which I'll go over first; and then is a gravity-based component, which has to do with potential for harm and deviation from the regulations.

Let me first concentrate a little bit on the economic benefit component. And the reason why we have an -- an economic benefit component is to make sure that -- that EPA or any regulatory agency gets a penalty at least in the amount that an owner and/or operator may have gained because of noncompliance.

As an example, if an owner or operator that is trying to do a good job spends the money for equipment and maintenance and so forth, and the guy across the street, or owner and operator, does not put all the equipment, he has or she has an economic benefit; they could sell gas cheaper than the person next door, because they have to spend the money. So what we try to do is level the playing field by at least assessing an economic benefit.

Now, the economic benefit is essentially made up of two components itself; one is called "avoided costs," which are periodic operation and maintenance expenditures that should have been incurred, but were not.

As an example, if you were supposed to do a tightness test on your tanks every year, an annual test, and you missed one and you are caught somewhere down the line, you can't go back and make that test for that year; you

basically avoided that cost.

So essentially, there was an advantage. If the -- if the cost was a thousand dollars for the three tanks, that owner or operator actually has an $1,000 advantage to do that, and that's an example.

The other component of your economic benefit is the fact that there are called "delayed costs." They are costs or the expenditures that have been deferred by the violation, but will be incurred to achieve compliance.

Essentially, as an example, if you did not, say, install a -- a corrosion protection system, and we go out and do -- EPA or the state finds they did not -- did not put a corrosion protection system on the tanks, that owner/operator, to get back in compliance, would have to install that piece of equipment anyway.

They will not -- they will not avoid it, but they had incurred some savings from the standpoint of capital expenditures that they could have gained by putting it in the bank, making interest, and that type of thing. So what we try to do is take those -- those economic benefits away via penalties.

So essentially, if you want to go now in a little bit more detail; determining avoided costs, avoided costs is the avoided expenditure plus the avoided expenditure times the interest, times the number of days over the -- over

365 days.

You are essentially trying to determine -- and making it more simpler -- what is that interest that they would have incurred if they put the money in the bank. But then, of course, you have to look at their marginal tax rate to see what they would actually save.

So as you could say, the avoided expenditures are estimating using local, comparative costs, interest as equity discount.

At this point, it's about 7.8, and that's what we used, provided the BEN Model. In the old days, it was 18.1 percent, but that, luckily, has gone down quite a bit.

It's also based on the number of days of noncompliance, and the 365 is the number of days in a year; and, of course, the marginal tax rate.

Now, delayed cost is a little bit different, because you are not talking about the fact that you are saving some money because you didn't spend the money; you actually never would spend the money, so you are trying to recoup that.

Delayed expenditures are estimated using local, again, comparative costs.

Essentially, delayed cost is your delayed expenditure, times your interest rate, times the number of

days, divided by 365 days.

And essentially, these are just kind of a general -- I mean it's very simplified, but that is the formula that you use.

And the numbers you crank in there will vary over time; the interest rates, inflation rates, those type of things will vary. And when I go over the actual counts, I will show you what -- what -- the numbers I used.

If anybody has any questions, I guess I will answer them.

Now, that is just covering the economic benefit, which, usually -- in the Underground Storage Tank program, is usually quite low. Is that the next -- that is the next --

Q So -- that's correct. So your next component --

A My next component -- I have covered the economic benefit; in other words, trying to level the playing field. The next part of it is called the gravity-based component.

It is based on a deviation from the regulation and potential for harm. It doesn't necessarily mean that you had a leak; it's if you could have -- what happens if you did have a leak.

Essentially, as an example, if you did not have release detection in your -- in your -- for your

Underground Storage Tanks, even though it did not leak, there's a massive potential there that if it did leak you would never know it, and it could cause quite a few major leaks and cost a lot of expenditures to the taxpayers and to the owner/operator.

Now, the gravity-based -- there are different components to the gravity-based. The gravity-based component is based on a matrix value that, again -- and I'll go -- I'll show you the matrix -- but it has to do with deviation from the regulation and potential for harm.

And it -- it varies from all the way from a minor -- what they call a minor-minor to a major-major. It can go anywhere from $50 on your matrix, all the way up to $1,500 for your -- for your matrix.

Then there are things called your violator-specific adjustments, which I'll go over, and then your environmental sensitivity multiplier, which is based on: Where is that facility? Are there any type of potable water sources that may be impacted? If it's very sensitive areas, where, say, it's a nature reserve, a preservation, that factor may be higher than just a normal commercial area.

Then also, you consider your num -- your days of noncompliance. Those factors all go into calculating your -- your gravity-based component.

Again, the matrix value is based on the potential for harm and the deviation from the requirements.

The violator-specific adjustments to the matrix are based on the violator's cooperation, willingness, history of noncompliance, and other factors that I will go into.

And again, the environmental sensitivity multiplier is based on: Where is this facility? What is close by? Is there a drinking water supply there? Is there a lake, a marina? Any type of thing like that that would cause it to be even more dangerous if there was a -- was a release.

And of course, the number of days of violation is also included into this.

Okay. Let's just go over the matrix. And again, this matrix is just -- is in the policy. Now, how they developed it, I really don't know.

But this Exhibit 4, Matrix Values for Determining the Gravity-Based Component of a Penalty, essentially, what they look at is the extent of deviation from the requirements.

If it is a -- is a minor deviation, it will be in this category here. If it's a moderate, it will be in this category. And major.

On this side, you have the potential for harm; in other words, if you did not have this -- if you were out of compliance in this particular -- this violation, what

would happen if there was a release? What kind of danger would it be?

In other words, if you are -- again, example, if you're not keeping a certain specific record, would that -- if you didn't keep that record, would that cause -- would that cause major harm?

Well, each -- each violation has been broken down in our policy. Almost all of the -- all -- almost all of the violations have been, not -- not every one has been. But this matrix --

Q Mr. Cernero, if I may interject. What are factors that you look at when you are calculating potential for harm?

A You are looking at the -- how much damage, essentially, could be caused by not doing a certain -- meeting a certain compliance requirement.

For instance, I used the example, if you did not have release detection, the potential for harm is very high, very major, because you would not know if it leaked.

Or if you had corrode -- if you did not install corrosion protection on your tank, the potential for harm would be very -- very large, because it's going to rust.

Or if you did not have spill and overfill, the potential for harm would be very high, versus maybe a recordkeeping issue would not be that high, and it could

requirement and major potential for harm, all the way down to a minor potential for harm and a minor deviation from regulations would be $50.

So these matrix amounts, these nine categories here, will be used first to determine your penalty policy -- or penalty.

Q Okay. And then the next set of factors has part of the gravity component.

A Yes.

Q Would it be on another -- on the next --

A Yeah.

Q -- demonstrative aid?

A And I'm going to go to the next one at this time.

