

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY 06

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BEFORE THE ADMINISTRATOR

REGIONAL HEARING CLERK
EPA REGION VI

COPY

IN THE MATTER OF)
RAM, INC.,) Docket No.
) SWDA-06-2005-5301
RESPONDENT)

VOLUME I OF III

TRANSCRIPT OF PROCEEDINGS

HEARD ON THE

9TH, 10TH, and 11TH DAYS OF MAY, 2006

BEFORE SPENCER T. NISSEN,

ADMINISTRATIVE LAW JUDGE

Reported by: HEATHER SCOTT, CSR-RPR

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THE COURT: The hearing will be in order.
We will open the hearing in the matter of
RAM, Incorporated, Docket Number SWDA-06-2005-5301.

My name is Spencer Nissen. I'm an
Administrative Law Judge assigned to hear and decide
this case.

Will the parties please enter their appearances?
For the Complainant.

MS. DIXON: Good morning, Your Honor. My name
is Lorraine Tunley-Dixon. I am an attorney for the
Complainant. And this is my co-counsel, Yerusha
Beaver.

THE COURT: Okay. Thank you.
And for the Respondent.

MR. SHIPLEY: Your Honor, Charles Shipley,
Robert Kellogg, and Jamie Boyd; Shipley & Kellogg.
We're from the Tulsa office; Mr. Kellogg is from the
Oklahoma City office, for the Respondent.

THE COURT: Okay. Thank you.

This proceeding, under Section 9006 of the Solid
Waste Disposal Act, as amended, (42 USC Section
6991c) (sic), was commenced on August 19th, 2005, by
the issuance of a Complaint, Compliance Order, and

1 Notice of Opportunity for Hearing, by the Director of
2 the Multimedia Planning and Permitting Division, US
3 EPA, Region 6, charging Respondent, RAM, Inc., with
4 violations of Oklahoma Underground Storage Tank
5 regulations, found at Title 165, Oklahoma Corporation
6 Commission -- otherwise referred to as OCC -- Chapter
7 25, Underground Storage Tank Regulations, cited as
8 OAC 165.25.

9 Solid Waste Disposal Act Section 9004, (42 USC,
10 Section 6991c), authorizes the Administrator to
11 review and approve a State underground storage tank
12 release detection, prevention, and correction
13 program, provided it meets certain requirements and
14 is no less stringent than the corresponding standards
15 promulgated by the Administrator under Section
16 6991b(a).

17 The Oklahoma UST program was approved by EPA on
18 August 12th, 1992, (57 Fed. Reg. 41874), and became
19 effective on October 14th, 1992.

20 Notwithstanding approval of a State UST program,
21 the only condition to enforcement of the State
22 program by the Administrator is that notice be given
23 to the State having an approved program and in which
24 the violation -- alleged violation -- occurred prior
25 to issuance of a Compliance Order, or the notice is

1 to be given prior to the issuance of a Compliance
2 Order or the commencing of a civil action under
3 Section 6991c(a)(2). (Sic.)

4 The complaint herein alleges that notice of the
5 action was given to the State prior to the issuance
6 of the complaint.

7 Violations recited in the complaint are alleged
8 to have been observed at the time of inspections on
9 February 16th and 17th, 2005, at USTs at the
10 following facilities owned and operated by RAM:
11 Citgo Quik -- that's Quik Mart, Q-U-I-K Mart; and
12 Citgo Thrift -- and the "thrift" is not pronounced --
13 or not spelled like "thrifty," but "thrift-T-Y" (sic)
14 Mart in McAlester, Oklahoma; at Goodwin's One Stop,
15 Hartshorne, Oklahoma; and Monroe's Service Station,
16 and Longtown Citgo, Eufaula, Oklahoma.

17 RAM submitted documentation to the OCC to
18 register USTs at the mentioned facilities, and it is
19 alleged the USTs routinely contain regulated
20 substances, normally petroleum-related substances, as
21 defined in OAC Section 165:25-1-11, or 40 CFR Section
22 280.12.

23 Counts 1 through 5 concern violations of
24 Oklahoma UST regulations allegedly observed at the
25 time of inspections of Citgo Quik Mart on

1 February 16th and 17th, 2005.

2 Count 1 alleges failure to provide spill
3 prevention for three new tanks; that is, from the
4 date of installation, October 1st, 1990.

5 Count 2 alleges failure to provide adequate
6 spill prevention capacity for all USTs at the
7 mentioned facility.

8 Count 3 alleges failure to conduct monthly
9 release detection monitoring of a tank during
10 temporary closure.

11 And Count 4 alleges failure to conduct release
12 detection monitoring for tanks.

13 And Count 5 alleged a failure to document that a
14 corrosion expert designed a field-installed cathodic
15 protection system.

16 Now, it's my understanding that Complainant has
17 agreed to withdraw Count 5.

18 MS. DIXON: That's correct, Your Honor.

19 THE COURT: We can handle that, and you can --
20 when you make your opening statement, you can go down
21 a list of the items or the charges that the
22 Complainant is presently dropping. I believe that
23 also applies to Count 6, which we'll get to in a
24 minute.

25 For these alleged violations, Complainant

1 proposes penalties of 27,413.93 for Count 1; 9,000
2 for Count 2; 4,500 for Count 3; 22,239.43 (sic) for
3 Count 4; and 18,827.86 for Count 5. Count 5, of
4 course, has now been dropped.

5 Counts 6 through 9 concern violations allegedly
6 observed at Citgo Thrif-T-Mart.

7 Count 6 alleges failure to document that a
8 corrosion expert designed a field-installed cathodic
9 protection system. That, again, is one of the counts
10 that I believe EPA has agreed to drop.

11 Count 7 alleges failure to operate cathodic
12 protection systems continually.

13 Count 8 alleges failure to test automatic line
14 leak detector annually.

15 And Count 9 alleges failure to test pressure
16 lines annually.

17 Complainant proposes penalties of 9,413.93 for
18 Count 6; 11,250 for Count 7; 6,491 for Count 8; and
19 6,400 -- no, 6,941 for Count 9.

20 Counts 10 through 13 allege violations observed
21 at Goodwin's One Stop at inspections on February 16th
22 and 17th, 2005.

23 Count 10 alleges failure to provide adequate
24 spill prevention for tanks.

25 Count 11 alleges failure to document that a

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corrosion expert designed a field-installed cathodic protection system. That, I believe, again, is one that EPA has agreed to drop.

Count 12 alleges failure to conduct detection.

And Count 13 alleges failure to test cathodic protection systems for metallic flex connectors within six months of installation, and every three years thereafter.

Complainant proposes penalties of 1,500 for Count 10; 9,413.93 for Count 11; 13,500 for Count 12; and 12,624 for Count 13.

Counts 14 through 17 concern alleged violation at Monroe's Service Station, which was allegedly temporarily closed at the time of EPA inspections.

Count 4 -- 14 alleges failure to conduct release detection for tanks which were temporarily closed.

Count 15 alleged failure to operate corrosion protection system for tanks when in temporary closure.

Count 16 alleges failure to test cathodic protection systems for metallic flex connectors within six months of installation, and then every three years thereafter.

And Count 17 alleges failure to conduct an integrity test prior to installing a cathodic

1 protection system.

2 Complainant proposes a penalty of 1,500 for
3 Count 14; a penalty of 16,500 for Count 15; a penalty
4 of 18,347.11 for Count 16; and a penalty of 19,534.34
5 for Count 17.

6 Counts 18 through 20 concern alleged violations
7 at Longtown Citgo station.

8 Count 18 alleges failure to conduct tank
9 tightness testing every five years when using the
10 inventory and tank tightness testing method for
11 release detection.

12 Count 19 alleges failure to document that a
13 corrosion expert designed a field-installed corrosion
14 protection system.

15 And Count 20 alleges failure to conduct an
16 integrity test prior to installing a cathodic
17 protection system.

18 Complainant proposes a penalty of 37,206.91 for
19 Count 18; a penalty of 12,551.91 for Count 19; and a
20 penalty of 19,549.34 for Count 20.

21 The total penalty proposed for all counts is
22 \$279,752.04.

23 Now, as I mentioned earlier, Complainant has
24 agreed to drop certain of these counts, and Ms. Dixon
25 will so elaborate that when she makes her opening

1 statement. Excuse me.

