lack of responsibility and disregard for the rules and regulations that Respondent is required to comply with. This disregard has put human health and the environment at risk. Respondent now argues that it wasn't completely his fault because he relied on others to do that which he was required to do. This argument is unpersuasive.

Respondent also argues that the regulations are difficult to understand for someone similarly situated as Respondent. Complainant finds this claim insupportable.

For at least two of the counts cited, the only requirement was to keep spill buckets clear of debris and product and in good repair such that they would have sufficient capacity to contain spilling and overfilling. Again, these are requirements that would have taken little time to address. At a minimum, Respondent would have needed only to observe the condition of the

spill buckets and look inside them to see if trash and/or product was present, and if so, empty the buckets. These actions are similar to emptying a trash can at one's home.

In addition to the minimal acts required to be in compliance with the regulations, the evidence shows that Respondent has made little to no attempt to attend training or send his employees to training. The purpose of training is to assist UST owners and operators in the understanding and application of UST rules and regulations. However, when asked if the Respondent has sent any of his employees to training for UST regulations and rules, Respondent answered, "I don't recall." (Tr. at 655) Surely one would know whether he has a program and/or policy in place to ensure that his employees are being trained in the required regulations to operate his business. In addition to the above, Mr. Allford admits that he does not regularly attend training although he knows that training exists. (Tr. at 655) Further, when asked what training he has attended, Mr. Allford could only state the location of the training. (Id.)

The testimony demonstrates that Ms. Monroe is the employee responsible for the day-to-day operations of the facilities, dealing with the experts and professionals (Tr. at 655-56), managing all of the facilities at issue, performing most of the work (Tr. at 605, 611), running the operations and training others on the regulations (Tr. at 611-12). Yet, as Ms. Monroe testified, she has never taken any training or attended any environmental compliance training regarding the UST program, neither does she have any formal education regarding environmental regulations and/or USTs. (Tr. at 605)

While it is Respondent's choice on how he chooses to run his operations, the fact that he is now in violation of those regulations should be of no surprise. Respondent now argues that the

regulations are hard to understand. But the fact is that he has put little to no effort in ensuring that his employees and himself are properly trained to understand the regulations he now complains of.

As Mr. Cernero explained, there are websites that Respondent could have utilized. There are publications that an owner or operator can read and determine what they need to do to get into compliance. The State provides outreach. And consultants can be hired. (Tr. at 385) All of these tools were available to Respondent, but Respondent chose to take a course of being reactive as opposed to proactive. (Tr. at 626)

Respondent also argues that the penalty should be mitigated because it was the responsibility of the marketers/operators of the facilities to comply with EPA rules and regulations. Third-party liability is a business decision between Respondent and whomever he decides to go into business with. In the instant case, based upon a review of the records and information provided, EPA determined that Respondent was the responsible party. Notwithstanding, there is no evidence that would suggest that Respondent's liability as the owner of all the USTs should transfer to the marketers/operators he enters into business with. However, what the evidence does provide is that in the event Respondent has some legitimacy to his argument, Respondent and his marketers/operators have an indemnification clause in the agreement(s) among themselves. Whether or not Respondent chooses to pursue the indemnification is of no consequence to EPA.

Finally, Respondent argues that it relied upon the OCC inspector, Mr. Roberts, to make sure that it complied with all rules and regulations. (Tr. at 662) In fact, what Respondent implies is that Mr. Roberts' role to its facilities was one of compliance assistance.

Respondent's reliance is misplaced. The OCC inspectors are there to conduct compliance inspections, not to fill a job description or provide compliance assistance as Respondent implies. Moreover, not only is it inappropriate for Respondent to rely on an OCC inspector to make sure it is operating the facilities properly, the OCC would not have had enough time or resources to do so. The fact that the primary goal of OCC inspectors is not compliance assistance during an inspection was corroborated by Respondent's own witness.

Q: Your role was more one of compliance assistance, right?

A: I don't know if that's a yes or no question or not.

Q: Your role wasn't as compliance assistance as an OCC inspector was it?

A: I was a fuel inspector?

Q: That's right. You were required to go out an inspect those facilities.

A: Yes, ma'am. (Tr. at 525-26)

Mr. Allford admits that he never looked at the federal rules to determine compliance. (Tr. at 662) Yet, once again, he urges the Court to mitigate the penalty for passing his responsibility on to a third party.

Complainant is not swayed by Respondent's arguments and asserts that to mitigate the proposed penalty because of Respondent's blatant disregard for its duty to act as a responsible

environmental actor in protecting human health and the environment does not provide a deterrent, protect the environment or level the playing field for those who are.

Therefore, based upon the above, Respondent's argument that it is due mitigation of the penalty based upon reliance on third parties and that the regulations are hard to understand are without merit.

INCONSISTENCIES BETWEEN EPA AND OCC INSPECTIONS

During the Inspection, EPA observed and noted that Respondent was in violation of the UST regulations at several of its facilities. This information was confirmed and verified by a records review of Respondent's OCC registration forms and the records review conducted on February 17, 2005. (CTX-1) While EPA does not now contest the previous OCC inspections, EPA stands by its findings during the joint Inspection and records review of Respondent's facilities. EPA also notes that the prior OCC inspections were not joint inspections with EPA. Further, as the testimony provides inspectors use enforcement discretion in citing potential violations. (Tr. at 386, 387, 521)

That there are inconsistencies in inspection reports should come as no surprise. The fact is that these are inspectors, not machines, the likelihood that one inspector notices something that some other inspector does not see during his or her inspection is realistic. As Mr. Cernero explained, it is quite possible that the OCC inspector did not notice the violations during his prior inspections that Mr. Cernero saw at the time of the joint Inspection or simply exercised enforcement discretion. (Tr. at 387)

Notwithstanding, the fact remains that during the joint Inspection of, EPA observed and noted that Respondent was in violation of the UST regulations at several of its facilities. The information was confirmed and verified by a records review of Respondent's OCC registration forms and the records review conducted on February 17, 2005. Based upon EPA's review of the records and the relevant evidence, EPA determined that Respondent was in violation of the regulations for the time periods alleged in the Complaint.

Throughout the hearing, the evidence demonstrated that Respondent unreasonably relied on the OCC for compliance at its UST facilities. Respondent now asks the Court to mitigate Respondent's penalty based upon this reliance. Complainant responds that this reliance is improper and is not the intent of the statute. The OCC is not responsible for maintenance and operation of Respondent's USTs. It is Respondent's duty to make sure that its USTs are operating in compliance with the relevant rules and regulations. Throughout the hearing, the testimony and evidence demonstrated that Respondent has taken a reactive stance to compliance with the UST rules and regulations. Respondent's reactive attitude concerning the compliance of its facilities should not be rewarded.

IX. PROPOSED ORDER

Pursuant to Section 9006 of the Solid Waste Disposal Act, 42 U.S.C. § 6991e, the following Order is entered against Respondent, Ram, Inc.

A civil penalty of $175,062.75 is assessed against Respondent for violations of Section 9006 of the Solid Waste Disposal Act, 42 U.S.C. § 6991e.

Respectfully submitted,

_____ _____

Date

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CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of July, 2006, the original of the foregoing COMPLAINANT'S POST HEARING BRIEF, in the matter of Ram Inc., McAlester, Oklahoma, Docket Number SWDA-6-2005-5301, was filed with the Regional Hearing Clerk, EPA Region 6, Dallas, Texas, and that a true and correct copy of this document, with attachments, was sent to:

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