181. Nevertheless, Mr. Cernero calculated the penalty period as one year and a day, which increased the penalty multiplier [*TR-1, page 225, line 23*].

182. At this facility, Ram was using, according to Mr. Cernero's interpretation of the OCC regulations, an out-of-date leak detection method, inventory control, believing that its addition of cathodic protection in 1998 constituted an "upgrade" of its USTs which extended its authority to use inventory control [*TR-2, page 449, line 10*]. Nothing in the OCC regulations makes it clear that what Ram did was merely a "modification" not triggering the extension of the deadline [*TR-2, page 282, lines 4-8, and page 285, lines 3-9*]. It was not even clear until the time of trial that Ram was not entitled to another 10 years for having installed an upgrade to its USTs [*TR-2, page 450, line 9*]. Ram understood that effort to be an upgrade, and that seemed reasonable given the terms used on official OCC forms regarding the changes [*TR-2, page 451, line 1*] and [RX-60, page 4].

183. From Ram's perspective, the data they collected for inventory control was the same as that which would have been collected for SIR. Ram was in fact monitoring for releases, collecting the same data, but using the wrong method for using that data [*TR-2, page 449, line 18*]. Mr. Cernero confirmed that this was the case [*TR-2, page 269, lines 1-12*].

184. This factor, too, should have diminished the gravity of the violation.

185. Ram subsequently addressed this violation by changing its release detection method to SIR at this facility [*TR-3, page 581, line 5*].

186. The EPA imposed a penalty of $23,229.43 for this violation [*CX-19, page 6*].

187. Farris Fuels received an EPA Field Citation with a $300 penalty sought and assessed for one listed violation, as follows: "1) failure to conduct release detection for tanks" [*RX-60, page 9*].

188. A comparable OCC penalty for failure to correct such a violation is $250 [*CX-30, Appendix S, page 71*].

189. The assignment of a major gravity component in spite of the fact that monitoring was being done, the period of a year and a day, the lack of capitol expenditure all make it clear that the EPA was eager to amplify this penalty beyond reason.

190. Enforcement of this portion of the UST program as proposed by the EPA is improper under the law.

Citgo Thrif-T-Mart, McAlester

191. EPA seeks a total penalty of $25,131.92 for violations observed at Citgo Thrif-T-Mart. This includes $11,250 for having failed to continuously operate the corrosion protection system that serves three tanks; $6,940.96 for failure to do an annual line leak detection test on three tanks; and $6,940.96 for failure to test pressure lines annually for three tanks [*CX-19, pages 7-9*]. This facility is shown in [*RX-16*].

Count 7: failed to operate CP system continuously

192. The CP system was not operating on the day of the EPA inspection [*TR-1, page 119, line 10*]. Mr. Cernero used the date of the last CP test that was done [*TR-1, page 119, line 16*], and found the violation to be major/major in the matrix [*TR-1, page 120, line 19*]. Mr. Cernero used a March 14, 2004 report that said one of the anodes was not up to 0.85 volts as probably when it failed to calculate a period of violation of 334 days [*TR-1, page 121, line 11*].

193. The OCC conducted an inspection of this facility *one month* before Mr. Cernero's inspection and the associated inspection report showed the facility to be in compliance on

this issue [*TR-1, page 230, line 22*] and [*RX-18*]. The note on the form showing 5 amps is indicating correct operation [*TR-2, page 453, line 15*].

194. RX-18 shows that the CP system was operating in January 2005, one month before the EPA inspection. [*TR-2, page 452, line 19*]. Under OCC regulations, the operator must check the system once every 60 days. Ram was not required to inspect this system until another month *after* the EPA's inspection. If it tripped a month after the last check that does not constitute a violation [*TR-2, page 453, line 23*].

195. It is also not clear if all of the tanks at this facility required CP protection. Looking at [*RX-70*], Tank Liners' invoice, Mr. Cernero changed the type of tank from "unknown" to "lined" [*TR-3, page 543, line 1*]. The basis of the violation is that the CP system would not operate for 3 tanks. STI-P3 tanks generally do not need corrosion protection [*TR-3, page 544, lines 14 to 23*]. Thus, according to RX-70, two of the three tanks for which the penalty was calculated might not have required CP at all, although pump manifolds which had some metal parts touching soil would need CP [*TR-3, page 545, line 2 & page 548, line 20*]. Mr. Cernero did not know whether these tanks were covered by CP system [*TR-3, page 556, line 18*]. Despite this lack of certainty, Mr. Cernero would not change the penalty [*TR-3, page 550, line 14*].

196. Mr. Cernero is not a corrosion expert but he still charged the gravity for failure to have a CP system as major [*TR-1, page 238, line 21*] despite the implication of a corrosion expert finding compliance [*RX-18*].

197. Ram subsequently addressed this violation by repairing the CP system [RX-25, page 2].

198. The EPA penalty for this violation was $11,250.00 [*CX-19, page 7*].

199. There is no comparable EPA Field Citation penalty observed in the Oklahoma data [*RX-60*].

200. A comparable OCC penalty for failure to correct this violation would have been $250 [*CX-30, Appendix S, page 71*] and [*TR-1, page 229, line 20*].

201. This count should not be a major deviation because there was an impressed current system installed, albeit one which had developed a low voltage reading. Further, this system passed OCC inspection 8 days before the EPA inspection [*RX-18, 19 & 23*]. This CP system has subsequently been repaired [*RX-2, Attachment 2*]

202. Ram was not required to inspect this system until another month *after* the EPA's inspection. In effect, the first date upon which Ram had reasonable notice that this failure constituted a violation was the date of the EPA's inspection. Enforcement of this portion of the UST program as proposed by the EPA is improper under the law.

203. No penalty is warranted for Count 7.

Counts 8 and 9: Late annual line leak and pressure tests

204. EPA found that annual line leak and pressure tests were conducted on Jan.10, 2005. The facility passed these tests [*TR-1, page 242, line 6*] and [*RX-24*]. Mr. Cernero still found Ram's failure to conduct the tests in November of 2004, within one year following an inspection November of 2003, to be a major violation, and he found that the extent of deviation from the rules was very high because test are to be performed annually [*TR-1, page 127, line 10; page 128, line 24; page 130, line 4; and page 132, line 1*].