2 RAM answered under date of October 11th, 2005,
3 admitting certain factual allegations in the
4 complaint, but denying others. Alleging, among other
5 things, that its facilities had been inspected many
6 times by the Oklahoma Corporation Commission and
7 found to be in compliance; that the penalty was
8 improperly calculated, and was in -- excessive for
9 various reasons, including that the alleged violation
10 should have been considered a single process
11 violation rather than multiplied by the number of
12 tanks involved; and that some of the periods of
13 alleged noncompliance were, in fact, periods of
14 compliance; that the proposed penalty is
15 disproportionate to the harm and the gravity of the
16 violations; and because Respondent lacks the ability
17 to pay such a finance -- such a -- such a penalty and
18 to finance compliance.

19 Additionally, Respondent says that the proposed
20 penalty should be mitigated, because Respondent
21 justifiably relied on independent contractors and
22 consultants for compliance with the requirements at
23 issue.

24 RAM requested a hearing.

25 The parties have exchanged prehearing

1 information in accordance with an order of the ALJ,
2 and conducted a limited amount of discovery --
3 additional discovery pursuant to Rule 22.19(e).

4 Respondent's request for copies of all EPA
5 inspection records and subsequent enforcement
6 documents -- including warning letters, notices of
7 violation, administrative complaints and settlement
8 agreements -- with regard to UST facilities located
9 in the State of Oklahoma, including those operated by
10 Native American tribes and/or located in Indian
11 Country, was denied upon the basis of the rule
12 that -- because settlements involve a myriad of
13 factors and are thus not relevant to what may be an
14 appropriate penalty in the instant proceeding, and
15 because of Complainant's contention that compliance
16 with request -- request was unduly expensive and
17 burdensome.

18 This hearing will be conducted in accordance
19 with the Consolidated Rules of Practice Governing the
20 Administration -- Administrative Assessment of Civil
21 Penalties, 40 CFR Part 22.

22 Complainant has the burden of establishing the
23 violations alleged in the complaint, and the
24 appropriateness of proposed penalties, and will
25 present its evidence first.

1 Witnesses will be sworn and subject to cross --
2 direct and cross examination in the usual manner for
3 nonjury trials.

4 A copy of each document or exhibit offered or
5 proffered in evidence should be presented to the
6 court reporter at the time of the proffer.

7 All factual matters in dispute will be decided
8 by a preponderance of the evidence.

9 After Complainant has completed the presentation
10 of its evidence, Respondent will have an opportunity
11 to present its case.

12 Under the Rules applicable to this proceeding,
13 Respondent must make its own arrangements for a copy
14 of the transcript.

15 After receipt of a copy of the transcript or
16 notification by the Regional Hearing Clerk of its
17 availability, each party will have 45 days in which
18 to serve proposed findings and conclusions, and a
19 brief in support thereof.

20 Thereafter, each party will have 30 days from
21 the date of service of the opposing party's
22 submission in which to serve a reply brief.

23 After briefing is completed, this proceeding
24 will be ready for decision. Any decision I render
25 will be an initial decision; which, unless appealed

1 in accordance with Rule 22.30, or unless the
2 Environmental Appeal Board elects to review the same
3 sua sponte, will become the final decision of the EAB
4 and the agency.

5 At a prehearing conference this date, the
6 parties reached certain stipulations, as I understand
7 it, and I'll allow you to read those into the record
8 along with -- after you have completed your opening
9 statement, Ms. Dixon. So you may proceed.

10 Do you have any comments or objections,
11 Mr. Kellogg?

12 MR. KELLOGG: No, Your Honor. Thank you.

13 THE COURT: Proceed, Ms. Dixon.

14 MS. DIXON: May it please the Court.

15 To start off, Your Honor, Complainant would like
16 to acknowledge that it drops Counts 5, 6, 11, 13, 18,
17 and 19 that was filed in the initial complaint on
18 August 19th, 2005.

19 Your Honor, this is a case about taking
20 responsibility. A case about making sure that owners
21 of Underground Storage Tanks comply with the
22 established rules and regulations.

23 This case is about sending a message of
24 deterrents for those who refuse to be responsible for
25 environmental actions.

1 This case states there will be consequences if
2 you fail to comply. Because if we remain silent,
3 Your Honor, the result is polluted ground water,
4 drinking water, and contaminated land.

5 Your Honor, the Complainant brings this action
6 pursuant to the Hazardous and Solid Waste Amendment
7 of 1984, in which Congress added Subtitle I, The
8 Resource Conservation Recovery Act.

9 The statutory framework for the national UST
10 program is set forth in Sections 902 through 904 of
11 Subtitle I.

12 The UST regulations are found under Title 165 of
13 the Oklahoma Corporation Commission, Chapter 25 in
14 the Federal Regulations, found at 40 CFR 280.

15 Your Honor, it is uncontested that the
16 Respondent, RAM, Incorporated, is the owner of all
17 the USTs -- Underground Storage Tanks -- at issue
18 today.

19 It is also uncontested that inspection took
20 place at Citgo Quik Mart, Citgo Thrif-T-Mart,
21 Monroe's Service Station, Goodwin's One Stop, and
22 Longtown Citgo, on February 16th and 17th of 2005.

23 The evidence will show that the inspections were
24 joint inspections with the Oklahoma Corporation
25 Commission, and that the U.S. Environmental

1 Protection Agency, Region 6 -- the Environmental
2 Protection Agency had the lead in the inspections,
3 pursuant to the MOU between EPA and OCC. The notice
4 requirements were followed.

5 The evidence will also show that prior to the
6 final inspections, EPA had serious concerns about
7 RAM's operations.

8 Mr. Greg Pashia, an employee of the
9 Environmental Protection Agency will explain to the
10 Court why he inspected RAM's facilities and
11 Underground Storage Tanks.

12 You will also hear from Mr. John Cernero.
13 Mr. Cernero, he will walk you through each count
14 alleged today.

15 He will walk you through what he saw during his
16 inspections of the Underground Storage Tanks owned by
17 RAM.

18 He will walk you through why he decided to
19 pursue an enforcement action against the company, and
20 the concerns he had for the potential threat to human
21 health and the environment.

22 And then, Your Honor, Mr. Cernero will walk you
23 through his analysis of how he calculated each count,
24 the proposed penalty for the violations discussed
25 today. And at the end of this explanation, the

1 evidence will show that the proposed penalty is fair
2 and just in the instant case.

3 Now, Your Honor, you will also hear some of the
4 following: "It's not my fault. Someone else was
5 supposed to do it. I relied upon a third party. OCC
6 didn't tell me something was wrong. EPA has targeted
7 me." But none of these excuses relieves RAM from
8 their obligation and responsibility to comply with
9 the UST regulations.

10 The evidence will show RAM was not a responsible
11 environmental actor, and this hearing is a
12 consequence of those inactions.

13 Accordingly, at the close of all the evidence,
14 we will ask that the Court find RAM liable for 14
15 counts of the Underground Storage Tank provision, and
16 assess a penalty in the amount of \$179,713.07.

17 Your Honor, at this time, I will read the
18 stipulations into the record.

19 THE COURT: You may do so.

20 MS. DIXON: The following evidence has been
21 agreed upon as a stipulation, Your Honor.

22 The first is Exhibit 1. It is now labeled as
23 CTX-1, Government Exhibit CTX-1. It is a copy of
24 EPA's inspection report conducted on February 16th
25 and 17th of 2005.

1 The second is Government's Exhibit CTX-2, which
2 was previously marked Government's Exhibit 2 in the
3 prehearing exchange.

4 The third is Government Exhibit 3 in the
5 prehearing exchange, which we have now as CTX-3; we
6 have now identified CTX-3.

7 Is there an easier way, Your Honor, that you
8 prefer to do this?

9 THE COURT: Proceed the way you are.

10 MS. DIXON: Okay.

11 THE COURT: It will avoid confusion, I believe.

12 MS. DIXON: Okay. The next exhibit is
13 Government's Exhibit 5 -- I'm sorry, 4 -- which was
14 previously labeled Government's Exhibit 4 and is now
15 labeled CTX-4.

16 The next exhibit is Government Exhibit 5 in the
17 prehearing exchange; now labeled as CTX-5.

18 The next exhibit is Government Exhibit 6 in the
19 prehearing exchange that is now labeled Government
20 Exhibit CTX-6.

21 The next exhibit is CTX-7, which was previously
22 identified as Government Exhibit 7 in the prehearing
23 exchange.

24 THE COURT: Well, let me ask this. Maybe there
25 is a way to speed this up, Ms. Dixon. How many

1 exhibits does this stipulation cover?

2 MS. DIXON: Respondent has agreed to stipulate
3 to all of the Complainant's -- wait -- exhibits
4 through 29; 1 through 29 of Complainant's.

5 THE COURT: Yeah, okay. Why don't you do it
6 that way. And then these are -- Exhibits 1 through
7 29 are now CPX Exhibits 1 through 29.