Q It's the next --

A Now, this is -- this is the violator-specific adjustments. And these have to do with degree of cooperation, noncooperation. And there's more definition in our policy, which I don't think we need to spend too much time going into this; hopefully not.

But you can actually give -- you can increase the percentage of the penalty as -- as much as 50 percent increase; in other words, you take the matrix of $1,500, and if they did not have a -- they were not cooperative -- they were -- they were not cooperative, you could actually go in and say I want to increase that $1,500 by

50 percent, or $750, and you could add $1,500.

So you could take the matrix and make it even larger. Or you can actually go in and make it less, as much as 25 percent decrease.

So EPA would have the decision and the option to go in and change these factors here depending on the degree of cooperation or noncooperation.

The degree of willfulness or neglect can either be increased by 50 percent of the matrix -- the matrix could be increased by 50 percent, or it could be decreased by 25 percent, depending on the situation.

And again, for a history of noncompliance, you can go all the way up to another 50 percent increase only; there's no decrease.

So if you have a -- if you are not cooperating and if you are not doing anything and you are negligent and you are not -- and you have a history of noncompliance, all of these factors will get added in on top of the other.

So as you can see, the penalty can get quite high on this -- on this -- using this type of policy. Or you can actually reduce --

Q Question: When you do a history of noncompliance, is that a noncompliance in general, or is that noncompliance with respect to the specific violation?

A It's -- it's -- has -- this -- these factors here

have to do with the -- how the owner and/or operator was interacting: What did they do because of this violation? Was it total neglect? Was it just an oversight? Was -- you know, you have to take those into -- into consideration.

And the other factors called "other unique factors," which is basically kind of a catchall, just in case there are other factors that are not in these three, and you can actually increase -- EPA can actually increase the penalty again another 50 percent, or it can decrease it by 25 percent.

Q Do you have examples of what those other factors might be?

A I'm trying to think of -- there could be -- sometimes they put a piece of equipment in, a storm came, knocked it out, it was essentially no fault of anybody, it's just nature did that. Sometimes you can give a discount for that for an owner/operator.

Q Would that be called like an act of God, quote unquote?

A That type of thing. Or it was just an -- you know, it's really kind of an unusual situation; the equipment was working fine, and all of a sudden lightning hit it, you know, and it went off for a day or two, and it just happened that when we went out there, it was gone, and

that type of thing.

Q Okay.

A Now, one of the things, as far as Region 6 does on these, we normally will not use these factors unless we absolutely have to. We try to keep everything neutral; in other words, don't give an increase, don't give a decrease. Just so you are not raising it up very high and you are not reducing it extremely low. We try to go with the --

Q What's the purpose behind that rule of thumb?

A It's so that you try to get a good, fair penalty. Because as you can see, adding 50 percent to the matrix and then adding 50 percent again and adding another 50 percent, it can be an extremely high penalty.

And again, what we try to do is keep a neutral. Unless there are some circumstances where the owner/operator basically just says, "I'm not going to do anything, I'm not -- don't -- you know, you are going to have to take me to court," there's no cooperation, they essentially don't really care about the situation, there's no -- there's no attempt to get the thing corrected, or that their -- or the history of noncompliance is that no matter what you do, this person or this particular company is always out of compliance, then you would probably use something like that.

Again, a lot of it is a judgment call. It's very -- it's very open. The penalty policy is very wide, so you try to maintain a normalcy when you determine your penalty. You don't want to make it an extremely high penalty, and you are not looking to make it an extremely low penalty. You're trying to be, at least in our region, middle of the road.

That is your violator-specific adjustment to the matrix value.

Determining the environmental sensitivity multiplier has to do with where is that particular site, what is the potential for harm to some sensitive areas?

If you are out in the middle of nowhere, out in the middle of the desert, most likely, there's not an sensitive issue, you can use the 1 factor, which does not increase your penalty; it keeps it neutral, again.

However, you could be in a situation, say, in Louisiana, where you are going to impact a coastal area or some kind of everglade or some type of thing like that where it -- the potential for harm to the environment -- human health and the environment, endangered species, you may want to use a factor of 2.

And again, we use the lowest we can, unless there's -- like unless it's right next to some kind of water well where it was a very sensitive area, we would

normally use 1 or 1 1/2.

So these factors are allowable under our penalty policy. We use them at our discretion; however, the attempt is not to make a huge penalty, it's to try to keep it fair and reasonable.

And again, the other factor, which -- which does cause the penalty to be quite high is the number of days of noncompliance; it's a multiplier.

And it's just a schedule, essentially anywhere from zero to 90 days out of compliance, if they were out of compliance anywhere from zero to three months, the factor is 1, so you are not getting penalized for anything from zero to 90 days.

You go over -- between 91 days and half a year, six months, that factor goes to 1.5. If you are going from 181 to 270, which is nine months, it would be a factor of 2. And anywhere from a year or less would be a factor of 2.5.

If it goes over a year, then for every six months that it goes over, then you add another .5. So as you can see, if it's a four- or five-year violation, it's going to run up to almost a 5 or 6 factor, which is going to be very expensive.

Now, of course, the EPA has a statute of limitations, so you can't go back more than five years, so that's one

of the ways of keeping the penalty down.

Okay.

Q And then that's the -- that's -- that's the end of those exhibits?

A That -- well, no. I think the end --

Q Well, the next one gets into the counts.

A Okay. I thought there was a basic formula, too, there.

Well, the basic formula is you add in your -- your economic benefit penalty component, and then you add in your gravity, and that's your penalty.

Q Okay. Thank you, Mr. Cernero. You can now return to your seat, I believe. So I have a couple more questions for you, and then we'll get into Count 1.

Against whom do you ordinarily assess penalties?

A Excuse me?

Q Against whom do you ordinarily assess penalties?

A The regulated community, violators.

Q Who -- who does the statute allow you to assess a penalty against?

A The -- the statutory -- the --

Q Against whom does --

A Oh, I'm sorry; against owners and/or operators. The EPA has the authority to go after owners and/or operators.

Q Okay.

A Not contractors or anybody else, but owners and operators.

Q Does the statute allow an owner and operator to transfer liability of a penalty to a third-party contractor?

A No.

Q What ensures fairness of the penalty assessment among the regulated community?

A Trying to -- the way they tries (sic) to keep it even is to use a common penalty policy.

Q Do you look to what has been done in previous cases when you assess a penalty to ensure fairness, or do you only look to the policy?

A I -- I don't look at other cases, because each case is unique in itself, and I just have to go by the penalty policy.

Q Okay. Well, what are factors that cause penalty assessments to vary in different cases?

A Again, it has to do with the violator-specific factors, the days of noncompliance; obviously, for the number of counts you may have, the number of violations, the number of tanks you have, the number of facilities. There's so many things that can -- that could affect the -- the magnitude of the penalty.