205. Richard Heck has performed the line leak and pressure tests at this Citgo Thrift-T-Mart from 2001 to the present [*TR-3, page 512, line 4*]. Looking at [*RX-26*], Mr. Heck performed the required tests on 11-14-2003. Mr. Heck returned in November of 2004 as

required to conduct these tests, but was unable to do so because the groundwater table was over the tops of the tanks due to heavy rains. Mr. Heck returned again in December, but the water table still remained too high to conduct the testing [*TR-3, page 513, line 6 to 13*]. Mr. Heck returned in January, found that the water table had receded, and he conducted the tests. The facility passed these tests [*RX-24*] and [*TR-3, page 515, line 8*]. OCC inspected this facility the next day by coincidence and did not consider the two month delay in testing a violation [*RX-18*].

206. Looking at [*RX-24*], Mr. Cernero would have reduced days of noncompliance and reduced the penalty by only $2,000 [*TR-2, page 394, line 21*].

207. Ram did not intentionally delay the testing of this facility in an effort to avoid costs. Ram relied upon its expert to conduct the tests when it was safe and proper to do so. Once circumstances allowed, these tests were in fact conducted and the system passed.

208. The EPA imposed a penalty for this violation of $6,940.96 for the line leak testing and $6,940.96 for the pressure testing [*CX-19, pages 8 & 9*].

209. Farris Fuels received an EPA Field Citation with a $600 penalty sought and assessed for *two* listed violations, *one* of which was "2) failure to monitor pressurized piping monthly or conduct annual test" [*RX-60, page 4*].

210. A comparable OCC penalty for failure to correct such a violation is $250 [*CX-30, Appendix S, page 72*] and [*TR-1, page 240, line 21*].

211. Ram's contractor attempted to conduct the tests within the one-year period, but was precluded from testing because of high water levels due to recent heavy rains; and the tests were completed successfully on January 10, 2005, after water levels subsided. The OCC

inspected and accepted this work on January 11, 2005, just 8 days prior to the EPA inspection. These circumstances entirely mitigate any penalty.

212. In effect, the first date upon which Ram had reasonable notice that this failure constituted a violation was the date of the EPA's inspection. Enforcement of this portion of the UST program as proposed by the EPA is improper under the law.

Goodwin's One Stop, Hartshorne (Counts 10 & 12)

213. EPA seeks a total penalty of $15,000 for violations observed at Goodwin's One Stop. This includes $1,500 for one cracked spill bucket on one tank; and $13,500 for failing to take "stick readings" every day on three tanks [*CX-19, pages 10 &11*]. This facility is shown in [*RX-27*].

Count 10: Damaged spill bucket

214. Upon its inspection in February, Mr. Cernero observed a gap or crack in one of the installed spill buckets. Mr. Cernero concluded that this crack constituted a major/major violation [*TR-1, page 133, line 15*].

215. [*CX-31*] is a color photo which shows liquid contained in the bucket but *below* the crack [*TR-1, page 135, line 13*]. This spill bucket still held product because the damage is at the top of the spill bucket [*RX-27*] and [*TR-2, page 448, lines 9 & 18*].

216. The standard capacity for spill buckets is about 5 gallons [*TR-2, page 255, line 3*], which is less than the capacity of a full hose [*TR-2, page 255, line 14*]. The regulations state that an operator is to prevent release of product to environment when the hose is detached [*TR-2, page 256, line 2*].

217. Ram subsequently addressed this violation by replacing all three spill buckets at this facility [*TR-3, page 586, line 1*].

218. The EPA imposed a penalty for this violation of $1,500.00 [*CX-19, page 10*].

219. Although there does not appear to be a comparable EPA Field citation provision, Quick Shop received an EPA Field Citation with a $3,600 penalty sought and not yet assessed for *ten* listed violations, *one* of which was the following: "5) inadequate overfill protection (flapper valves not functioning)" [*RX-60, page 14*].

220. The OCC rules do not list a penalty for having damaged spill buckets; however, the penalty for accepting fuel into a tank without spill protection would be $1,000 [*CX-30, Appendix S, page 70*] and [*TR-2, page 254, line 6*].

221. Although one of the spill buckets at this facility did have a crack, that crack was in the upper portion of the bucket and the bucket was still able to contain product, as shown in [*RX-28*]. This bucket was replaced. This is only a technical violation of the rules, warranting mitigation of this penalty.

222. In effect, the first date upon which Ram had reasonable notice that this failure constituted a violation was the date of the EPA's inspection. Enforcement of this portion of the UST program as proposed by the EPA is improper under the law.

Count 12: Failed to take daily stick readings

223. At this particular facility, daily sticking and an annual tank tightness test is permitted for the purposes of release detection [*TR-1, page 138, line 15*]. However, this facility is operated by a third party and this operator did not maintain records documenting that it had been "sticking" the tanks as frequently as was required [*TR-1, page 138, line 25*].

224. Mr. Cernero chose to impose a period of noncompliance of 366 days, interpreting the regulations to require that an operator retain a year's worth of data plus data for the day the

EPA inspected [*TR-1, page 139, line 15*]. Adding a day to the one year increases the penalty multiplier [*TR-2, page 262, line 23*].

225. The OCC inspection of 2-27-2004 shows no violation, a period of less than one year prior to the EPA inspection [*TR-2, page 263, lines 16-24*].

226. Although the facility was in fact conducting release detection, and although it was ultimately able to produce a significant portion of the records to this effect [*RX-65*], Mr. Cernero assigned this violation a major-major status [*TR-1, page 140, line 3*].

227. The regulations in fact require that an operator stick a tank only when fuel is sold or delivered, not necessarily 365 days/year [*TR-2, page 266, line 11*]. Mr. Cernero contended that if bad weather caused a stick test to be missed, such a failure would still be a violation [*TR-2, page 264, line 14*].