8 MS. DIXON: Okay.

9 THE COURT: Would that --

10 MS. DIXON: Thank you, Your Honor.

11 THE COURT: -- speed up the situation?

12 MS. DIXON: Yes. And there was one additional
13 exhibit, Government's Exhibit CTX-30, which says,
14 "yes, upon review."

15 MS. BOYD: It is -- it is, as I understand it,
16 basically a printout of the regulations for the
17 Underground Storage Tank program in Oklahoma, a
18 complete printout of the entire regulatory provision
19 for 2004.

20 MS. DIXON: Correct. It does not include the
21 penalty provisions, however.

22 MS. BOYD: Penalty provisions are included in
23 the version that we have of 30.

24 MS. DIXON: Okay.

25 MS. BOYD: Thirty includes it, if I am reading

1 that correctly.

2 MS. DIXON: Well, that's -- that's fine, Your
3 Honor.

4 MS. BOYD: Here on the last page.

5 MS. DIXON: Okay. So yes to Government Exhibit
6 CTX-30, provided that the penalties aren't included?

7 MR. KELLOGG: Correct. Which is listed as
8 Appendix S. And I am not sure if you are referring
9 to the final subchapter of that. It's --

10 COURT REPORTER: Excuse me? I'm sorry.

11 MR. KELLOGG: Subchapter -- well, it's also
12 missing a sub -- no, here it is, 18.

13 Did you start with 10? Yeah.

14 We agree to Government Exhibit 30, Your Honor,
15 provided they also include Appendix S, which is known
16 as the fine citation table --

17 THE COURT: Okay --

18 MR. KELLOGG: -- as part of the regulation.

19 THE COURT: -- do you agree with that,
20 Ms. Dixon?

21 MS. DIXON: Yes, Your Honor. Regarding
22 Complainant's stipulations to Respondent's exhibits,
23 do you want me to go through that, as well, Your
24 Honor?

25 THE COURT: Yes.

1 MS. DIXON: Okay. Complainant agrees to Exhibit
2 Number 1.

3 Complainant objects to Exhibit Number 2;
4 however, we agree to Attachment 1, 2, 3, and 4,
5 included in Attachment 2 (sic).

6 Complainant agrees to Exhibits Number 3 through
7 46 of Respondent's exhibits; however, 44 is objected
8 to.

9 Regarding Exhibit 47, Complainant objects.

10 Regarding Exhibit 48, Complainant objects.

11 Forty-nine, 50, 51, 52, 53, and 54 is admitted,
12 so we stipulate to that.

13 Exhibits 55 through 60, Complainant objects to.

14 Exhibits 61 and 62, there is no objections, and
15 they are stipulated to.

16 Exhibit 63, Complainant objects to.

17 Exhibit 64, Complainant agrees to.

18 And 65 and 66 are objected to.

19 THE COURT: Okay. Thank you. Do you wish to
20 proceed with your opening statement, Ms. Dixon, or
21 are you through?

22 MS. DIXON: I'm through.

23 THE COURT: Okay. Thank you.

24 Mr. Kellogg, you may make an opening statement,
25 or you may defer until the opening of -- of your

1 case.

2 MR. SHIPLEY: If the Court please, Your Honor,
3 my name is Chuck Shipley; I'm with Mr. Kellogg and
4 Ms. Boyd. If the Court please, I'm going to take a
5 shot at the opening statement.

6 We -- we asked for a couple of minutes before we
7 begin our case to give you a couple of more detailed
8 opening statements, but let me give you a brief
9 summary in response to Ms. Dixon's brief summary.

10 And the opening is that we draw the Court's
11 attention to the overlaying regulatory structure that
12 the businessman in Oklahoma and in most states must
13 deal with. But there is also a unique aspect to the
14 regulatory structure that a businessman must deal
15 with when he is in the gasoline retailing business,
16 as is RAM.

17 And while we -- we agree, and don't have any --
18 any issue with the underlying fact that the USTs are
19 all owned by RAM, that many, if not most, of the
20 retail outlets and stations at which these USTs sit,
21 are part of another company's and person's ownership
22 and operation.

23 And we emphasize, we do not try to avoid
24 responsibility, our primary responsibility, our
25 client's, for complying with the UST regulations.

1 It is not -- when we bring forward evidence, our
2 theme with you will be: We, in large part, do not
3 disagree that there are violations as have been
4 denoted by the EPA.

5 But our principal issue here, Your Honor, is
6 that the -- the punishment determined to be
7 appropriate is so outrageously out of whack, that we
8 believe it to be violative of substantive due
9 process, and we therefore intend to show you what the
10 EPA publicizes on its website for the public's
11 guidance and the -- and the regulated community's
12 guidance.

13 It is not that we -- we are trying to avoid the
14 penalties. We are trying to make them in concert
15 with common-sensical understanding of community, this
16 regulated community, those who have USTs in retail,
17 commercial, gasoline sales.

18 The one thing that we find in Oklahoma which is
19 different in the regulatory system, is that there is
20 a substantial part of the regulatory -- of the retail
21 gasoline sales which are owned by tribal entities.

22 And the record shows or the evidence will show
23 you --

24 MS. DIXON: Your Honor, I apologize, but the
25 Complainant really has to object to the way the

1 Respondent is proceeding.

2 We find that the issues that Respondent are --
3 is addressing to the Court is irrelevant, immaterial,
4 and it has little probative value under 22.22(a) of
5 40 CFR.

6 THE COURT: Well, I think there is a danger here
7 that Mr. Shipley is getting into argument; which, of
8 course, an opening statement isn't supposed to be.
9 An opening statement is supposed to be an exposition
10 of facts that you intend to produce.

11 But I will allow you to proceed, if you don't
12 take too long, Mr. Shipley.

13 MR. SHIPLEY: I do not -- I do not intend to
14 take long at all, Your Honor. And the fact of the
15 matter is what we intend to summarize for you here.

16 The evidence that we will put before you will
17 show that the guidance that EPA publicly transmits to
18 the regulated community shows that over the past five
19 and a half years, five and a half years in UST
20 violations that they publish for public consumption
21 and guidance, there is no penalty which is within 50
22 to 100 times the size of what they are asking for
23 here.

24 There is no penalty above 3 or \$4,000 in a
25 five-and-a-half year period for all exactly the same

1 kind of penalties we have here.

2 And so when a businessman sits down to try to
3 monitor a widespread group of businesses, some of
4 whom are under the direct control of others, not --
5 that doesn't transfer his liability, but he
6 understands -- and he also has been inspected by the
7 agency that has primary responsibility, and they have
8 given him a pass for years.

9 It doesn't -- we don't have a record, and the
10 proof we will put on shows that the OCC has not been
11 complaining. The OCC -- the EPA points out it was a
12 joint inspection.

13 The proof that we will put on is that the day of
14 the inspection, the OCC inspector was called and
15 asked to join an EPA inspection; it wasn't a joint
16 operation.

17 We are here to try to show that substantive due
18 process is -- the facts will show that substantive
19 due process has been transgressed here, sir.

20 Thank you for your time. I'm sorry if I took
21 too long, but that's what our evidence will be today.

22 THE COURT: Well, let's see. The other cases
23 you are referring to, are they Oklahoma cases, or are
24 they just UST cases in general?

25 MR. SHIPLEY: I'm sorry. The cases that I refer

1 to are Oklahoma UST cases shown from federal fiscal
2 year 2000, 2001, 2002, 2003, 2004, and thus far in
3 the year 2005.

4 Those -- this is the -- this is the summary
5 that, as I said, is put out publicly by EPA for
6 guidance for the regulated community as to what
7 happens if you do not comply with the UST
8 requirements.

9 THE COURT: Well, are there a large number of
10 those cases, Mr. Shipley?

11 MR. SHIPLEY: There are roughly 60 --

12 MR. KELLOGG: Thirty-eight.

13 MR. SHIPLEY: I'm sorry. The EPA lists 38 of
14 such cases where they have issued penalties or asked
15 for penalties for failure to comply with UST guide --
16 UST operations within the state of Oklahoma. This is
17 all Region 6, all Oklahoma, all UST.

18 THE COURT: Okay. Thank you.

19 MR. SHIPLEY: Thank you, sir.

20 THE COURT: You may call your first witness,
21 Ms. Dixon.

22 MS. BEAVER: Your Honor, I know it's a bit
23 awkward, but can we just -- would it be okay to have
24 a five-minute recess?

25 THE COURT: Yes, we will -- we'll do that. We

1 can take a 10-minute recess.