Q Earlier, you heard Mr. Pashia testify regarding field

citations, and you heard Respondent's counsel ask questions regarding field citations. Do field citations cause penalty assessments to be different?

A Field citations is a totally different method of enforcement. Field citations was developed by Region 6 to -- from the standpoint that we had a large university of regulated -- a large universe of regulated community, it was very difficult to get to every one of them.

So we tried to develop a field citation program, or a traffic cop type violation, a ticket book, where you can go, do your inspection. If you find some -- the minor violations, there are criteria that you have to use before you can use a ticket. You know, if there's a leak that's discovered, you can't use a ticket.

If there's so many violations at this facility or they have a huge history of noncompliance, you may not be able to use the ticket.

The field citation is at the discretion of the inspector. Hopefully, what you try to do is get compliance within a 30- to 60-day period, assess a small fine anywhere from $50 to as much as about $3,000.

There are no attorneys involved in it; no offense, but there's no attorneys involved in it. It is done by the inspector and the enforcement officer. When they come back to the office, they can either -- either do it on the

spot, or they can actually mail it to the owner/operator.

Hopefully, that the owner/operator will accept the offer of settlement. Essentially, EPA agrees to take no further action on that particular violation or violations, as long as the owner would get it back in compliance within 30 to 60 days, pay the penalty, and EPA will sign off -- they will sign off on the order, and we will sign off on it to take no further action.

That is not required that they have to take the offer, it's just an offer of settlement, hopefully to resolve the issue without having to go through a formal complaint.

It is a totally different method of enforcement. The penalties that are determined in the field citation are set forth just like you would have as a traffic cop: Speeding would be this much, you know, you know, parking in a non-parking zone would be this much. There's no calculating --

Q Do you have --

A -- of the penalty.

Q Right. I'm sorry, I cut you off. Do you have a rule of thumb for when you use field citations versus an administrative complaint?

A Yes. Normally use a field citation when this is basically a new facility or a new owner, you don't have a

big history of -- of noncompliance, it is a way -- particularly, if it's minor violations that can be corrected within a 30- to 60-day period.

If it's a very major issue where they got to pull tanks and -- or add a lot of equipment on that's going to take many months, then you may not want to use that field citation.

It's a very way -- it's also a screening tool. If they get in compliance, then there's no need to go to a complaint.

Q Okay. And are there other penalty assessments or ways to collect a penalty that are different from -- in value than what is alleged in your initial complaint? And maybe my question is not clear.

A No, I'm not understanding what you're saying.

Q Okay. Are there other mechanisms for assessing a penalty for UST violations that would have the penalty even lower than what is usually seen in administrative complaints?

A No. The only two -- only two tools we have for actually assessing penalties is the field citation, and the formal complaint using the UST penalty policy.

Q Have you been involved in the settlement of an administrative complaint?

A Yes.

Q In UST?
A Many. Many of them, yes.
Q Okay. And in those settlements, do you settle for a value less than what you plead in your complaint?
A Yes. Sometimes.
Q Let us turn our attention to Count 1.
A Okay.

THE COURT: Maybe, Ms. Beaver, this would be a good time to take our noon recess. And we'll recess for one hour.

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(A lunch break was taken, after which the following continued:)

THE COURT: The hearing will be in order. You may resume the stand, Mr. Cernero.

THE WITNESS: Okay. Okay. Can y'all see this?

MS. BEAVER: Wait. Hold on, John, I'm not there.

THE WITNESS: Oh, you got to get there?

MS. BEAVER: I got to get there.

THE WITNESS: Do you want me to sit down?

MS. BEAVER: Don't start without me, yes, please.

(An off-the-record conversation was held, after which the following continued:)

Q (By Ms. Beaver:) Okay, Mr. Cernero. We finished off last time with you going through, generally, the penalty policy and how a penalty is calculated.

And for a point of clarification, how does subsequent -- how does the information regarding subsequent -- subsequent repairs or modifications factor into penalty consideration?

A It wouldn't, because if -- to correct the violation is something that should have been done in the first place, so it's covered by the fact that you are giving them an economic penalty. Fixing things after the fact doesn't -- doesn't do anything for your penalty policy.

Q Even though -- you said "economic penalty." Do you mean --

A Economic benefit, I'm sorry.

Q So say -- tell me again, how does subsequent repairs and modifications factor into economic benefit?

A Because those are the things that they should have done, and that's when -- that's why we've calculated an economic benefit.

We have that penalty in that -- in there already, so we are not going to give anybody any credit for the fact that they fix it after the fact. It should have been

fixed from the very beginning. It's something that they should have been doing from the very beginning.

Q Okay. What about the cooperation factor? Does the fact that they, you know, as in response to a complaint, have now -- someone who has now made subsequent repairs or modifications, does that information show cooperation, based on that cooperation factor?

A No. According to the penalty policy, that is not considered cooperation, or -- 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 Fiberglas piping and state of the art tanks, that actually was going above and beyond what is required -- the minimum requirement.

Q Okay.

A Then you can give some kind of an economic -- or not economic -- you can give some kind of reduction in your penalty.

Q Okay. Great. Thank you so much. So now, let's turn

to Count 1.

A Okay.

Q Of your penalty. And again, for this part of the discussion, we do have demonstrative aids --

A Okay.

Q -- for each count, and the penalty that -- and these aids are enlargements of what appears in the exhibits.

Now, for Count 1, walk us through, Mr. Cernero --

A Okay.

Q -- how you calculated the penalty for Count 1.

A Okay. I --

Q But before that, remind us what Count 1 is.

A Okay.

Q And what facility it is.

A Okay. Count 1 is "Failure to Provide Spill Prevention for New Tanks." This is at the Citgo, the first one, Citgo Quik Stop.

Essentially, the economic benefit component was based on only a delay, since -- if you recall, since the spill buckets, they had to be installed anyway, they couldn't be avoided.

I used the cost of approximately $1,000 per UST, was considered a reasonable cost to replace the spill buckets.

Using a discount rate of 7.8 percent, an inflation rate of 3 percent, and a tax rate of about 38.9 percent.

It was like -- something like 1,600 days of delay.

Delayed costs ended to be about $137.98 per tank, making the total economic benefit component of $413.93.

The economic and gravity base was calculated as follows. I wanted to cover the economic benefit first, because it's not really that descriptive in this.

Q Mr. Cernero.

A Yes.

Q A quick question. The avoided costs -- you did zero for avoided costs.

A That is correct.

Q And you used -- so you used delayed costs, and I believe you explained why you did the delayed costs.

A Right.

Q My question is, what was your basis for selecting the number that you used for delayed costs?

A The number?

Q For delayed costs. What was your basis? Let's do the number that you started out with and put into that formula. What was your basis for that number?

A This is the matrix, okay? That -- is that what you are talking about, the matrix?

Q Your economic benefit, delayed costs.

