

1 MS. BEAVER: Your Honor, I'd like to object.
2 They have already stipulated to liability, so why is
3 Counsel questioning in a way that goes to liability?

4 THE COURT: Well, I think it goes to the
5 magnitude of the penalty. Proceed.

6 MR. KELLOGG: Yes.

7 Q (By Mr. Kellogg:) What we are looking at here,
8 Mr. Cernero, are we not, is failure to provide
9 documentation.

10 A No, I don't believe that's the case. I believe
11 that -- we're trying to determine --

12 Q And what did you mean when you told me you couldn't
13 find any documentation that the test had been done?

14 A Requests were made at the facilities and at RAM for
15 documentation showing that an integrity test was conducted
16 prior to installing the cathodic protection. I think at
17 numerous times, those bits of information were requested
18 so that we could verify that they were in compliance with
19 the requirements to have an integrity test --

20 Q Okay.

21 A -- prior to installing. So I did not see anything
22 that would give me a verification that those types of
23 tests were done prior to installing the cathodic
24 protection. And those were asked several times, I believe
25 (sic).

1 Q All right. I would like to ask you to turn to
2 Exhibit -- in our notebook, sir, Exhibit Number 51. That
3 is the Oklahoma Corporation Commission Rules. Do you have
4 those, sir?

5 A Yes, I do. Yeah.

6 Q You stated that you were in Oklahoma to enforce the
7 Corporation Commission Rules, so --

8 MS. BEAVER: Your Honor --

9 Q (By Mr. Kellogg:) -- that would be something like
10 this; isn't that correct?

11 MS. BEAVER: I would like to object, Your Honor,
12 that these regs are dated July 1, 2005. These are
13 not the regs that were used at the time of the
14 inspection. And so I object to relevance, that it's
15 irrelevant and immaterial at this point.

16 THE COURT: Do you have any -- well, let me ask
17 you this: Do you have any documentation or any
18 listing of differences or possible differences, if
19 they were amended in 2005?

20 MR. KELLOGG: We do, Your Honor. And I
21 apologize for not having a copy of the 2004
22 regulations that were in effect at the time of the
23 inspection in February of 2005. But we did -- I
24 thought we had an agreement with EPA that these were
25 similar enough that we could use them.

1 I do have -- well, I will -- I will agree that
2 some revisions have been made to this document, but I
3 need to examine this witness from the 2004 copy. I
4 can't obtain a copy of the 2004 rules.

5 I have a document that tells me what's
6 different, and I have the 2005 rules. And the
7 questions that I intend to ask him, I don't believe,
8 have changed in the rules.

9 MS. BEAVER: Your Honor --

10 MR. KELLOGG: And I would be happy to be more
11 specific.

12 MS. BEAVER: -- we've provided an exhibit,
13 Government's Exhibit 30, that's a copy of the July 1,
14 2004 rules that we provided to Respondent.

15 MS. BOYD: We received those. Those were
16 received today.

17 MR. KELLOGG: Today?

18 MS. BOYD: Yes.

19 MR. KELLOGG: Your Honor, for the record, we
20 received that today, and --

21 MS. BOYD: Here they are.

22 MR. KELLOGG: Could you -- do you have a copy of
23 the notebook for the witness, so that he can look at
24 your exhibit?

25 MS. BEAVER: And we -- yeah, we received some

1 items today from you guys, as well. Just -- so --

2 MR. KELLOGG: And you can make your record on
3 it.

4 MS. BEAVER: Yeah. So the question is?

5 MR. KELLOGG: Did you have a copy of your
6 Exhibit 30 for this witness to look at, instead of my
7 Exhibit 51?

8 THE COURT: I would think so.

9 MS. BEAVER: It should be in what I just handed
10 him.

11 THE WITNESS: Okay. Exhibit 30?

12 MS. BEAVER: The second -- the second packet.
13 It says Exhibits 14 through 30.

14 MR. KELLOGG: My apologies, Your Honor.

15 And you are quite right, ma'am. And thank you
16 for assisting me in that.

17 Q (By Mr. Kellogg:) Let 's look at exhibit -- EPA
18 CTX-30. Do you have that?

19 A Yes.

20 Q And that would have been the regulations, I take it,
21 that you would follow when you made your inspections in
22 February of 2005, right?