2 MS. BEAVER: Thank you, Your Honor.

3 *****

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

6 THE COURT: You may proceed, Ms. Dixon.

7 MS. DIXON: Your Honor, at this time, the
8 Complainant calls Mr. Greg Pashia.

9 THE COURT: Do you have any objection to taking
10 an oath?

11 THE WITNESS: No, sir, I don't.

12 THE COURT: Raise your right hand.

13 Do you solemnly swear the testimony you are
14 about to give shall be the truth, the whole truth,
15 and nothing but the truth, so help you God?

16 THE WITNESS: I do.

17 THE COURT: You may be seated.

18 *****

19 GREGORY PASHIA

20 was called as a witness, and after having been
21 first duly sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MS. DIXON:

24 Q Could you state -- sorry. Could you state and spell
25 your name for the Court.

1 A Gregory Pashia: G-R-E-G-O-R-Y, P-A-S-H-I-A.

2 Q And where are you employed?

3 A U.S. Environmental Protection Agency, Region 6,
4 Dallas, Texas.

5 COURT REPORTER: I'm sorry? The address?

6 THE WITNESS: 1445 Ross Avenue, Dallas, Texas.

7 Zip code 75202.

8 Q (By Ms. Dixon:) How long have you and -- how long
9 have you been employed by the EPA?

10 A Approximately 16 year.

11 Q And what's your job title?

12 A Currently, my title is Environmental Engineer,
13 Compliance Officer in the Underground Storage Tank section
14 of the Multimedia Planning and Permitting Division.

15 Q Let's talk about your duties. What was the last
16 title or position, again, at EPA -- EPA?

17 A Compliance Officer.

18 Q Again, what was the other?

19 A Underground Storage Tank section.

20 Q Do you have any other job duties?

21 A I'm also the liaison or coordinator for the state of
22 Oklahoma UST Petroleum Storage Tank Division.

23 Q Okay. Let's talk about your duties as an oversight
24 coordinator for the state of Oklahoma. How long have you
25 been doing this?

1 A Approximately four years.

2 Q Okay. What does your job duty entail?

3 A I communicate with the OCC Petroleum Storage Tank
4 Division on various issues involving rules and regulation
5 changes, data collection of the compliance inspections
6 conducted each year by the state, cleanups conducted each
7 year by the state. We perform yearly reviews with the
8 state. And basically, I take the information together and
9 schedule the yearly review in Oklahoma City.

10 MS. DIXON: Permission to approach the witness,
11 Your Honor?

12 THE COURT: Yes.

13 (Respondent's Exhibit Number 52 was presented
14 for identification.)

15 Q (By Ms. Dixon:) Mr. Pashia, I'm showing you what has
16 been marked as Respondent's Exhibit Number 52. If you
17 could just take a look at that for me.

18 A Okay. I'm familiar with this document.

19 Q And what is this document?

20 A It's a Memorandum of Agreement between the US EPA
21 Underground Storage Tank Section, and the Oklahoma
22 Corporation Commission Petroleum Storage Tank Division for
23 the implementation of the regulations regarding
24 Underground Storage Tanks.

25 Q Are you familiar with what the Memorandum of

1 Understanding states about EPA conducting enforcement
2 actions in the state of Oklahoma?

3 A Yes, I am.

4 Q What does it say?

5 A It states that the EPA shall have -- implement the
6 Oklahoma regulations within the state regarding the
7 Underground Storage Tanks.

8 Q And does it say anything else about EPA's
9 requirements before taking enforcement action?

10 A Before we take enforcement actions and/or inspection,
11 we notify the state of our intention.

12 Q Let's talk about your duties as a Compliance Officer
13 for the Underground Storage Tank Division at EPA. What
14 does your job duty entail?

15 A I am a -- trained to conduct UST inspections
16 concerning all regulations that require USTs to perform
17 release detection and other requirements as far as
18 financial assurance, as far as releases and corrective
19 actions.

20 Q In your job capacity as an Underground Storage Tank
21 Compliance Officer for EPA, are you familiar with a
22 company by the name of RAM, Incorporated?

23 A Yes, I am.

24 Q And how are you so familiar?

25 A I am familiar with RAM, Incorporated, through an

1 inspection jointly conducted with OCC on November the
2 10th, 2004, in McAlester, Oklahoma.

3 Q And why did you decide to inspect RAM?

4 A That particular facility was among approximately
5 seven to nine facilities that we chose within Pittsburg
6 County, Oklahoma, to conduct inspections in 2004.

7 Q And what was the result of your inspection?

8 A The result of the inspection at the RAM facility,
9 McAlester, showed three violations to the UST regulations
10 concerning cathodic protection. And I'd have to have the
11 document, the inspection report, to refresh my memory
12 exactly.

13 Q That's not necessary. Let's just move on.

14 After you did the inspection, what did you do next?

15 A After the inspection, I briefed the attendant at
16 the -- the manager at the time; I think, again, his name
17 is Thomas Doll -- and about the issues I had discovered
18 during -- on the day of the inspection. And I left him an
19 observation report along with a -- what we call a field
20 citation, which is an expedited agreement to --
21 enforcement instrument to bring about compliance forth
22 from the facility owner concerning the deficiencies in the
23 UST regulations.

24 Q Was the issuance of a field citation the only
25 enforcement tool you could have used?

1 A No.

2 Q Why did you choose to issue the field citation?

3 A The field citation, again, is an expedited tool we
4 use to gain compliance, which is the main issue. It's a
5 Compliance Order with a Settlement Agreement.

6 If the person or the owner we issue the field
7 citation to agrees to correct the deficiencies in a timely
8 manner and pay the associated penalty, then no further
9 proceedings administratively are pursued.

10 Q Okay. And after the issuance of the field citation,
11 what happened next?

12 A After the issuance of the field citation, in December
13 of 2004, I received a call from Mr. John Roberts of the
14 Oklahoma Corporation Commission, who is the fuel
15 specialist in Pittsburg County for OCC, concerning an
16 Aboveground Storage Tank facility owned and operated by
17 RAM, Incorporated. And he -- he wanted advice on how to
18 report a release of product from that Aboveground Storage
19 Tank facility.

20 Q And after this call, what happened next?

21 A After the call, I gave Mr. Roberts the information on
22 who to contact concerning the AST. And that also raised
23 concerns within our section, the UST section, concerning
24 the operation of other facilities owned and operated by
25 RAM Corporation.

1 Q And could you explain to the Court why this raised
2 concerns?

3 A It -- normally, if we see a facility that has the
4 type of violations we discovered at the McAlester
5 facility, cathodic protection, et cetera, deficiencies,
6 that's of major concern.

7 Then when the report that an AST was not being
8 operated correctly came in, that raised, again, my concern
9 that RAM Corporation may have other deficiencies at the
10 other facilities that they owned and/or operated.

11 Q And what, if anything, happened next?

12 A I proceeded to work with our office to pull a Dun &
13 Bradstreet report of RAM Corporation to assess how many
14 facilities -- Aboveground and Underground Storage Tank
15 facilities -- they operated. And then in consultation
16 with my section chief, suggested that we take another look
17 at some additional UST facilities operated by RAM in
18 Oklahoma.

19 Q And were those other facilities inspected?

20 A Yes, they were.

21 Q And do you know who conducted the follow-up
22 inspections?

23 A John Cernerio, my coworker in the UST section.

24 MS. DIXON: Pass the witness, Your Honor.

25 THE COURT: You may proceed.

1 Mr. Shipley, are you going to cross examine?

2 MR. SHIPLEY: If I may have a moment, Your
3 Honor, to check this.

4 *****

5 CROSS EXAMINATION

6 BY MR. SHIPLEY:

7 Q Is it Pashia?

8 A That's close enough, sir.

9 Q Okay, thank you. My name is Chuck Shipley.

10 Mr. Pashia, did you indicate that you had worked for the
11 OCC for a while before you went to EPA?

12 A No, sir, I didn't -- never indicated that.

13 Q Misunderstood. Do you have knowledge of the amount
14 of money which was assessed for the spill that you spoke
15 of?

16 A The spill from the Aboveground Storage Tank --

17 Q Yes, sir.

18 A -- you are referring to? Yes, I do.

19 Q And how much was that?

20 A Approximately \$6,900.

21 Q All right. And did you find RAM cooperative when you
22 pointed out what needed to be done?

23 A At which facility are we talking about?

24 Q I'm sorry, I'm still focusing on the spill of the
25 aboveground tank.

1 A No, because I don't -- I am not involved with the
2 Clean Water Act. We -- I work under Subtitle I of the
3 Solid Waste Disposal Act.

4 The Clean Water Act regulates, under the SPCC plans,
5 the Aboveground Storage Tanks, so I referred that to our
6 Superfund Division where that program is operated.