A Oh, okay.

Q You just started with economic benefit, correct?

A Right. I started with the economic, right. And --
Q And you explained how you came up with the number $413.94 --
A Right.
Q -- for economic benefit. You had zero for delayed -- for avoided costs.
A Right.
Q And your number for delayed cost was 137.98.
A Right.
Q Correct?
A Per tank.
Q Per tank?
A Right.
Q And my question is, the amount that you used for delayed costs per tank, what was your basis for selecting that number?
A Based on the penalty policy, and also checking with our headquarters on what the inflation rate is and what the discount rate is, and also what the standard tax rate is, which is in the -- it's in the formula when you do the calculation.

You have to make those adjustments, because you have to consider the inflation, you have to consider the discount rate. All those things change over time, so I tried to use the latest information I -- I can, according

to the penalty policy.

Q Okay. That's fine. The delayed -- so if I'm -- if I'm remembering this correctly, based on the chart for determining delayed costs, there is a delayed expenditures amount, then you multiply it by interest and the number of days.

A Right.

Q And the delayed expenditures amount is what you used -- estimated using local and comparable costs?

A Right. And I essentially have to use those -- those factors that are actually given to us by headquarters. Headquarters says, "here is the latest inflation rate you should use, here is the discount rate you should be using, and here is the -- the tax rate that you should be using for -- for Oklahoma."

Q Okay.

A Yeah.

Q Okay. Thanks for clarifying that.

A Yeah. Now, I had a typo over here. Actually, this is supposed to be 413.93, so that was -- there's a typo there.

So essentially, there is no avoided cost, because I got to -- you got to do something to get back in compliance.

The delayed cost is essentially $137.98 per tank;

ends up to be $413.92, even though this is a typo. Now, that is just economic benefit.

The gravity base is by taking that matrix for that particular violation, which is $1,500, it's a major-major. Now, 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.

Now, we did not use any violator-specific adjustments; essentially, what I call a neutral. I did not increase the penalty by any factors or decrease it by any factors. So essentially, the factor for the violator-specific would just be 1. There would not be any -- any type of adjustment.

Now, 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.

Now, however, we still have to deal with the number of days of noncompliance. The tanks were put in somewhere around 1990, so basically, the violation occurred from 19 -- whatever it was, put in 1990, until the day that -- at least till the day I got there that that was out of compliance.

However, because of the statute -- statutation of limitations -- the statute of limitations, we are not going to go back more than five years; therefore, we use the date of September 30th of 19 -- or 2000.

However, that still constitutes about 1,600 days of noncompliance, and the multiplier ends up to be a 6. So that's one of the reasons why the penalty is -- is quite high.

Now, if you multiplied the numbers out to 1,500 times the 1 for the violator-specific adjustments, 1 for the environmental sensitivity adjustments, and then 6 for the days of noncompliance times the three tanks, you end up with 20,000 -- $27,000 in penalties for just Count 1.

Q And can you remind us why you multiplied by three tanks?

A Well, because the penalty is based on -- because of the statutory factors, you base it on per tank per day of violation, so you go by tank.

And that's why we used -- it's a violation for each

tank. Each tank did not have the spill bucket it was supposed to, so we go by tank.

Q Okay.

A Now, once you get the economic -- the gravity base, you -- you add back in your economic base, and you ended up with $27,413.93. And it may be a penny or two off here, because of the typo that I have.

THE COURT: Well, Mr. Cernero, isn't that regarding those tanks as having no -- no spill buckets at all, when in fact, they did have?

THE WITNESS: They had -- the problem there is they had two ports that could be filled from either part of it. If -- if they had spill -- they did have spill buckets on the south end; and as long as they dropped fuel there, there would be no spill.

However, there's nothing to prohibit an owner or a truck driver to go in and make an erroneous drop and then have a spill. So therefore, it's got two drop ports, it should have two spill buckets.

THE COURT: Yes.

THE WITNESS: This happens quite often in military. They go -- they have two places where they can fill it; I don't know why they do it. In this particular case, I understand that it was in the way of traffic or whatever, and they started using the

south part of it. But essentially, they had spill buckets that were not there. And they were not there --

THE COURT: It still seems like the possibility of a truck driver misplacing it, though, and trying to fill from the north port -- from the other port that doesn't have the spill bucket, isn't that minimized by the fact there are some spill buckets there?

THE WITNESS: I would say no, because just one drop -- if they mess up and drop and just put the fuel in that one area and they have a spill, then you had the potential for -- you had the release, you would have an overfill or a spill.

And there's nothing -- I mean those -- those -- the fill ports they had, even though they had a lock on one, it's not unusual to see locks on -- on the caps; as a matter of fact, most of the time I go there, I see -- I see locks on the caps.

So that's a normal procedure, because a lot of people don't want to get their -- their gasoline stolen, so they have locks on them. And a lot of the truck drivers, they do have keys or they go in and get the key.

If they wanted to say that this -- these fill

ports are not to be used as fill port -- as the drop -- drops for fuel, they should have had a permanent cap on or a cap that's threaded that does not even appear to be as a regular cap.

And that's what was on their -- you'll see our pictures; they had regular caps on them, they -- they look just like any other cap.

There was no indication that there was a sign on there that said, "do not fill." There was nothing in there, or a bolted-down lid, or any type of indication that a driver would be able to determine that he -- they -- they should not -- they should not deliver to this product.

And also, it could be a situation where they were not able to get to those fill ports that were -- did have spill buckets; there might have been traffic on that or cars parked there, and they would be forced to use those other side (sic).

So what I'm saying is that the potential for some truck driver inadvertently using that is pretty high in this case.

THE COURT: Thank you, Mr. Cernero.

You may proceed, Ms. Beaver.

MS. BEAVER: Thank you, Your Honor.

THE WITNESS: Okay. So that, basically, is how

we calculate Count 1.

Q (By Ms. Beaver:) Okay. What's -- do you have information on the location for proximity to people? You mentioned that this Citgo Quik Mart was in an industrial area.

A A commercial area, yeah.

Q Pardon? A commercial area?

A Commercial area, yes.

Q Do you have -- can you kind of provide an idea of the proximity to people; to residential development or to people?

A As far as residential, I don't think there was that many in that area. But it is harmful because there is a lot of traffic through those stations. If there was a spill, it could -- I mean it could get into the soil and continue to cause contamination.

Also, the other issue, too, is if there was a spill on the concrete away from the spill bucket, you know, it's going to go right into the soil. There's nothing to catch it there.

But, of course, that's not part of the requirements. But the fact is that you could -- you could, over a period of time, continue to have contamination.

As a matter of fact, if you look at the pictures, it's possible that there was some contamination there.

Now, I'm not going to say I took samples and I know there's contamination, but by looking at the pictures, you could see some -- it looks like some soil staining, some concrete staining that could indicate that there was some drops at that particular -- that particular drop.