228. Bad weather and other good reasons should mitigate any penalty.

229. SIR procedure is an approved method [*TR-2, page 267, line 21*]. However, neither EPA nor OCC have SIR listed in their rules [*TR-2, page 268, line 3*]. Thus, a store owner could not look in the rules and find the criteria for SIR [*TR-2, page 268, line 17*]. Yet, the data the store collects for SIR is basically the same as for inventory control and annual tank tightness testing which *is* listed in the rules; except that SIR does not require the annual tank tightness test [*TR-2, page 269, line 7*].

230. Again, this can be confusing to operators, especially where there is high employee turnover. And the 2003 GAO Report noted that employee training is a big problem with high employee turnover [*RX-60, pages 2 and 6*] and recommend the regions work with the states to meet the training need.

231. There are no training requirements set forth under the OCC regulations for the individuals asked to do stick readings [*TR-2, page 270, line 11*].

232. Mike Majors requested the stick readings for the year prior to Feb 2005 [*TR-2, page 456, line 10*]. That information is in [*RX-65*], and is typical information for inventory control or SIR [*TR-2, page 458, line 4*].

233. Strict compliance with rules, even daily stick readings, may not always be possible, as a practical matter, in business [*TR-2, page 459, line 1*]. Upon his review of that stick reading documentation, Mr. Majors found that only 85 stick readings were missing out of a 365 day year [*TR-2, page 459, line 13*]. It is not uncommon to miss stick readings [*TR-2, page 459, line 17*].

234. Ram addressed this violation by reemphasizing the importance of the procedure to its operators, but because it does not operate this facility, it must still rely on those third-party operators, and their employees, to conduct this procedure and to retain the proper documentation. Ram agreements with third-party operators contain instruction to this effect [*TR-3, page 586, lines 5-8 and page 587, line 1*]; and see paragraph 77, *supra*. RX-46, an agreement Ram began to use a short while prior to the EPA inspection, actually refers to and attaches EPA's pamphlet "Doing Inventory Control Right"]. In fact, although Ram had not attached this pamphlet to its agreement prior to 2004 or so, it had been circulating this pamphlet among its marketers since it first received a copy of the document in the early 1990's from Mr. Cernero [*TR-3, page 598-599*].

235. The EPA imposed a penalty for this violation of $13,500.00 [*CX-19, page 11*].

236. Farris Fuels received an EPA Field Citation with a $600 penalty sought and assessed for two listed violations: "1) failure to provide adequate release detection for tanks (monthly

monitoring); and 2" failure to conduct monthly monitoring of pressurized piping or annual tightness test" [*RX-60, page 4*].

237. A comparable OCC penalty for failure to correct this violation is $250[*CX-30, Appendix S, page 71*] and [*TR-2, page 262, line 2*].

238. Although Ram's contract operator was conducting stick readings, that operator failed to produce evidence that he stuck the tanks *every day* that product was received or sold. This clearly does not reflect a pattern and a practice at Ram, yet Ram and not the operator was cited. While this is a violation, it should have been treated more in line with the field citation method and a penalty of $600 as is reflected in [*RX-68*] for inadequate release detection at several USTs. Since Ram has acted both in the past and now once again to train its contract operators [*TR-3, page 598, lines 1-19*], then under the OCC procedure even the Oklahoma penalty of $250 is not warranted.

Monroe's, Eufala (Counts 14-17)

239. EPA seeks a total penalty of $55,892.45 for violations observed at Monroe's. This includes $1,500 for failure to do monthly release detection on one temporarily closed tank; $16,500 for failure to operate the corrosion protection system for that temporarily closed tank; $18,347.11 for failure to have the corrosion protection system tested every three years; and $19,545.34 for failure to have had a tank integrity test done before the corrosion protection system was installed for four tanks [*CX-19, pages 12-15*]. This facility is shown in [*RX-34*] and is clearly no longer a UST facility.

240. Counts 14 thru 16 relate to protections for one temporary tank that was not quite empty (had more than one inch of product in the bottom) which then required monthly leak detection and operation of the impressed current corrosion protection system on the chance

that the tanks might be placed back into service [*TR-2, page 272, line 10*]. Ram intended to close all the tanks [*RX-35*], and did not know that an employee had inadvertently left some valuable product in one tank. [See, *TR-3, page 647, lines 9-22*]. Nevertheless, Ram has tested and repaired the impressed current corrosion protection system [*RX-37 & 38*] even though it intended to and did later remove the tanks. Upon removal of those tanks, it was confirmed that there had not been a release of product [*RX-36 and TR-2, page 465, lines 9-12*]. The OCC did not cite a violation.

241. No penalty is warranted for counts 14, 15 and 16 under the OCC system, or at most $600 under the field citation program as there was absolutely no risk or loss of product.

242. In effect, the first date upon which Ram had reasonable notice that this failure constituted a violation was the date of the EPA's inspection. Enforcement of this portion of the UST program as proposed by the EPA is improper under the law.

Count 14: No monthly release detection for one temporary closed tank

243. One UST tank at this facility in fact had nine inches of product remaining.

244. Mr. Cernero found this to be a major-major violation [*TR-1, page 142, line 14*].

245. Nine inches of product translates into approximately 65 to 70 gallons, worth about $250. Ram would not intentionally leave product behind [*TR-3, page 600, line 3*]. As was indicated previously, often when vacuuming a tank the end of the vacuum hose curls upward, not reaching several inches of product at the bottom of the tank and deceiving the operator into believing that all of the product had been removed.

246. Ram has subsequently addressed this violation by removing the product from the single tank, and ultimately all of the tanks have been removed [*TR-3, page 599, line 17*].

247. The EPA imposed a penalty for this violation of $1,500.00 [*CX-19, page 12*]. However, Mr. Cernero testified that this was miscalculated in the complaint, and that he should have assessed $4,500 instead of $1,500, using a factor of 3 for one year [*TR-1, page 143, line 7*].