7 Q All right.

8 COURT REPORTER: Your what division?

9 THE WITNESS: Superfund Division.

10 COURT REPORTER: Superfund?

11 Q (By Mr. Shipley:) All right. Just a second. I
12 gather, then, from your testimony, that you had no
13 dealings with the personnel at RAM about the Aboveground
14 Storage Tank leaking incident?

15 A No, sir, I did not.

16 Q All right. Did you participate in the determination
17 of the amount of the penalty for the aboveground spill?

18 A No, sir, I did not.

19 Q Are you aware of how much liquid was actually spilled
20 and released to the environment?

21 A No, sir, I'm not, because I didn't do the inspection.
22 I was just given information that a release had occurred.

23 MR. SHIPLEY: All right. Let me ask counsel
24 here about something.

25

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

3 MR. SHIPLEY: May I ask him if he has seen this
4 document? If I may, Your Honor, I wish to approach
5 the witness and ask him if he has seen a document
6 that is an EPA document addressed to Mr. Allford
7 concerning the aboveground tank spill that this
8 gentleman has testified about.

9 THE COURT: You may.

10 MS. DIXON: Your Honor, the Complainant objects.
11 The witness has already testified that he wasn't
12 involved in the actual calculation of the penalty.
13 He doesn't know --

14 THE COURT: That's correct. He has so
15 testified. But then Mr. Shipley, I think, is
16 entitled to ask him whether he's -- I'm going to
17 allow him, anyway, to ask Mr. Pashia whether he has
18 seen this document.

19 MR. SHIPLEY: If I may approach, Your Honor.

20 THE COURT: Yes.

21 MR. SHIPLEY: Thank you.

22 Q (By Mr. Shipley:) Mr. Pashia, I'm going to hand you
23 a document that was authored by Roberto Bernier; I'm going
24 to guess -- B-E-R-N-I-E-R -- Environmental Engineer, OPA
25 Enforcement, EPA Region 6, et cetera.

1 Perhaps I should ask, do you know who this
2 Mr. Bernier or Bernier is?

3 A No, I have never met the gentleman.

4 Q All right. May I ask you if you have seen this
5 document before? It is addressed to Mr. Allford
6 concerning the aboveground tank spill that you have
7 testified about. Have you -- have you ever seen that
8 document before?

9 A No, I have not.

10 Q All right. Thank you very much, and I will not ask
11 you further about that.

12 Let me ask, when Ms. Dixon asked you how you came to
13 inspect the RAM facility, your response was that there was
14 a group of seven to nine inspections which somehow came
15 up, that you looked at. What was the answer as to how
16 those seven to nine facilities were selected?

17 A The geographic area was picked; Pittsburg County,
18 Oklahoma.

19 Q By whom?

20 A The consultation with my Section Chief, Willie
21 Kelley, and the manager of the Compliance Office in
22 Oklahoma City, Butch Jeffers.

23 COURT REPORTER: Who?

24 THE WITNESS: OCC -- Butch Jeffers, OCC
25 Compliance Manager.

1 Every year, we conduct oversight inspections in
2 Oklahoma as part of my role as the oversight person
3 with the OCC Petroleum Storage Tank Division.

4 Q (By Mr. Shipley:) And you indicate that those are a
5 joint selection between your boss and Mr. Jeffers at the
6 OCC?

7 A On this occasion, the geographical -- geographic area
8 was selected jointly by us. On some occasions, I ask
9 management of OCC to go to a certain sector or area, a
10 geographic area within the state.

11 Q But you don't recall whether it was your suggestion
12 or whether it was Mr. Jeffers' suggestion as to the
13 geographic selection in this instance?

14 A Again, it's a -- for instance, the year before, I
15 selected truck stops, major truck stops in Oklahoma City.
16 This -- during 2004, it was a joint decision between
17 Mr. Jeffers and myself to concentrate on southeastern
18 Oklahoma and Pittsburg County.

19 Q And what was the basis upon which that selection of
20 concentration was made?

21 A Mainly, the geographic area; that this part of the
22 state was a part that we would go look at. Other part --
23 other times, we've gone to, like I said, Oklahoma City.

24 Within the cities, we've gone -- like I said, chosen
25 to look at a certain type of UST facilities, such as large

1 truck stops. At this particular time, it was the
2 southeastern area of Oklahoma.

3 Q I am -- I am still trying to determine what it was
4 about this geographical area --

5 MS. DIXON: Objection, Your Honor --

6 Q (By Mr. Shipley) -- that caught your attention.

7 MS. DIXON: -- asked and answered.

8 THE COURT: I will allow him to answer. Ask it
9 one more time. I believe it has been asked.

10 MR. SHIPLEY: He has told me that he has
11 selected this and has selected others, but I'm trying
12 to get the selection criteria, if he has any
13 knowledge as to why McAlester versus Weatherford, for
14 instance.

15 THE WITNESS: Well, mainly, it was on the
16 suggestion of the manager, Butch Jeffers, of the
17 compliance section of the OCC, that Pittsburg County
18 would be a good geographic area to look at.

19 Q (By Mr. Shipley:) Did he have concerns about rampant
20 violations in the Pittsburg County area?

21 A I can't answer that. We didn't discuss that detail,
22 we just discussed a geographic area.

23 Q How many joint inspections were made during 2004,
24 between EPA and the Oklahoma Corporation Commission, which
25 involved USTs?

1 A I believe only the seven -- I don't have the exact
2 number in mind, but the seven in Pittsburg County.

3 Q Just the -- just the Pittsburg County geographical
4 area --

5 A Yeah.

6 Q -- was the only one in 2004?

7 A We have limited resources that only allow us to do
8 one set of inspections per year.

9 Q All right. Of those seven to nine inspections, those
10 were all USTs?

11 A Yes, sir.

12 Q All right. How many of those USTs belonged to RAM?

13 A If memory serves me, one.

14 Q All right, sir. Were any of the other seven to nine
15 USTs found to be out of compliance with any -- any
16 standard that you were inspecting for?

17 MS. DIXON: Objection, Your Honor. Relevance.

18 THE COURT: Overruled. Proceed.

19 THE WITNESS: Would you repeat the question?

20 MR. SHIPLEY: Sure.

21 THE WITNESS: How many?

22 Q (By Mr. Shipley:) Were any of the other USTs that
23 you inspected on this joint inspection with the Oklahoma
24 Corporation Commission were found to be out of compliance
25 with any of the standards for which you inspected them?

1 A I don't know the exact number, but several.

2 Q Of the seven to nine, more than half?

3 A Yes, sir, more than half.

4 Q All right. Were any of those fined for the
5 violations that you found?

6 A Yes, sir, they were.

7 Q Which ones, sir?

8 MS. DIXON: Objection, Your Honor. Relevance.

9 THE COURT: Overruled.

10 THE WITNESS: Which ones?

11 MR. SHIPLEY: Yes, sir.

12 THE WITNESS: I don't have that information with
13 me.

14 Q (By Mr. Shipley:) All righty. Can you give us the
15 order of magnitude of the type of fine which was given to
16 any of those, say, four or five facilities?

17 A In relationship to the fine that was connected with
18 the field citation with the RAM facility?

19 Q I believe we have that one. I guess I would be
20 interested in -- and again, if there was a majority of
21 seven to nine inspections where you found USTs in
22 violation, other than RAM, do you remember the size of the
23 fine issued in the field citations to any of the other
24 facilities?

25 A Not exactly. I wasn't prepared to answer this --

1 this -- these type of questions in depth. But
2 recollecting, I would guess that some of the penalties
3 associated with the field citations were more than RAM,
4 and some were less.

5 Q Okay.

6 A RAM probably was closer to the top, but there was, I
7 believe, another facility that -- that had a higher
8 penalty involved with the field citation issue.

9 Q Do you remember the name of that facility?

10 A No, sir, I do not.

11 Q All right, thank you. Moving on.

12 The field citation was issued for the underground --
13 or UST violations that you found in December of 2004, I
14 believe you said.

15 A November.

16 Q I'm sorry, November of 2004?

17 A November 10.

18 Q All right. Thank you, sir. And you had no contact
19 with any personnel associated with the RAM UST violations
20 that you found in 2004?

21 A No, I talk -- I interviewed and we did a closing
22 interview with the manager of the facility that day, and I
23 do believe I also spoke with a lady at the office of RAM,
24 Incorporated, on the telephone, and I do recollect she
25 probably did bring me some records on that day or after.

1 I don't remember exactly the sequence, but yes, I had
2 conversations with employees of RAM, Incorporated.

3 Q Was the manager of the site -- let me change that.
4 This site, where you found UST violations, was this a
5 retail operation that was owned by RAM, or was it
6 separately a UST that was owned by RAM at another
7 company's retail facility?