Q Okay. Thank you. We can move on now --

A Okay.

Q -- to Count 2.

A All right. Count 2 was --

Q If you can --

A -- was "Failure to Adequately -- Provide Adequate Capacity for Spill Prevention."

This was the situation where the spill buckets were filled with either fuel or debris or both, such that the capacity was reduced, that you would not have sufficient capacity.

Essentially, in this case, there was no -- we did not see that in this case there would be much of an economic benefit, other than you have to spend some time cleaning out the buckets and that type of thing, which would be so minimal, it wasn't even worth looking at the economic benefit. So the economic benefit in this case was basically zero. There was really no -- no advantage.

However, because of the gravity part of it, because there could have been the potential for a spill, we said

that this was a major-major; in other words, major harm -- major potential for harm and major deviation from the requirements. It has to have sufficient capacity.

Q Could you explain again why it's major-major?

A Because -- because of the fact that the capacity was -- was considerably or significantly reduced. If there was a spill because of the hose being released too soon, you would have had product out on the concrete and spread -- not only cause contamination, but could cause some fire hazard and whatever, some -- some danger there.

And also, the potential from -- or the deviation from the requirements is that you must have sufficient capacity to make sure that you have enough capacity when the hose is released, that it will hold -- it will hold enough product.

Now, if you look at a standard spill bucket, it's about five gallons. And if you -- if you -- if the hose was completely full, it's going to -- completely full and it's about a 15-foot length of hose, it would hold about 15-gallons.

So the spill buckets aren't even there to hold a full hose after being filled; it's basically just to cut -- to -- basically to hold what's there, as far as spilling is concerned.

And that's usually anywhere from three to five

gallons, three to four gallons. And that's why you don't want to reduce the capacity, because you have debris in there.

So the matrix on this particular case was -- was $1,500. We did not use any type of violator-specific.

We used a 1 -- the sensitivity was 1; however, they did have -- the date now -- unfortunately, there was a typo on this one. There -- no, this is -- that's correct, it was one day of violation. We just looked at it as a one-day violation.

Q And you looked at it as one day, because?

A It was a day -- I mean I don't know if it was that way when I got there, before I got there. It may have happened over -- I would assume it happened over months, but I don't know that, so I just said one day.

Q So would you call that enforcement discretion? Or how would you phrase that?

A Just enforcement discretion. Try to give them the minimum amount. I said: Well, I know it's there when I got there, that's one day violation, so we used the factor of 1.

MS. BEAVER: Your Honor, at this time, I'd like to call the Court's attention and Respondent's attention and have the record reflect that what we are talking about right now is Complainant's

Exhibits -- pictures regarding this count are Complainant's Exhibits 24 and 25.

Q (By Ms. Beaver:) Based on the pictures that you took, Mr. Cernero, explain why the potential for harm and the extent of deviation was so great, based on the pictures that you took.

A The fact is that there's -- there was so little capacity left, because of the debris and/or fuel in there, 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.

Now, you have one time -- one spill, you know, one year is not necessarily going to be total contamination, but over a period of time, it will be.

Q Okay. And how much capacity do you -- would you speculate was left in the -- in this -- these spill buckets?

A It looked like it was almost completely full, so I would say it would be, you know, maybe a gallon it could hold; that's about it.

Q That it could hold about a gallon more?

A That's about it. But, you know, your typical excess in the hose after it's shut off is anywhere from, you know, two to three gallons or more.

Q Okay. So you walked us through economic benefit of Count 2.

A Right.

Q And you have been walking us through your gravity component for Count 2.

A Essentially, it was $1,500 times six tanks, ends up being $9,000.

There was no -- we did not -- the economic benefit to this was so insignificant, we didn't even consider it. Just it wasn't -- it wasn't worth trying to come up with an economic benefit.

Q And so your -- you multiplied by six tanks. Did you multiply by six tanks to reflect what was happening in the spill buckets for each tank?

A Yes. Yes. And of course, the three -- the other three had two spill buckets each, but they didn't have spill buckets, so I couldn't give them -- you know, I couldn't say anything there.

Q Was it customary -- in your experience as doing inspections, is it customary to find spill buckets with that much of product in it or debris in it?

A No, it is not. And they are -- it's not unusual to

see, you know, little bits of debris in there and some fuel. But 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.

It looks like it was used to -- apparently, somebody must have been hosing down the concrete and everything went in the bucket and that's where it stayed. I don't know if that was the situation; I'm just speculating.

But it was so severe that I -- that I noted that. And also, I believe -- I believe also, the inspector from OCC noticed it, too. And we both agreed that -- at least in my opinion, we both agreed that it was significant enough to -- to say it was a violation.

Q Okay. Thank you, Mr. Cernero. Let's move on to Count 3.

A Count 3 and 4 on this part?

Q Yeah, 3 and 4 are on the other side of the chart. So let's start with Count 3.

A Okay. Count 3 was "Failure to Conduct Release Detection on a Temporarily Closed Tank." Same station again, the Citgo Quik Stop.

Again, there was no -- in this case, there was no economic benefit to this one. We did not feel that the --

although there was some cost incurred, you know, they should have been sticking the tanks, we still felt that the labor in that was probably not significant to consider it, so we did not put the economic benefit in this one. However --

Q Mr. Cernero, I'm sorry, clarify for me. I just heard you say they should have been sticking the tanks. Are we dealing with sticking the tanks, or conducting monthly release detection monitoring?

A Well, no, I --

Q Or is that the same thing?

A No, you are right; I'm sorry. It was "Failure to Conduct Release Detection on a Temporarily Closed Tank." And it would not be using the stick; I'm sorry.

It would be the labor that would be normal for going out and monitoring the facility -- that particular tank. So that's why I was saying the economic benefit was insignificant, not worth even calculating it; that's why I left it out, although there would be, you know, technically would be something there.

The fact that they were not -- this -- this particular tank was claimed to be in temporary closure by the owner and by the operator that was there; however, when we did the stick readings, there was product in there.

The OCC inspector and I verified that there was product in there, and I think it was eight or nine inches of product in there; therefore, they were required to do some type of release detection.

Again, failure to do release detection is a very major potential for harm and a major deviation from the requirements; therefore, again, it was used as a matrix of 1,500.

Q Mr. Cernero, why was it a major deviation from the reg requirements?

A Because the regs require that -- that any -- even tanks in temporary closure, if there's product in it, must be monitored every 30 days, as long as there's product in there.

And failure to do that -- if they fail to do that and there was a release, you would not know that it released, because you would not know that there was -- that you were not checking the monitor -- you were not monitoring; therefore, you would not know it was released.

So it continued -- it would continue -- all that nine inches of product would have been released into the environment, so there was a potential for harm, major potential for harm.

Q To clarify, the extent of deviation from requirements does not require -- does it require release?