248. Quick Shop received an EPA Field Citation with a $3,600 penalty sought and not yet assessed for *ten* listed violations, *two* of which included the following: "1) product in tank but registered as temporarily out of service; 2) no release detection for tanks" [*RX-60, page 14*].

249. A comparable OCC penalty for failure to correct this violation would be $250 [*CX-30, Appendix S, page 71*].

250. In effect, the first date upon which Ram had reasonable notice that this failure constituted a violation was the date of the EPA's inspection. Enforcement of this portion of the UST program as proposed by the EPA is improper under the law.

Count 15: failed to operate CP system for that temporary-closed tank

251. Mr. Cernero assigned this violation a moderate-major status for less potential for harm [*TR-1, page 148, line 23*]. There would have been little or no product in the tanks [*TR-1, page 149, line 4*]. Yet this same rationale was not applied to Count 3, in which approximately the same volume of product was inadvertently left in the tank [*TR-1, page 107, lines 20-23*].

252. Mr. Cernero stated that the reason the CP system on a temporary closed tank must continue to be operated is because the tank may return to service in the future. But if the tank is removed, that potential is not realized [*TR-2, page 272, line 10*].

253. Ram subsequently addressed this violation by removing the liquids from the tank, certifying the CP system and then ultimately removing the tanks [*TR-3, page 599, line 17 and page 603, line 5*].

254. The EPA imposed a penalty for this violation of $16,600.00 [*CX-19, page 13*].

255. There is no comparable language observed in [*RX-60*].

256. A comparable OCC penalty for this violation would be $500 [*CX-30, Appendix S, page 71*] and [*TR-2, page 274, lines 4 and 11*].

Count 16: failed to test CP system 6 months after install and then every 3 years

257. Because the CP system was supposed to be in operation, it should also have been tested [*TR-1, page 152, line 8*]. However, this offense has already been penalized through counts 14 and 15.

258. Failure to test the CP system for metallic flex connectors was a typographical error, a misprint in the complaint, and it had nothing to do with the flex connectors [*TR-1, line 153, page 21*].

259. The reason Mr. Cernero started counting the violation period from Sept. 30, 2000 was because a test was due within 6 months of installation [*TR-1, page 155, line 14*].

260. Ram subsequently addressed this violation by directing the removal of the three tanks. No gasoline releases were detected upon that removal [*TR-3, page 603, line 12*].

261. The EPA imposed a penalty for this violation of $18,347.11 [*CX-19, page 14*].

262. James' Service Station received an EPA Field Citation with a $750 penalty sought and assessed for *three* listed violations, *one* of which was: "3) cathodic protection system must be tested 6 months after installation and every 3 years after that" [*RX-60, page 15*].

263. A comparable OCC penalty for this violation is $500 [*CX-30, Appendix S, page 72*] and [*TR-2, page 275, lines 16 & 21*].

Count 17: Failure to conduct a tank-integrity test before installing CP system

264. Mr. Cernero testified that "Respondent failed to do an integrity test" [*TR-1, page 160, line 6*]. At time of the EPA inspection, Ram had a NACE certification document in its file on this facility, but the certification was not t signed. Ram has subsequently secured a signature on that certification [*TR-3, page 601, line 16*].

265. Since Ram did not conduct the test prior to CP install, the test will be required as it is now (discussing the economic component of penalty) [*TR-1, page 161, line 8*]. Potential for harm is moderate because leak detection is in place, but extent of deviation is major [*TR-1, page 162, line 3*]. It should be noted that in circumstances where release detection system was in place, but the improper method was utilized, the potential for harm was still considered "major." See, *Count 4.*

266. Mr. Cernero imposed a period of noncompliance of five years, however, so the multiplier for this violation made the final penalty very high [*TR-1, page 162, line 23*].

267. Mr. Cernero testified that if Ram conducted an integrity test now and it fails, they have to pull the tank [*TR-1, page 163, line 7*]. If they pull the tanks in future, no point in doing test [*TR-1, page 164, line 12*]. These tanks have in fact been removed.

268. The penalties charged by the EPA were as if the tank integrity tests had not been done [*TR-1, page 176, line 20*], but the EPA has provided no proof that no such tests were performed, only that fact that Ram was unable to produce *documentation* that they were performed. Ram has produced documentation and testified that the CP installation was under the design and direction of a NACE certified consultant [*TR-3, page 627, lines 12-24*].

269. Before a corrosion expert can design a CP system, a tank integrity test is required [*TR-2, page 480, lines 18 & 25*].

270. A NACE expert must design the system [*TR-1, page 182, line 25*]. Mr. Cernero acknowledged that a store owner or operator is not qualified to design such a system, so they must rely on the NACE expert [*TR-1, page 183, line 11*]. Ram doesn't know how to install CP systems, nor is it NACE certified, so it relies on experts to know the requirements [*TR-3, page 628, line 9*]. Not any backhoe operator can do a tank integrity test, they must be NACE certified [*TR-2, page 460, line 16*].

271. Looking at [*RX-39*], the fact that a NACE certified expert designed Ram's systems does not change Mr. Cernero's opinion about the violation [*TR-1, page 185, line 1*]. The penalty only applies if the test was not done, and Ram cannot produce specific documentation that it was done. Even a certification from a NACE expert stating that he designed and installed the system per applicable law does not change Mr. Cernero's position on the violation. [*TR-1, page 186, lines 16-24*].

272. This may be more of a judgment call by an expert who examines the metal [*TR-1, page 188, line 8*].

273. The use of a NACE certified specialist is not sufficient to transfer liability for the regulation [*TR-2, page 411, line 21*], but it is sufficient to mitigate a penalty.

274. The tanks were removed at Monroe's [*TR-2, page 464, line 11*], and were found not to have leaked [*TR-2, page 465, line 9*]; [*TR-3, page 495, line 25*].