8 A I don't really have the information of the
9 ownership/operator relationship. On the day of the
10 inspection, I was told by the person I interviewed that he
11 was the manager of the Citgo Quik Lube that was owned by
12 RAM, Incorporated.

13 Q Okey-doke. Thank you, sir. And the lady on the
14 phone, was it Twilah, by any chance?

15 A Her first name was Twilah; I don't recollect her last
16 name.

17 Q Did you find her cooperative?

18 A Yes, she was very cooperative.

19 Q All right. Was the manager cooperative?

20 A Yes, he was. Generally, when we do our inspections
21 during normal business hours, they have other things to
22 tend to, people coming in for service, because it is an
23 oil change facility. But he knew where some of the
24 records were, he didn't know where other records were that
25 I needed to inspect.

1 Q Thank you, sir. Then you indicated the next time, I
2 believe, that you had occasion to hear of RAM was when
3 Mr. Roberts of the OCC called you about an aboveground, an
4 ABT, aboveground tank that spilled. And I understand your
5 testimony was that you wanted -- pardon me -- that
6 Mr. Roberts wanted to ask you how to handle that location.

7 A I wouldn't couch it as "handling"; he just wanted to
8 know who we should contact -- who he should contact
9 concerning that. Because he knew that my section didn't
10 regulate Aboveground Storage Tanks, ASTs, but he knew me
11 as a contact with EPA.

12 Q And you gave him that, and he proceeded. And I
13 gather you didn't have anything else to do with the
14 aboveground tank spill issue?

15 A Only that I submitted the telephone Record of
16 Communication to the Aboveground Storage Tank inspector,
17 who would be responsible to give further advice to
18 Mr. Roberts and to the owner of the AST.

19 Q All righty. Just a moment.

20 I had asked you earlier what the amount of the
21 citation was, field citation for others than RAM, but I
22 failed to ask you, what -- what was RAM's citation amount
23 for the initial inspection where you found issues?

24 A At the Citgo Quik Lube, the field citation amount was
25 \$750.

1 Q All right, sir. And to your knowledge, did they pay
2 that?

3 A Yes, sir, they did.

4 Q All right. And the -- the MOU, which is entered in
5 this case as Respondent's 52, which you referred to
6 earlier -- and as I understand the MOU, correct me if I'm
7 wrong, the state OCC has given primary responsibility for
8 inspection of the USTs, as well as other facilities in the
9 state of Oklahoma; is that correct?

10 A Could you repeat that question? That sounded a
11 little confusing to me.

12 Q Sure. I apologize. The MOU that you testified on
13 direct that you had knowledge of -- actually, it's an MOA;
14 I'm sorry, Memorandum of Agreement -- between Region 6 and
15 the State of Oklahoma, do you remember which agency, EPA
16 or the Oklahoma Corporation Commission, has primary
17 responsibility for inspection of USTs pursuant to that
18 MOA?

19 A Well, the way I would answer that question is yes,
20 the Oklahoma Corporation Commission Petroleum Storage Tank
21 Division enforces the federal laws, as well as the state
22 laws, through this Memorandum of Agreement, which is an
23 agreement that their -- this agency is given the authority
24 to do so and authorize, as long as the state laws are as
25 stringent or no less stringent than the federal law.

1 Q Yes, sir. And -- and under that policy, also, there
2 is an agreement that you will coordinate with the OCC --
3 you being Region 6 -- before you do inspections within the
4 State of Oklahoma.

5 My question is, with respect to those joint
6 inspections, how many -- you told us that during 2004, the
7 one event of a joint inspection was the one that occurred
8 around November 2004 in the McAlester area.

9 What joint inspections were there, if you know, with
10 the OCC in Oklahoma, of USTs in 2005?

11 (A siren was heard.)

12 A I'll wait for the siren.

13 Q Sorry. That's distracting to me, as well. Pardon
14 me.

15 A What joint -- how many --

16 Q Yes, sir.

17 A -- or what -- what inspections in 2005?

18 Q Yes, sir. Do you remember how many joint inspections
19 there were in 2005?

20 A Our fiscal year runs October through September. So
21 2005 would actually have been November of 2004.

22 Q Correct.

23 A And that's the way we keep track of things.

24 Q All right.

25 A So that counted as a 2005 inspection of -- the

1 Pittsburg County inspection counted as 2005.

2 Q All right, sir.

3 A They -- okay.

4 Q All right. So were there other joint inspections in
5 the fiscal year 2005?

6 A I believe so. I'm trying to remember exactly. I
7 think that, yes, I did some other inspections in central
8 Oklahoma, in and around Pauls Valley.

9 Q All right.

10 A Before the end of our fiscal year 2005.

11 Q Which would have been September 1?

12 A September. October 1.

13 Q Yeah, September 30th.

14 A Yes.

15 Q I'm sorry; September 30th in 2005.

16 A (Nods head.)

17 Q You have to speak. When you nod your head --

18 A Yes. That -- that -- that's right. That's correct.

19 Q Thank you.

20 A I'm sorry.

21 Q All right. None of the rest of those, then,
22 involve -- that you were involved in -- RAM?

23 A No, sir, they did not.

24 Q All right. Do you recall any of the violations that
25 you found in the rest of 2000 and -- fiscal year 2005

1 involving UST violations --

2 MS. DIXON: Objection, Your Honor, relevance.

3 THE COURT: Well, overruled.

4 Q (By Mr. Shipley:) Any of the other UST violations
5 that you were involved in inspecting during the fiscal
6 year 2005 exceed a \$5,000 fine?

7 A Five thousand dollars? No.

8 Q All right. Have you ever --

9 A Total.

10 Q Sorry.

11 A For one facility, no.

12 Q All right. Have you ever inspected a facility in
13 Oklahoma, while you're with EPA, and been involved with a
14 citation that exceeded \$5,000 for UST violations?

15 A No, I have not. And I could expand on that a little
16 bit, if you allow me. The expedited settlement procedure
17 of field citation is, again, as I explained, to get
18 immediate compliance.

19 We're more concerned with protecting the environment
20 than collecting penalties; therefore, the field citation
21 is not an administrative order where we don't use the
22 penalty policy we normally use for administrative orders.

23 It's a table we use that has been worked out by EPA
24 headquarters policy that is targeted at, yes, a deterrent
25 through monetary -- collecting of monetary penalty, but

1 the penalties are -- associated with these violations are
2 kept low. That's why I've never been associated with the
3 issuing of a field citation of up to or over \$5,000.

4 To my knowledge, this is the first case that RAM is
5 associated with where we've actually issued an
6 administrative order for UST violations in Oklahoma, a
7 federal UST administrative order.

8 Q All right, sir. Are you aware of any enforcement in
9 the State of Oklahoma by EPA against any Indian-owned --

10 MS. DIXON: Objection, Your Honor, relevance.

11 Q (By Mr. Shipley) -- and operated UST?

12 THE COURT: Overruled.

13 THE WITNESS: Could you repeat the question,
14 please?

15 Q (By Mr. Shipley:) Yes, sir. Are you aware of any
16 inspection -- first, any inspection by EPA of any
17 Indian-owned and operated UST in the state of Oklahoma?

18 A Yes, I am aware of inspections conducted at
19 tribally-owned facilities in the state of Oklahoma.

20 Q By EPA?

21 A Yes.

22 Q And are you aware of any situations where those
23 resulted in fines?

24 A No, sir, I'm not.

25 Q All right. Can you tell me when and where the

1 inspections were, if you remember, with respect to Indian
2 facilities?

3 MS. DIXON: Objection, Your Honor. This line of
4 questioning is irrelevant, it's immaterial, and it
5 adds -- adds little to no probative value to the case
6 at bar.

7 THE COURT: Well, I understand your -- where you
8 are coming from, Ms. Dixon, but I'm going to allow
9 this to continue for the moment. Overruled.

10 MR. SHIPLEY: We'll be very brief, Your Honor.
11 I understand your indulgence.

12 Q (By Mr. Shipley:) Do you remember the question?

13 A Would you please repeat that question?

14 Q I think -- I think the question was: Do you remember
15 where these inspections by EPA of Indian-owned UST
16 facilities were?

17 A Yes, I remember there are facilities inspected by the
18 EPA in Oklahoma. Where exactly, is your question?

19 Q If -- if you remember.

20 A And what time period are we talking about?

21 Q You -- you have been there four years?

22 A Yes, sir.

23 Q All right. Any time during your four years, are you
24 aware, during that period of time, in Oklahoma, of the EPA
25 inspecting Indian-owned facilities? And I believe you

1 said yes, and I'm trying to determine where those were.