A Right.
Q When you calculate extent deviation from the requirements, do you require a release?
A No.
Q No?
A It does not have to release, no.
Q So your extent deviation from the requirement is major because?
A Because the regs say you must have release detection. There was no release detection.
Q Okay.
A Okay?
Q And the --
A That's deviation from the requirement. Deviation from the harm was that there was a potential there for harm, a major potential for harm.
And although it did not -- we are not saying that it did leak, there was a potential for harm because no one was monitoring that particular tank with nine inches of product in it.
Q Okay.
A For -- for sev -- probably for over a year.
Q What period did you calculate this penalty for?
A Okay.
Q Your days --

A I calculated --

Q I'm skipping ahead --

A I calculated --

Q -- to the days of noncompliance.

A I calculated -- based on the fact that you are only required to keep 12 months' worth of data, I said that the compliance should be one year.

Even at the time that I was there, they were out of compliance. So essentially, I took the one year plus one day, 366 days, which should have been a factor of 3, based on the penalty policy.

Q Okay. I notice -- and for the record, on Count 3 in our exhibits, it shows a period of violation that says 03-01 of 2000 to 5-24 of 2004, which equals 1,545 days of noncompliance. Would you explain the discrepancy in what's noted in the summary --

A Yeah.

Q -- there?

A Yeah, this is a -- this is a typo; it was due to cut and pasting. It should have been just 366 days. It should have been from February 16th, '04, to February 16th, '05.

And the fact that they were still out of compliance there, we used 360 (sic). We tried to be a lenient as possible with the -- with the penalty policies; therefore,

we used 366 days.

The factor for 366 days is 3. Multiply it out, and you come up with the fact that it was $1,500 for the matrix. All the factors were 1 except the factor for the, you know, the multiplier for the date. One tank -- there was only one tank, a diesel, a 12,000-gallon diesel tank, and it ended up being $4,500 for the penalty.

Q Is this calculation correct, irrespective of the typo --

A Yeah.

Q -- of the date range there?

A Right. This is the only place where we got the typo. For some reason, this got in there and it shouldn't have been in there. But the -- the factor is right and the -- and the penalty amount is correct.

Q Okay. We can move on to Count 4.

A Okay. Count 4 was "Failure to Conduct Monthly Release Detection Monitoring for Tanks," for the remaining five -- the other five tanks that were at this site.

The economic benefit based component was evaluated for avoided costs and delayed costs. Only the avoided costs was considered in this count.

Since RAM did not conduct acceptable monthly release detection for at least one year, it was estimated that the capital expenditure of $5,000 was delayed in installing an

Automatic Tank Gauging equipment to conduct monthly release detection properly.

Using a discount rate of the 7.8, with 3 percent inflation, 38.9 percent, and 366 days of avoidance, the avoided cost was $145.89 per UST, making the economic benefit total of $729.45 for the gravity -- for the -- I'm sorry, for the economic benefit.

Essentially, what I was saying, the method of release detection that they were using was the Inventory Control and Tank Tightness Testing method, which in this particular circumstance was not allowed because the tank was put in in 1990.

You can only use that method for 10 years afterwards. So they were going beyond the deadline for coming up with a monthly monitoring system.

Now, I used an Automatic Tank Gauging because that's normally what people use. That doesn't necessarily mean they had to go with an Automatic Tank Gauging; they could have went with some other monitoring device. However, even that would have probably been about a $5,000 investment, maybe more, maybe less. I had to use the best judgment I could.

Based on that, the gravity-based component for the matrix -- again, the fact that they were not doing a release detection that was allowable under the regs, there

were major -- major deviation from the regs. Also a major potential for harm, because they were not -- this method of release detection, the sticking and the -- and the testing of the tanks is basically a permanent -- was a -- was a temporary fix.

That's why they said in the regulations you can only use this method of release detection for 10 years after upgrade or 10 years after installation.

Q So was it possible for Respondent to have upgraded --

A No.

Q -- the tanks --

A No.

Q -- and be able to continue using that method?

A No, because the tank was not upgraded. It was considered a new tank because it was installed after December 22nd, 1988. It had to have all the bells and whistles on it when it went in the ground.

Q Is this true for all six tanks at this facility, at the Citgo Quik Mart?

A My understanding, yes. I don't have my notes in front of me, but I understand all the tanks were put in in 1990. I will have to look at my notes and see if that's correct, but I believe that's so.

Actually, this -- it would be the five tanks in this -- in this instance.

Q Right. In this count, there are five tanks.
A Right.
Q Question: In Count 4, you assess an economic benefit, and Count 3, there was not economic benefit assessed. Could you explain why?
A Yes, because this particular one, you had to install something.
THE COURT: That's Count 3?
THE WITNESS: Huh?
THE COURT: That's Count 3, you had to install something?
THE WITNESS: Count 3 was the --
Q (By Ms. Beaver:) Count 3, the same caption of violation: "Failure to Conduct Monthly Release Detection"; however, Count 3, it was for a tank that was supposedly in temporary enclosure.
A Right.
Q In Count 4, it was for the five tanks not in temporary closure.
A But this was the -- that's correct. This was in temporary closure. If the tank was empty, they wouldn't have had to have done anything.
So really, if they would have just not had any product in that tank, no more than an inch, there would not have to have been anything here.

However, this one, the Count 4, as to the other five tanks that were in operation, there would have had to have been some kind of capital expenditure to be able to have a monthly release detection.

So yet again, trying to be lenient on 3, I did not include any type of economic benefit in this one, but I did in this one, because something was going to have to be done here.

Q Okay. Mr. Cernero, what, if anything, can be taken into consideration in your penalty, given the fact that Respondent alleges that they were doing something, they were doing a method of testing.

Could the fact that they were doing a method of testing be taken into consideration in your penalty calculation?

A According to the regulation, using this method is not the correct method of release detection. Not only that is that it has been going on -- it was supposed to have stopped in 2000. This is five years later. I cannot see that that would be considered as an acceptable method of release detection.

Also, the fact is, you only have to test the tanks once every five years under that method. But yet that method, the Inventory Control and Tank Tightness Testing method, was never meant to be a permanent type of monthly

monitoring. It was -- it was allowed, but only for 10 years, because considering that tanks that were more than 10 years old should not be using that method.

Q And is that the case for a new tank and an existing tank?

A A new tank and an upgraded tank; you know, all of these have 10 years. And again, keep in mind, these tanks were put in in 1990. They were already -- they were already 15 years old -- 16 years old -- yeah, 15 years old when I was there. They were continually using that method, after -- I mean after all these years.

So again, a tank of that age should not -- in accordance with regulations, should not be using this method, because it's not -- it's -- it has not been proven that that type of -- that leaks down to .1 gallon per hour could not be detected by this. Or .2 gallon. I'm sorry; .2 gallon per hour could be detected with this method.