275. The EPA imposed a penalty for this violation of $19,545.34 [*CX-19, page 15*].

276. Gary's Service Station received an EPA Field Citation with a $2,100 penalty sought and not yet assessed for *six* listed violations, *one* of which was: "4) failure to ensure that tank is strcturally [*sic*] sound before installing cathodic protection" [*RX-60, page 16*].

277. A comparable OCC penalty for this violation would be $250 for failure to maintain CP records [*CX-30, Appendix S, page 71*] and [*TR-1, page 190, line 6*].

278. Ram did not order an integrity test on these tanks because they were subsequently removed and no contamination was found, thus total mitigation of the penalty is warranted.

279. In effect, the first date upon which Ram had reasonable notice that this failure constituted a violation was the date of the EPA's inspection. Enforcement of this portion of the UST program as proposed by the EPA is improper under the law.

Longtown Citgo, Eufala (Count 20)

280. EPA seeks a total penalty of $19,545.34 for violations observed at Longtown Citgo. This is for failure to have had a tank integrity test done before the corrosion protection system was installed for four tanks [*CX-19, page 16*]. This facility is shown in [*RX-40*].

281. It is a reasonable presumption that since the tanks have now been demonstrated to have integrity, they must have had integrity at the time the CP system was installed. The OCC rules do not expressly require tank integrity testing [*TR-3, page 502, line 2*]. If a tank did not have integrity when its CP system was installed, it would not have integrity 10 years later [*TR-2, page 473, line 14*].

282. Ram addressed this violation by performing the test on 4-13-2005 in response to Mr. Cernero's field notes [*RX-69*]. The field notes [*CX-1*] suggested that an integrity test needed to be done [*TR-3, page 501, line 7*]. Mr. Cernero testified that a subsequent tank integrity test could not cure the violation [*TR-2, page 482, line 3*]. Yet, Mr. Cernero also

testified that if the tanks are pulled in the future then there is no point in doing the integrity test [*TR-1, page 164, lines 12-14*].

283. Mike Majors has seen documentation that the Longtown tank now has been demonstrated to have integrity [*TR-2, page 473, line 17*].

284. Mr. Cernero cited Ram for failure to conduct a tank integrity test prior to installation of a CP system. What in fact is the case is that Ram was unable to produce *documentation* directly demonstrating that such a test was conducted. What Ram has produced is a certification that the tank system was designed and installed under the supervision of a NACE certified consultant. EPA has presented no evidence that the tank was not tested prior to the installation of the system or that this NACE consultant failed to direct that testing prior to the installation of that system. The EPA imposed a penalty for this violation of $19,545.34 [*CX-19, page 16*].

285. Gary's Service Station received an EPA Field Citation with a $2,100 penalty sought and not yet assessed for *six* listed violations, *one* of which was "4) failure to ensure that tank is strcturally [*sic*] sound before installing cathodic protection" [*RX-60, page 16*].

286. A comparable OCC penalty for this violation is $250 for failure to maintain CP records [*CX-30, Appendix S, page 71*] and [*TR-1, page 190, line 6*].

287. Count 20 involves the failure to document that a tank integrity test was performed before a NACE expert designed and installed a corrosion protection system. Ram engaged a NACE certified consultant, one whose name appeared on the OCC's own list of NACE certified consultants, to conduct the installation of the corrosion protection system. No one at Ram is NACE certified, nor do the OCC regulations require that each UST operator secure his own NACE certification. Ram relied on the experts to do their jobs properly [*RX-43*], and

had not expertise to determine whether or not that had been the case. Nevertheless, following the EPA's February, 2005 inspection, Ram ordered an integrity test done to establish whether the tanks within the CP system were sound, and the test showed that they were [*RX-69*]. If the tanks were sound at the time of that testing, they were sound at the time of the installation of the CP system. Therefore, although Ram is unable to produced documentation to this effect, it has produced documentation that the system was installed by a NACE certified consultant and the presumption is that the tanks were properly tested at the time. The integrity of the tanks has been conclusively established nevertheless since the EPA inspection, and no penalty is warranted.

288. In effect, the first date upon which Ram had reasonable notice that this failure constituted a violation was the date of the EPA's inspection. Enforcement of this portion of the UST program as proposed by the EPA is improper under the law.

Ultimate Penalty

289. Although the original amount of the penalty sought by the EPA was $279,752.00, the EPA now seeks, by its calculations, a penalty in the total amount of $179,713.07 against Ram as the owner, if not the operator, of the five facilities inspected by the EPA in February of 2005 [*CX-19*].

290. According to Appendix S of the OCC rules, the total penalty which could be assessed against Ram for the violations that remain in EPA's complaint is $2,900.[6] However, even those penalties are not applicable until the Respondent has first been given notice of the

[6] OCC Appendix S [*CX-30, page 70*] lists fine amounts for only the following counts: Count 3, $500; Count 4, $250; Count 7, $150; Count 8, $250; Count 9, $250; Count 12, $250; Count 14, $250; Count 15, $500; and Count 16, $500.

violation, and an opportunity to redress the violation, and then still failed to comply as noted by reinspection. See, OAC 165:25-18-12 ([*CX-30, page 64*]).

291. In spite of the fact that Mr. Cernero stated that the EPA "would adopt their [Oklahoma's] rules and regulations" [*TR-2, page 293, lines 6-13*], and in spite of the fact that Mr. Cernero stated that he came to Oklahoma in February of 2005 "to do [a] compliance inspection based on state requirements" [TR-2, page 311, lines 8-9], and in spite of the fact that Mr. Pasha understood the MOA to state that the EPA "shall implement the Oklahoma regulations within the state regarding the Underground Storage Tanks" [*TR-1, page 30, lines 5-7*], Mr. Cernero chose to enforce the *federal* rules and penalty provisions in calculating penalties against Ram.

292. Prior to his utilization of the federal penalty policy in the Ram matter, to Mr. Cernero's knowledge no determination had been made by the EPA that OCC program was being operated inadequately [*TR-2, page 294, lines 4-8*].

293. Prior to his utilization of the federal penalty policy in the Ram matter, to Mr. Cernero's knowledge, no determination had been made that the OCC was "unable to act" [*TR-2, page 295, lines 11-19*].