2 A Well, there were many, and I cannot recollect or
3 enumerate the number. I can just throw out a -- one
4 facility that the EPA inspected on -- because the tribal
5 land -- tribal land is in trust to the U.S. Government,
6 the EPA is the only authority that inspects tribal
7 facilities, and under our policies, we are expected to
8 inspect these facilities regularly.

9 And since my tenure within the UST section beginning
10 in 2002, I have inspected several tribally-owned
11 facilities in -- across the state. And then we also have
12 a contractor who works for EPA that inspects tribal
13 facilities across the state of Oklahoma.

14 Q Have all of the facilities that you have inspected,
15 all of the tribally-owned facilities, been in full
16 compliance with the requirements of the UST regs?

17 A No, they have not.

18 Q Yet, you have never fined -- the EPA has never fined
19 one, correct?

20 A There is a policy from the Office of Enforcement and
21 Compliance Assurance that must be followed in order to
22 issue an administrative order. That policy does not allow
23 for the use, at this time, of field citations. So no
24 field citations have ever been issued.

25 Q All right.

1 A Only administrative orders are allowed.

2 Q Okay. Are you aware of any administrative orders
3 that have ever caused -- called for a fine of a
4 tribally-owned UST in the state of Oklahoma during your
5 tenure at EPA?

6 A Not at this time.

7 Q And you are aware, are you not, that the Indian
8 facilities that you've inspected -- correction; let me
9 rephrase that.

10 The Indian facility, tribally-owned UST facilities
11 that you have inspected, are or are not in business
12 competition with non-tribal retail --

13 MS. DIXON: Objection, Your Honor.

14 Q (By Mr. Shipley) -- gasoline establishments?

15 MS. DIXON: Your Honor, these issues were
16 already addressed prior to this proceeding with you,
17 and in preconferences. And again, Your Honor, we
18 object to the relevance, the probative value of this,
19 as well as it being immaterial.

20 THE COURT: Yes, well, I recognize that there's
21 some -- there's substantial basis for the argument
22 that it's irrelevant; but on the other hand, if -- if
23 there's a record to be made, that -- just for
24 example, I can assume -- see what Mr. Shipley is
25 going after.

1 And I discussed that point in -- in my chem lab
2 case where I was overruled by the Board. And what I
3 said was that under this -- under the EPA theory,
4 then there's no way that the Complainant or that the
5 Respondent can ever show that the agency was acting
6 arbitrarily, because they can't bring in this
7 other -- other material.

8 And I'll just say one other thing, and then I --
9 and that is that the courts don't necessarily
10 address -- buy that argument of the Boards, but this
11 is another matter. And what I would hope,
12 Mr. Shipley, is that you speed it up, expedite it.

13 MR. SHIPLEY: Your Honor, I -- with his final
14 answer, I believe that my line of questioning is
15 completed on this.

16 And I appreciate your time, and thank you very
17 much, sir, Mr. Pashia, for your bearing with me.

18 No further questions at this time.

19 Thank you, Your Honor.

20 THE COURT: Do you have any further redirect,
21 Ms. Dixon?

22 MS. DIXON: No, Your Honor, but I would just ask
23 that this witness be excused. He has to present
24 himself at a conference tomorrow in New Mexico, so he
25 needs to get on the plane.

1 THE COURT: Okay.

2 MR. KELLOGG: No objection, Your Honor.

3 THE COURT: Well, thank you, Mr. Pashia. You
4 may be excused.

5 You may call your next witness.

6 MS. BEAVER: May it please the Court, my name is
7 Yerusha Beaver, co-counsel for EPA. And at this
8 time, Your Honor, I'd like to call John Cernero to
9 stand, please.

10 THE COURT: Do you have any objection to taking
11 an oath, Mr. Cernero?

12 THE WITNESS: I can affirm.

13 THE COURT: Raise your right hand.

14 Do you solemnly swear the testimony you are
15 about to give shall be the truth, the whole truth,
16 and nothing but the truth, so help you God?

17 THE WITNESS: I affirm.

18 THE COURT: You may be seated.
19
20
21
22
23
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25

JOHN CERNERO

was called as a witness, and after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. BEAVER:

Q Mr. Cernero, would you state your name and place of employment and address and phone number for the record.

A Yes. My name is John Cernero. I work for the Environmental Protection Agency in Dallas, Texas.

THE COURT: Will you spell it, please?

THE WITNESS: C-E-R-N-E-R-O.

1440 -- I'm sorry. 1445 Ross Avenue, Dallas Texas, 75202.

MS. BEAVER: Your Honor, there are a couple of preliminary matters I'd just like to ask.

As far as Mr. Cernero's testimony, he's going to testify regarding liability and penalty, but I'd like to bifurcate and have him assess liability first, count for count, then pass the witness, redirect, and then recall him to discuss penalty. Is that okay?

THE COURT: That's fine with me. Proceed.

MS. BEAVER: Okay. And I also have some exhibits that I'd like to use for demonstrative purposes. But actually, those are for the penalty

1 phase, so I will hold off on discussing those with
2 Respondents and the Court.

3 MR. SHIPLEY: Your Honor, we'll stipulate to
4 liability in order to move this along.

5 I want to underline and underscore the point
6 that I tried to make in opening; we are not here to
7 avoid responsibility or liability. We stipulate to
8 liability in each and every case. Many of them I'll
9 mention appear to be technical; but nonetheless, we
10 are liable.

11 Thank you, sir.

12 THE COURT: Then that, of course, excludes the
13 counts for which the Complainant has agreed to drop
14 the complaint.

15 MR. SHIPLEY: Of course. I'm sorry. Implicit
16 in that is the standing counts that they have not yet
17 dropped, we accept liability for them.

18 THE COURT: Thank you.

19 MS. BEAVER: Okay.

20 THE COURT: You may proceed, Ms. --

21 MS. BEAVER: So then I'm assuming, then, the
22 necessity is to proceed with penalty?

23 THE COURT: Yes.

24 MS. BEAVER: If I can have a moment, Your Honor,
25 to get my demonstrative aids.

1 THE COURT: Off the record.

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

4 MR. KELLOGG: Your Honor, our representative is
5 here.

6 MR. SHIPLEY: Your Honor, just for your
7 information, the gentleman that's joining us at
8 counsel table, Mike Majors, is a consultant for us
9 and for RAM in these compliance issues, so just for
10 the record.

11 MS. BEAVER: Okay. Your Honor, what I have are
12 some exhibits marked Complainant's Trial Exhibits A
13 through J. And basically, what I'd like to use these
14 for are demonstrative purposes. These are basically
15 blowups of exhibits that appear in the record or in
16 the Complainant's exhibit list. And basically, they
17 are each count -- the counts for each penalty
18 basically enlarged.

19 THE COURT: You can put them on the easel.

20 MS. BEAVER: And there's an easel, yeah.

21 THE COURT: Yes.

22 MS. BEAVER: And I am going to bring these up
23 there and let Mr. Cernero walk us through them when
24 it's appropriate in the testimony.

25 And then also, I have portions from the penalty

1 policy that he will walk us through, as well.

2 MR. SHIPLEY: Your Honor, would it be possible
3 for me to either move a chair around here so I can
4 see --

5 THE COURT: Yes.

6 MR. SHIPLEY: -- the easel --

7 THE COURT: Yes, I recognize that Respondent had
8 somewhat of a --

9 MR. SHIPLEY: We need you to be able to see it,
10 as well as the witness, and us, too, so....

11 MS. BEAVER: Would Your Honor be able to see if
12 it's here, or is there a better place?

13 THE COURT: No. Well --

14 MS. BEAVER: Is there a better --

15 THE COURT: Then how -- then Mr. Cernero can't
16 see it, can he?

17 MS. BEAVER: I could actually bring -- well, I
18 was going to have him actually interact with the
19 aid --

20 THE COURT: Yeah.

21 MS. BEAVER: -- with the demonstrative aid.

22 THE COURT: That's all right, as long as he's
23 not blocking somebody's vision.

24 MS. BEAVER: Or -- is that okay with you, with
25 the Respondent?

1 MR. SHIPLEY: I'm sorry, I couldn't hear your
2 question.

3 MS. BEAVER: Mr. Cernero is going to actually
4 interact with the aid at certain points. And so we
5 can either have the exhibit over there, Your Honor,
6 next to the Complainant's area, or here.