Given the fact that it's an older tank, the regs say you can't use it; and essentially, as far as I'm concerned, if it was one day or maybe you are still using it maybe a year later or six months later, it may have been considered, but now you are talking about it was used, you know, five years after the fact that they weren't supposed to be using it.

Q Did you have any notice that any of the -- any of

these five tanks were in temporary closure?

A No.

Q Was there ever any indication or notes that would evidence that these five tanks were under temporary closure?

A No. They were -- they -- as far as I was concerned, they were active. There was product being sold. The only one that I was able to say well, it probably was, was the diesel; however, it still had nine inches of product in it. And thus, it had to have some kind of release detection.

And again, they could have remedied it very easily; as soon as they put it in temporary closure is to pull the -- all the product out of it. They would never had to worry about measuring the product in that tank.

Q And what was your basis -- going back now to Count 3, what was your basis for determining that the tank in Count 3 was in temporary closure?

A I was told.

Q Who were you told by?

A I was told by the operator, and I was also told by Ms. Twilah Monroe that those were in temporary closure, although I had --

Q "Those" or "that"?

A Excuse me?

Q "Those tanks" or "that tank"?
A That tank, that particular tank.
Q In Count 3?
A Yes.
Q Does Count -- does Count 3 --
A Yes.
Q -- have one tank or more than one tank?
A Just one tank.
Q One tank? Thank you. Have you -- did you conclude your discussion of Count 4 sufficiently?
A I think I have. Essentially, that was a matrix of 1,500. There was no violator-specific increase or decrease. The environmental sensitivity was just 1. It had a factor for one year, they should have had release detection for at least one year; 366 days, factor of three, five tanks, ends up to be $22,500. And there was no -- and plus the economic benefit.

And again, the economic benefit was a delayed cost of putting equipment in, whether it's an ATG, monitoring wells, or some kind of a system in there that would be a monthly monitoring.

Again, I try to use my best judgment in how much it would cost, and I'm probably -- probably low, but I had to come up with some kind of rationale.
Q Okay. Thank you. We'll proceed now to Count 7,

since Counts 5 and 6 have been withdrawn.

Mr. Cernero, first, would you explain what Count 7 is --

A Okay.

Q And then --

A Right.

Q -- walk us through --

A Count 7 was, "Failure to Operate Cathodic Protection System Continuously." And I think this is -- I forgot what station this is. I think it was the Thrif-T -- my recollection is not really good which one this was. I think it was the --

Q Count 7, we've now -- exactly. The record -- it's been put on the record that count -- you know, the counts that each -- that correspond with each facility, and Count 7 does correspond to the Citgo Thrift or Thrif-T-Mart.

A Okay. And again, this one, we did not feel like the fact that they were not operating it continuously (sic). Again, the economic benefit did not seem -- I mean the -- yeah -- economic benefit seemed to be insignificant.

The only thing that they probably saved on was some electricity, and I don't think I have the knowledge or the information to determine what that electrical savings was, so I just basically said it would be insignificant even if

we did calculate what the economic benefit is, so that was zeroed out.

The only thing that we're dealing with on this one would be the gravity base. And again, I picked a matrix of the 1,500, because again, this is a major component of the UST program, is corrosion protection for steel tanks. Because if you have corrosion, you are going to end up with -- with leaks.

Again, the -- when we were out there -- when I was out there with the state, this particular facility, the cathodic protection system was not in operation, and so what we used was the matrix of 15.

We did not give any type of plus or minuses for violator-specific.

It was a non -- environmental sensitive area is 1; however, we used the date of the last CP test that was done --

Q Mr. Cernero, I need to interject and ask you to back up for me.

A Okay.

Q Regarding the matrix component.

A Okay.

Q Could you explain the -- why you calculated what you calculated for the matrix, regarding degree of harm and extent of deviation from the requirements for this count.

A The reason for -- again, deviation -- or potential for harm; 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.

Potential for 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: 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, also.

So the $1,500 was considered -- it was considered a major -- a major deviation from the regulations and a major potential for harm; therefore, it ended up to be a matrix of 1,500.

Q Mr. Cernero, you say that there was a high potential for release without the system operating. Why is that?

A Because without a cathodic protection system, the

corrosion will continue to occur; although it does slowly, it will continue to occur over a period of time. Given the fact that the tank -- some of the tanks that were there were already aged, failure to have cathodic protection is going to cause corrosion.

Q Okay.

A Corrosion will not be stopped.

Q Thank you. You were earlier getting into your explanation of the days of noncompliance. Could you explain your basis for the days of noncompliance?

A Okay. I had to determine when did the particular cathodic protection system fail? The only data that I had was a report that came out on March 14th of '04 that essentially said that there was -- one of the anodes was not up to the .85 volts or 850 millivolts, and should have been replaced. So it was an indication that that -- that was probably the time that it had failed, in my opinion.

It ends up to be 334 days of noncompliance. It was from that date to the date that I did the inspection.

Also, when I was there, I did turn the box on to see if there was current flowing. Current flowed for maybe about 20 seconds and then shut off. It indicated to me there was either some kind of a short or some kind of malfunction of the -- of the box.

Q Mr. Cernero?

A Yes.
Q How many times do you recall did you try to turn the system on?
A Twice. At least twice. We tried -- we tried to turn it on and we tried to get -- the inspector from OCC, we also tried to get a reading on it to see if we can get a -- see what the potential was. And we never did get the reading that was up to 850 millivolts.
Q And approximately how long did this system remain on before shutting off?
A Oh, maybe a minute or two. It did not stay on very long. So it indicated to me there was some -- some major problems with that particular piece of equipment.
Q And again, Mr. Cernero, at the time that you concluded your inspection, was the CP system still off?
A Yes.

MS. BEAVER: Your Honor, I'd like permission to approach the witness.

THE COURT: You may.

MS. BEAVER: Your Honor, I have Exhibit -- what's been marked as Respondent's Exhibit 23 in my hand, which is what Mr. Cernero referred to earlier.

Q (By Ms. Beaver:) Mr. Cernero, you referred just a minute ago to the component that was below the -- if I'm correct -- .850 millivolts.

A Right.
Q Did I characterize that correctly?
A Eight hundred fifty millivolts.
Q Eight hundred and fifty millivolts?
A Yes.
Q What component was that, based on the Respondent's Exhibit 23 that you have there?
A It was the unleaded -- unleaded pump, submersible pump. It said in the report by the company that did the readings, it said "the unleaded pump readings are low, cannot adjust" -- and it's hard to read what that says.

And then, "one five-pound anode would correct the problem."