294. Prior to his utilization of the federal penalty policy in the Ram matter, to Mr. Cernero's knowledge there had been no event triggering the EPA's authority to directly implement the UST program in Oklahoma [*TR-2, page 295, lines 20-23*].

295. In fact, according to Mr. Cernero, "the decision to go with a standard enforcement action really had nothing to do with the state" [*TR-2, page 377, lines 9-13*].

296. In this case, no mitigating circumstances were considered in determining whether or not a violation had occurred, in determining which enforcement method to utilize, or in calculating the penalty to be assessed for alleged violations.

297. Mr. Cernero concluded that virtually all of the alleged violations noted during his inspection to be "major" in their deviation from the regulatory requirement, and "major" in their threat to the environment [see, *CX-19*]. Despite the seriousness of these violations in Mr. Cernero's view, Mr. Cernero did not emphasize to Ram that it needed to correct any particular alleged violations at the time of his inspection [*TR-3, page 575, lines 20-24*], Mr. Cernero did not seek to contact Ram between the date of the inspection to the date of the filing of the administrative complaint to check on Ram's progress with regard to the alleged violations [*TR-3, page 631, lines 6-10*], and Mr. Cernero did not complete and file the administrative complaint until August 19, 2005, *more than six months* after Mr. Cernero's inspection. Nevertheless, Ram began to address the violations noted in Mr. Cernero's field notes immediately after the inspection [*TR-3, page 63, lines 15-21*]. While the violations noted by Mr. Cernero may indeed constitute violations of the OCC rules, they are technical in nature, they have all been addressed, Ram would not have incurred such penalties from the OCC, Ram would not likely have incurred such penalties if Ram had not been targeted and Mr. Pasha, rather than Mr. Cernero, had conducted those February 2005 inspections, and therefore no penalty should be imposed upon Ram. Ram has been sufficiently penalized through costs it has incurred since the February, 2005 inspection to either correct problems identified in the field notes (but not necessarily violations of the OCC rules, such as adding spill buckets on unused ports) and/or to place

systems into place which will assist Ram in ensuring its compliance in the future, both at the five stations involved in the inspections and at other Ram facilities.

PROPOSED CONCLUSIONS OF LAW

298. Ram's spill at its bulk facility was addressed under the Clean Water Act's SPCC program and not under the RCRA UST program. A violation of the CWA at one facility might justify seeking permission to conduct a multi-media inspection at another facility, but it does not constitute a "history of non-compliance" at a UST facility.

299. Had the Oklahoma Corporation Commission noted the violations which the EPA now alleges, and had Ram failed to correct these violations by the OCC's next inspection, the total penalty to which Ram would have been subject based upon OCC's enforcement policy is only $2,900.00.

300. Pursuant to the terms of the MOA executed between the State of Oklahoma and the EPA, the EPA's role should be one of management, not direct enforcement, absent a showing that the OCC has failed in its obligations to properly enforce the UST program.

301. EPA has made no showing that it has made a determination that the OCC's enforcement and administration of the Oklahoma UST program was inadequate as to Ram or as to any other regulated party.

302. It was improper for the EPA to inspect Ram without a prior determination that the OCC had failed in adequately enforcing its UST program.

303. The Oklahoma Corporation Commission would not have wanted fines at this stage unless the violations were not corrected by the follow-up inspection. Therefore, under the Oklahoma program, which has been praised more than it has been castigated, RAM would not be subject to a penalty at all. The EPA has not informed the OCC that its program is

unacceptable, and therefore because the EPA has accepted Oklahoma's program for what it is the EPA is bound thereby.

304. It was improper for the EPA to enforce a policy against Ram which differed substantially from the policy previously enforced in the State of Oklahoma in general and as to Ram in particular.

305. Not all violations of the UST regulations constitute "major deviations" from the regulation. Mitigating factors may result in a conclusion that the violation is "moderate" or "minor."

306. A violation of the UST regulations which involves wholesale disregard for the requirements of the regulation is not an equivalent "deviation" to a violation in which a facility has in good faith attempted compliance or has made a mistake in its interpretation of the requirements of the regulation. Mitigating facts may result in a conclusion that such a violation is "moderate" or "minor." For example, the failure to install a spill bucket at all, if required, is more deviant than installing a spill bucket and later finding it to be damaged or to contain product and debris. Similarly, failure to conduct release detection at all, if required, is more deviant than conducting release detection by a once-proper method that has become untimely under the regulations.

307. A "major" deviation from the regulations is not supported when the behavior has not been cited after numerous inspections under an authorized state program.

308. Similarly, the potential for harm to the environment is not always "major." Circumstances such as the volume of the potential spill, the likelihood of a spill, and similar considerations may render a violation to have a "moderate" or "minor" potential for harm.

309. In this case, no mitigating circumstances were considered in either determining whether or not a violation had occurred, in determining which enforcement method to utilize, or in determining the penalty to be assessed for alleged violations.

310. One previous inspection at a separate Ram-owned facility that resulted in a Field Citation for an operations violation should not have precluded the subsequent use of the Field Citation Program at other Ram facilities, especially when that has been the past practice at facilities owned by others.

311. EPA abused its discretion in choosing to pursue an administrative order with its consummate heavy penalties against Ram when it should have simply followed its Field Citation Program. In the alternative, the EPA should not have singled-out Ram for all of its inspections in 2005.

312. It is improper for the same individual to inspect a facility, decide which enforcement policy to utilize, determine the penalties, and draft the administrative complaint.

313. In this case, it was an abuse of discretion to send one individual who has worked most of his professional life in only one program to make targeted inspections, to evaluate the risks and impacts and, where the violations are technical in nature and based upon a perceived risk of future harm without product reaching the soil or waters of the United States, for that same person to determine the penalties to be sought.

314. The EPA penalty policy is unlawful in that it permits discretionary determinations on the part of EPA which result in penalties wholly out of proportion to the nature of the violation, the nature of the harm to the environment, and the history of using the Field Citation Program in a state or region.