7 THE COURT: Well, I think it's essential the
8 witness be able to -- to see it, and also Respondent.

9 MR. SHIPLEY: We have no objection to the
10 witness leaving the stand --

11 THE COURT: Yes.

12 MR. SHIPLEY: -- and pointing out --

13 MS. BEAVER: Is that location good for you guys?
14 That's fine? Okay.

15 MR. SHIPLEY: Okay. Thank you. This will be
16 okay for the Court?

17 MS. DIXON: Mr. Kellogg, would you like to come
18 up, as well?

19 MR. KELLOGG: I'm fine right here. Thank you.

20 MS. BEAVER: Okay. I think we have that
21 situated.

22 Q (By Ms. Beaver:) Mr. Cernero, I have a few
23 preliminary questions for you --

24 A Uh-huh.

25 Q -- before we get into the discussion of penalty.

1 In what capacity are you employed with EPA?

2 A I am an environmental engineer in the -- for EPA, and
3 am presently working in the Underground Storage Tank
4 program as an enforcement officer.

5 Q Okay. And is it correct that your -- your position
6 would commonly be referred to as an UST enforcement
7 officer?

8 A Yes.

9 Q How long have you been employed with the EPA?

10 A Over 30 years.

11 Q And how many of those 30 years have you been employed
12 as an UST enforcement officer?

13 A Approximately 17 years.

14 Q Seventeen? Could you please describe your major job
15 functions.

16 A My major function is to enforce the regulations
17 pertaining to Underground Storage Tanks; conduct
18 inspections, issue orders, field citations to achieve
19 compliance, training for state inspectors, tribal
20 inspectors, training for EPA inspectors. I participate a
21 lot in headquarters issues and policies. I testify.

22 I also am a program officer for the state of
23 Arkansas, in which I -- my capacity is basically a liaison
24 between the EPA and Arkansas.

25 I have done inspections all over the United States;

1 not just in our region and not just our five states.

2 I have been on the National Work Group on Leak
3 Detection, which evaluates various pieces of equipment to
4 ensure that they meet the minimum requirements of the
5 regulations.

6 So essentially, anything to do with enforcement,
7 compliance of Underground Storage Tanks, I usually am
8 involved in.

9 Q Shifting to your educational background. Do you hold
10 any degrees?

11 A Yes. I have a bachelor of science degree in civil
12 engineering.

13 Q And where was that from?

14 A New Jersey Institute of Technology, Newark, New
15 Jersey.

16 Q Do you have any other degrees --

17 A No other --

18 Q -- or professional licenses?

19 A No other degrees, but I am a professional engineer
20 licensed in the State of Texas since 1980.

21 Q Do you have any publications?

22 A I have written articles for various trade journals,
23 for -- there's a magazine called LUST Line, believe it or
24 not.

25 COURT REPORTER: Excuse me?

1 THE WITNESS: Excuse me?

2 COURT REPORTER: The name of the magazine?

3 THE WITNESS: There's a LUST Line. It has to do
4 with leaking Underground Storage Tanks.

5 There are other articles that I have written; I
6 can't even remember. Also for the National
7 Association of Convenience Stores, I had written some
8 articles for them.

9 Q (By Ms. Beaver:) You mentioned that you performed
10 UST inspections. How long have you been performing UST
11 inspections with EPA?

12 A Approximately 17 years. I started doing
13 inspections -- EPA was not even involved in the
14 enforcement side of it or the inspection side of it. And
15 when I came on board, that was one of the job duties that
16 I had to do, was basically build an enforcement program.

17 Q And how -- about how often do you perform
18 inspections?

19 A In the early years, I did quite a few, but now it's
20 down to approximately maybe 30 a year.

21 Q Have you had occasion to conduct UST inspections at
22 facilities owned by RAM?

23 A Yes, I have.

24 Q Which facilities?

25 A If I may refer to my little notes here. The Citgo

1 Quik Mart in McAlester, Citgo Thrif-T-Mart in McAlester,
2 Goodwin's One Stop in Hartshorne, Monroe's Service Station
3 in Eufaula, and Longtown Citgo in Eufaula.

4 Q What types of facilities are these?

5 A They are gasoline and convenience store facilities,
6 typical convenience stores with -- with fueling
7 facilities.

8 Q Were you alone in your inspection of these
9 facilities?

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

12 Q Who was that representative?

13 A John Roberts.

14 Q Was this a joint inspection?

15 A Yes, it was. It was planned together and coordinated
16 together. In my opinion, the only difference is that --
17 that I did take the lead, as EPA.

18 Q Were any other parties besides you and Mr. Roberts
19 present during your inspection?

20 A No. There were -- of course, there was various
21 managers of the facilities; right now, I can't recollect
22 their names.

23 But we also had a records review at RAM's
24 headquarters in McAlester. And I did meet with Ms. Twilah
25 Monroe to get additional records that I could not find at

1 those facilities that I inspected.

2 Q What was the purpose of your inspection of these
3 facilities?

4 A To determine compliance. To determine -- basically,
5 to determine compliance.

6 Q And --

7 A And also to determine whether an enforcement action
8 was necessary.

9 Q What did you do following your inspection?

10 A After I got back, I looked at all the violations,
11 looked at all the -- I looked at all the inspection
12 reports, determined what the violations were, then I
13 developed a draft complaint.

14 Q Did you give notice to OCC, the Oklahoma Corporation
15 Commission, of your complaint --

16 A Yes. Before --

17 Q -- before you filed --

18 A -- before I -- yeah, before I filed it. We -- that
19 is part of our Memorandum of Agreement with the state.
20 Since OCC is a delegated state, that is part of our
21 agreement that we would notify them prior to issuance of
22 any type of enforcement action.

23 Q And so as part of your complaint, did you assess
24 penalties --

25 A Yes.

1 Q -- for the violations?

2 A Yes, I did.

3 MS. BEAVER: Okay. Given that the -- that
4 Respondent has stipulated to liability on all the
5 counts, minus the ones that the record reflects that
6 have been dropped, what I propose to do, Your Honor,
7 is to go through count by count and discuss the
8 assessment of the penalty per count.

9 Q (By Ms. Beaver:) Before that, I would like to ask
10 some questions about how you calculated your penalty,
11 Mr. Cernero.

12 A Okay.

13 Q Basically, what did you use to determine the penalty
14 for the counts?

15 A I used the EPA penalty policy, which is based on the
16 statutory factors. That essentially says that EPA has
17 the -- has the authority to issue or to calculate
18 penalties not to exceed \$10,000 per tank, per day of
19 violation.

20 Of course, that has changed. There are some
21 inflation adjustments because of a different statute that
22 came out now. It is now \$11,000 per tank, per day of
23 violation. So my --

24 Q So the statute -- so if I hear you correctly, the
25 statute allows you to assess penalty based on -- what is

1 it again? Statutory factors?

2 A Statutory factors, that essentially says that I have
3 the authority to fine up to -- now it's \$11,000 per tank,
4 per day of violation.

5 Q So did you use the statutory -- that statutory factor
6 in assessing your penalty?

7 A Yes.

8 Q What is the purpose of assessing a penalty?

9 A The purpose of assessing a penalty is -- is for
10 deterrence purposes. And I'll go into the different
11 factors of how you calculate your penalties and so forth;
12 but essentially, it's a deterring factor.

13 It's -- it's -- it cannot be just the cost of doing
14 business, it has to be such that owners and operators
15 will -- will spend the money to get into compliance, get
16 the proper equipment, because of the threat that if they
17 don't, then there could be consequences for monetary
18 penalties.

19 It's basically to make a -- and I just -- I guess I
20 don't want to use the example as the IRS; everybody pays
21 their taxes because of the threat that could happen if we
22 don't.

23 MS. BEAVER: Okay. At this time, Your Honor,
24 I'd like to ask for Mr. Cernero to step to the
25 demonstrative aid as he gets ready to talk about how

1 he calculated the penalty or the model for
2 calculating the penalty.

3 THE COURT: Okay.

4 THE WITNESS: I'll -- I'll try to speak louder
5 here so you can hear me.

6 Essentially, there's -- there are two components
7 to determine -- and again, this is an EPA penalty
8 policy, which has been around for a very long time,
9 which is also -- it's supported by the statutory
10 base, and --

11 Q (By Ms. Beaver:) Mr. Cernerio, I'm sorry, if I may
12 interject a question. Why do you use the penalty policy,
13 again?

14 A Essentially, it was -- the penalty policy was based
15 on the statutory factors, which is specifically -- it was
16 specifically written for an Underground Storage Tank
17 program. It doesn't have anything to do with RCRA or air
18 or water or anything else; it was specifically for the
19 Underground Storage Tank program. It's a way of -- of
20 coming to what the penalty -- a fair penalty would be.

21 Q Okay. Thank you. And so if you could take us
22 step-by-step through the components of your penalty.

23 A Yes, and that's what I will do now.

24 Essentially, the penalty policy is made up of two
25 general components; one is an economic benefit component,