The readings on that location that was said low was the location number 16 on the report, and it was below the 850 millivolts or .85 volts.
Q And in your -- and characterize for me, again, what your interpretation of that component is regarding this violation.
A It's the -- the component is the pump -- they call it the pump manifold, which is the -- the portion of the pump and motor that is visible from the surface. It does contain -- routinely contains product, it was in contact with the soil, it should be protected from corrosion. Apparently, the voltage that was being generated by the

anodes at that -- for that particular area was not sufficient.

Also, I look at the second -- the third page of this, at the rectifier reading, in 19 -- as late as December 1st of '99, for some reason, it shows that the volts and the amps were zero.

So I conclude, also, that at least for that particular year, most of the time, there was no current flowing into that rectifier box. So I used this as my time from when it started to fail.

Q Do you have any -- do you have any -- was there any evidence to show that the system had been repaired?

A No, I don't have any evidence.

Q Why -- if you look at -- the purpose of that piece of -- that document that you have there, the purpose of that is to record what?

A This is what they call the half-cell test; it's done at least -- it has to be done under regulations at least once every three years. And that's what this test was; it was to determine whether this cathodic protection system was actually operating properly in accordance with the regulations.

Q And does that document, Respondent's Exhibit 23, indicate that the corrosion protection system was operating properly on 3-19 of '04?

A It does say, "passed."

It says, "is the cathodic protection system working properly?" It says "yes," which is on 3-19 -- or yeah, 3-19-04.

Q So how do you reconcile, Mr. Cernero, the apparent discrepancy between the documents showing that the system passed for corrosion protection, and yet it has a component that's shown to be below the requirement.

A I don't -- either -- either it was missed, it was not passed, or it was not realized that it had -- it had failed. And the inspector or whoever, the company that did this said it did pass, or there was something happen between then and that, there was a repair. But there was no documentation, as far as that was given to me, that showed that this was ever repaired.

Q So in looking at Respondent's Exhibit 23, does that document indicate or communicate to you that a repair had been made --

A No.

Q -- on the system?

A No. It just -- it shows that there was a -- there was a deficiency. For some reason, it was shown that it did pass, or the contractor that did this said it passed. However, when I was in -- and also, this shows that there was no -- there was no current flowing through the

rectifier in '99.

I don't know what really all that means, but there is discrepancies. The fact that the cathodic protection system was not working while I was there definitely was in violation.

Now, when that violation actually occurred, all I had to go by is what the records were shown to me by Ms. Twilah Monroe, and in subsequent information I have received from the Respondent.

Q And have you received any evidence to this point that a repair had been made?

A Not to my knowledge, no.

Q Have you received anything?

A No, I have not received anything.

Q Okay. So that was -- you were discussing days of noncompliance, still on Count 7.

A Right. And because of the -- I went back to that report, knowing that at least at that time, there was a deficiency. I used that date, which it should have been -- well, I have 3-14-04, but it was 3-19 -- again to the date that I did the inspection was 331 (sic) days of noncompliance. The factor 2.5 was used.

And, of course, I already talked about the matrix was 1,500 times 1 times 1 times 2.5 times three tanks, ends up to be 11,250. We basically zeroed out the economic

benefit. So Count 7 ended up to be $11,250.

Q Okay, Mr. Cernero, moving to Count 8.

A Okay. Count 8 is "Failure to Test Automatic Line Leak Detectors Annually." And essentially, on this one, I I said the economic benefit component was evaluated for avoided costs and delayed costs. Only the avoided cost was considered in this count.

Since RAM, Incorporated, did not conduct annual tests of the Automatic Leak Detector every year, we assume that conducting the test would cost approximately $100 per UST for each year period.

Again, using the factor of 7.8 for the inflation, three percent for -- I'm sorry, 7.8 for the discount rate, three percent for inflation, and 38.9 percent for the tax rate, and 94 days of not -- of avoidance, the avoided cost was $63.65 per detector, Automatic Line Leak Detector, for the total of $190.95. Again, it wasn't all that much, but I went ahead and calculated it anyway.

As far as the gravity base is concerned, again, the failure to test these Automatic Line Leak Detectors is very important on an annual basis.

An Automatic Line Leak Detector is essentially a mechanical or electrical -- electronic mechanism that prevents a catastrophic leak from a pressurized line if it should break or it should be a massive leak. It's very

important.

On a pressurized system, EPA requires -- and the state does, also -- requires two mechanisms or two methods for preventing releases; one is the Automatic Line Leak Detector, which will prevent a catastrophic release. It will detect a three-gallon per -- three-gallon per hour leak.

And then it's also required that the lines be tested once -- at least once a year or have a monthly monitoring that would detect down to a .1-gallon per hour leak. So you have to actually have two mechanisms.

This particular count only has to do with Automatic Line Leak Detector. And under the regulations, Automatic Line Leak Detectors must also be checked on an annual basis to ensure that they're working.

It's very similar to an emergency brake on your car. If that emergency brake is not working and your brakes fail, you are -- you know, you are going to have a problem.

And it's required under the regulations that the Automatic Line Leak Detector be checked at least once a year, according to the manufacturer.

Therefore, I had to come up with a matrix. The matrix on this particular one was, again, major-major. Major potential for harm. If 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.

Deviation from the requirements. It says that you must have an Automatic Line Leak Detector checked at least once every 12 months.

COURT REPORTER: Excuse me. Would you slow down just a little bit?

THE WITNESS: Oh, I'm sorry.

COURT REPORTER: Thank you.

THE WITNESS: So therefore, the matrix was $1,500 in this particular case. There was no violators -- do you have any questions?

Q (By Ms. Beaver:) I do. My question is, if you can explain for me your period of noncompliance.

A Okay.

Q And how you calculated the period of noncompliance.

A Apparently -- in this particular situation, the test for the Automatic Line Leak Detector was due -- the first test I had, I think it was November 14th of '04 -- '03, I'm sorry.

The next test should have been done by November 14th of '04. So the violation was from November 14th, '04, when it was supposed to have been done -- that was the 12-month span of time that it had to be -- it was the last

day it could have been done to be in compliance.

However, it was not done at the time of the inspection of February 16th, '05; therefore, it ended up to be 94 days of noncompliance, which is a factor of 1.5.

And the matrix is 1,500.

The violator-specific was 1.

Sensitivity is 1.

Days of noncompliance is 1.5 times three tanks, ended up to be $6,750.

MS. BEAVER: May I have a second, Your Honor, please?

THE COURT: Sure.

(An off-the-record conversation was held, after which the following continued:)

MS. BEAVER: Thank you, Your Honor.

Q (By Ms. Beaver:) Okay. Mr. Cernero, let's see. I don't know if there are any missing components of Count 8 that we need to explain. I think you covered them all.

A Okay.

Q Okay. Count 9.

A Count 9 was "Failure to Test Pressurized Lines Annually for Use -- or Use Monthly Monitoring."

The economic component was evaluated for avoided cost and delayed cost only. Or only -- or only the avoided cost, I'm sorry, was considered for this count.