315. Had this been more of a normal, routine, annual look through Oklahoma UST systems, then the violations would likely have been addressed with Field Citations, as had been done for several years in the past. Moreover, those penalties would have been in the range of hundreds of dollars, not hundreds of thousands of dollars.

316. The amount of penalty that EPA sought in its administrative order is shocking under the circumstances.

317. It is improper for the EPA to enforce a policy against Ram, and other non-Indian USTs which differs from the policy enforced against the Indian tribes which operate UST facilities in Oklahoma.

318. Ram has incurred substantial costs both in securing compliance with the UST regulations as interpreted and applied by the EPA and in engaging outside consultants to secure compliance at UST facilities other than those addressed by the EPA.

319. Because Ram was not included as part of a neutral administrative scheme but was targeted specifically for inspection, EPA should have reviewed the circumstances of that selection under the standards used to obtain an administrative search warrant.

320. Administrative Law Judges are not bound by EPA's penalty policy guidance, especially where there is a reasonable basis.

321. There is a reasonable basis to deviate from the penalty policy in this case. Indeed, the reasons are compelling. The selection of Ram for inspection was not neutral, Ram was specifically chosen. Because EPA went specifically to Ram to find violations, the Field Citation process was not chosen. The elements of the penalty policy were strenuously applied. The EPA ignored the previous work and inspections by the State of Oklahoma,

despite the fact the state program has been praised and its enforcement program has not been faulted. And, finally, EPA treated Ram disparate from its treatment of Indian USTs.

Respondent's Brief in Support

By way of introduction, this is a case that, for many reasons, should not have been brought, and once brought, should not have been pursued to this advanced level. At the outset of this administrative process EPA management failed to question a penalty of more than a quarter of a million dollars against a small Oklahoma business and then, when presented with multiple opportunities to correct that circumstance, resolutely declined. As a result, this case reveals the consequences of a bureaucracy which has lost sight of reason and instead doggedly follows its policies and procedures.

The Respondent, or at least its undersigned counsel, does not suspect that it was malice or avarice which gave rise to this undeniably huge penalty action. Nevertheless, this action is a transgression under color of law against the constitutional rights of a legitimate business. But even absent such ill-meaning design, the chilling chain of events in the matter before us suggest that EPA's UST enforcement policies and procedures must be revisited and modified to prevent the recurrence of what may be characterized, at the very least, as bureaucratic indifference.

First, it was more than ten years ago that the EPA delegated the UST program to the State of Oklahoma. In doing so, EPA accepted Oklahoma's regulations, including the procedure to address violations. EPA has annually reviewed Oklahoma's performance and praised it, without complaining about Oklahoma's penalty procedures. *See*, for example, [*RX-54*] wherein the EPA was satisfied with Oklahoma's collection of only $500.00 in penalties from over 2,000

violations. EPA wrote this letter on November 4, 2005, *after* having filed its $279,752 complaint against Ram.

Oklahoma chose to offer carrots instead of sticks to its UST community. Year after year the EPA blessed Oklahoma's methods of achieving compliance in the regulated community. And so one might wonder why the EPA chose suddenly in February of 2005 to itself inspect Oklahoma USTs instead of adhering to its role of observing how the Oklahoma Corporation Commission operates, and to follow that inspection with the imposition of a penalty derived from its own federal penalty policy rather than with the compliance assistance normally practiced by the OCC within its regulated community. If the EPA concerns regarding OCC's UST program, why did not EPA simply observe John Roberts perform his routine inspections and then offer its critique and training?

It is noteworthy that the Oklahoma Corporation Commission would not have imposed fines at this stage unless the violations were not corrected by the follow-up inspection. Therefore, under the highly-praised Oklahoma program, RAM would not have been subject to a penalty at all. The EPA has not informed the OCC that its program is unacceptable. The EPA is supposed to enforce the Oklahoma rules, the EPA has accepted Oklahoma's program for what it is, and the EPA should therefore be bound by that program and all of its rules. The imposition of EPA's interpretations is appropriate for instructing the State of Oklahoma but not Ram, and EPA's penalties against Ram are improper.

Second, it is still not completely clear how or why Ram was targeted to receive ***all*** of EPA's 2005 inspections in Oklahoma, although we do know that Ram was targeted. We also know that EPA did not obtain an administrative search warrant before embarking on its inspections. Yet regardless of whether such a warrant was necessary, the protections afforded by the administrative warrant process certainly would have served as a fair check of governmental heavy-handedness, even if only reviewed internally by unbiased professionals.

Since at least 1978, government inspections to enforce regulatory statutes on commercial property have been subject to the Fourth Amendment's prohibition of unreasonable searches and seizures. Marshall vs Barlow's, Inc., 436 U.S. 307 (1978). This concept[7] prevails, regardless of whether legislation has "empowered" or authorized government inspectors to go onto private property and inspect. Congress cannot waive the Fourth Amendment protections by simply passing legislation. And what are those protections? The agency must show that the facility about to be inspected either "just turned up" as part of a standard, administrative process (a neutral administrative scheme), or that the government has administrative probable cause (a good reason to suspect a violation, such as an insider tip or a complaint) to target that facility. Marshall, supra. at 436 U.S. 321; Norman C. Mayes, RCRA (9006) Appeal No. 04-01 (EAB 2005) (warrantless inspection was allowed after notice was given to UST owner, discussion begins on page 28).

[7] "The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria." Marshall, supra, at 436 U.S. 323.

Here, EPA targeted Ram on its own, according to Greg Pasha's testimony at [*TR-1, page 39, line 16*], after the OCC had suggested to EPA that it focus its inspections on Pittsburgh County [*TR-1, page 37, lines 15-22*].[8] Thus, Ram did not routinely "turn up" and was not under the first test. Was there probable cause to suspect a violation at these five Ram facilities? Perhaps, perhaps not. EPA's inspectors testified they became suspicious when they realized that a different Ram UST facility had received a Field Citation a year earlier, and another Ram facility – a bulk wholesale fuel plant, not regulated under the UST program – had a leak in an above-ground storage tank. Never mind that ten UST facilities owned by Farris Fuels and five USTs owned by Cathy Camp had each *also* received Field Citations [*RX-68 and TR-3, page 633, line 18*].

We do not know whether an impartial magistrate would have granted such a warrant. EPA would probably argue that it is academic anyway because Ram consented to the inspections. But then, when the EPA inspector arrived he did not advise that only Ram was targeted for inspection. And when Ram's employees and marketers saw that the usual OCC inspector was also present, they would not likely have been concerned. So, regardless of whether the warrantless inspections were legal or proper, they were surprising in many ways.

Had EPA not targeted any particular UST, and had it simply focused on Pittsburgh County as had been suggested by the OCC, then it is quite likely that Field Citations would have been issued as had been EPA's past practices. At least, that would have been the case based upon EPA's past practices as employed by Mr. Pasha. Penalties levied through Field Citations, such as those employed by Mr. Pasha, do not and have not in the past five years reached into the quarter million dollar range. Mr. Cernero's conducting the Oklahoma inspections, and his

[8] Please take judicial notice that Monroe's is located in McIntosh County.

methods of enforcement, were by all accounts unusual. Mr. Cernero was sent in, expecting violations, and he obliged with many excuses to elevate penalties under the administrative order penalty guidance.

EPA chose to issue Mr. Cernero's administrative order, with penalties based on guidance that was written soon after the EPA regulations took effect. That penalty guidance has not been updated to reflect either the current business climate or the state of the program. Even the GAO has recognized that the states are pulling the weight in this program. The UST guidance is improper, it should be revised, and it must not be used against RAM in this matter.

The amount of the penalty imposed is shocking. While it may or may not rise to the level of a deprivation of substantive due process,[9] it is shocking nevertheless and warrants at least a reduction of the penalty and perhaps the imposition of costs and attorney fees.

Third, it is undisputed that EPA treats Indian and non-Indian USTs differently. EPA discriminates against non-Indian USTs in Oklahoma by fining them for violations when it does not fine Indian USTs for apparently similar violations. EPA points to Congress and its own guidance for excuses, but regardless of whatever justification the EPA may point to as the basis for this disparate treatment, the effect is still felt by the regulated community. Due to the

[9] The U.S. Supreme Court has summarized the concept in County of Sacramento v. Lewis, 523 U.S. 833 (1988). The Court noted that the core of due process is to protect against government arbitrariness, but only the most egregious executive action can be said to be arbitrary in the constitutional sense. Citing Daniels v. Williams, 474, U.S. at 328, the Court notes that liability for negligently inflicted harm is categorically beneath the threshold, but when culpability falls between negligence and intentional conduct it is a close call.

competitive nature of retail gasoline sales, that disparate treatment is economically damaging and improper.

The OCC has chosen to run its program as one of compliance assistance, offering carrots instead of sticks and not swinging a hammer unless they are not corrected by the time of reinspection. And the program is apparently quite successful, even in the estimation of the EPA itself. It is improper under the spirit and express terms of the MOA and the enabling legislation for EPA to interfere with Oklahoma's authority by coming into the state and issuing fines against the regulated community that has for many years come to expect assistance from the government. It is instructive that the very same assistance OCC provides to its non-Indian USTs is provided by the EPA to Indian tribes. Therefore, if the EPA genuinely intended to "level the playing field" among all the UST operators, as it says is its goal, then the EPA would be inspecting the OCC instead of fining Oklahoma's non-Indian UST community.

EPA's penalty policy is not binding. ALJs are not bound by the EPA's penalty policy. *In Re Carroll Oil Company*, RCRA (9006) Appeal No. 01-02 (EAB 2002); *In re City of Marshall*, 10 E.A.D. 173, 189 n.29 (EAB 2001); *In re B & R Oil Co.*, 8 E.A.D. 39, 63 (EAB 1998); *In re Employers Ins. of Wausau,* 6 E.A.D. 735, 759 (EAB 1997). Of course, there must be a rational basis to depart from the penalty policy. That rational basis is described above for this matter.

Conclusion. These violations clearly lend themselves to the level of "punishment" in the UST Field Citation program. EPA inspectors themselves pointed out that the benefit of noncompliance in the UST program is quite low, and that perhaps is more reflective of why the

fines levied by Field Citations are considerably lower. Under most circumstances, including those presented in this case, the penalties levied by the administrative order through the EPA penalty matrix and guidance can only be interpreted as disproportionately and unreasonably punitive. The penalty guidance fails to take into account the expectations of the regulated community based upon the pattern and practice developed by the state programs, programs which the EPA actively encourages. Just because the EPA has statutory authority to ignore a state program and bring its own penalty actions does not mean that doing so is right or proper. After all, the concept of justifiable reliance has with good reason been in our jurisprudence for centuries.

WHEREFORE, Respondent respectfully prays the Court will issue the following order: The penalties sought by EPA against Ram are denied. It is further found that had EPA observed and critiqued inspections of Ram by the OCC, then Ram would likely have complied as it had in the past, which is the result Oklahoma has successfully sought for many years. Had EPA either not targeted Ram, or obtained an administrative search warrant targeting Ram, and inspected normally then EPA would or should have used the Field Citation process with its substantially lower penalties. Indeed, had EPA issued Field Citation penalties against Ram instead of the administrative order that is being litigated today, then Ram would have been treated similarly to how EPA has treated other non-Indian USTs in Oklahoma and Ram would likely have paid those penalties. However, due to the egregiousness of the EPA's actions, and the single-handed circumvention of the very state practices that EPA had encouraged, Ram incurred the expense of both legal representation *and* compliance. EPA's position is not substantially justified, its

penalty demand is unreasonable under the facts and circumstances of this case, and the Respondent is therefore entitled to an award of its costs and attorney fees pursuant to 5 USC 504.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the __ day of July, 2006, I placed true and correct copies of the foregoing in the U.S. mail addressed to the following:

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