23 A Not necessarily.

24 Q You testified to that. What else would --

25 A Well --

1 Q -- you have inspected?

2 A You have to also look at the regulations that were in
3 place at the time the tanks were put in place or upgraded,
4 also, as to what was required then.

5 Q All right. Fair enough. But let's now turn your
6 attention to -- and it's got a different page number. I
7 want to find regulation 25-2-51; 25-2-51.

8 In the 2005 version, it's page 23, Your Honor. And
9 in the 2004 version -- 25-2-51 -- it's page 26 of your
10 exhibit, sir.

11 And do you see that Paragraph A requires that
12 corrosion protection must be done by a properly
13 engineered, installed, and maintained cathodic protection
14 system?

15 A Yes. Are you talking about 25? Or is --
16 165:25-2-51?

17 COURT REPORTER: I'm sorry, I can't hear you.

18 THE WITNESS: Is this 165:25-2-51, is that what
19 you are saying, "Corrosion Protection"? Yes, I have
20 got that. Part 5?

21 Q (By Mr. Kellogg:) Yes.

22 A Yes.

23 Q Yes. And there are several standards listed under
24 there in paragraphs numbered 1-6, right?

25 A Uh-huh, yes.

1 Q American Petroleum Institute, Underwriters
2 Laboratories, and so on.

3 A (Nods head.)

4 Q And is there a certification program for people that
5 do corrosion protection installations?

6 A Well, yes. There's the -- there's a National
7 Association of Corrosion Engineers: NACE.

8 Q NACE?

9 A Has certification for expert in -- I forget what they
10 are called -- technical expert. And in -- there's another
11 term they use, and I just can't remember what the other
12 term is right now.

13 Q NACE is the common name --

14 A NACE, right.

15 Q -- that it's referred to, right?

16 A Uh-huh.

17 Q All right. And that's what is done for installation
18 control, or should be done, right? A corrosion control
19 expert or a NACE-certified expert should install the
20 system, right?

21 A Right.

22 Q And would a --

23 A Not -- not necessarily install it. Our regulations
24 and the state regulations require that a NACE specialist
25 or a NACE expert or a NACE engineer, corrosion engineer,

1 design the system.

2 Q Design the system --

3 A Right.

4 Q -- too?

5 A Right.

6 Q All right. And what does that say about the
7 individual that owns a store that has some gas pumps? Is
8 that individual capable and qualified of performing that
9 kind of work?

10 A No.

11 Q No? So the store owner has got to rely on a
12 NACE-certified expert, correct?

13 A Correct.

14 Q Okay. Thank you. Please keep those Corporation
15 Commission Rules handy with you; I'm going to ask you to
16 refer back to them from time to time.

17 Now, I want you to look in my exhibit book, if you
18 would, to exhibit -- Respondent's Exhibit 39. Do you see
19 where --

20 MS. BEAVER: Your Honor, I'd like to object. We
21 have not stipulated to 39. And I don't know if
22 Counsel is intending to --

23 MR. KELLOGG: I'm sorry, I thought you had.

24 MS. BEAVER: -- admit -- offer for admission 31.

25 MR. KELLOGG: It's my understanding, Judge, that

1 the stipulation read earlier included -- 39 has
2 already been agreed to. I can establish its
3 authenticity through other witnesses.

4 MR. SHIPLEY: Slow down.

5 MS. BEAVER: Yeah, we -- we had -- we had
6 orig -- we had said no to this particular exhibit
7 that appeared in two places in your prehearing
8 exchange.

9 We said no to it for reasons that we didn't have
10 the ability to -- we didn't have the witness present
11 to cross examine, it wasn't under oath. I mean there
12 were issues that we had to authenticity and what it
13 was offered for.

14 THE COURT: Well, my list of --

15 MS. BEAVER: We -- we said no.

16 THE COURT: -- what was stipulated to this
17 morning doesn't include 39, Mr. Kellogg. Maybe --
18 maybe it was intended to, but --

19 MR. KELLOGG: Your list does not?

20 THE COURT: No. What I have written, just my
21 rough notes.

22 MR. KELLOGG: Well, my apologies. All right,
23 sir.

24 Q (By Mr. Kellogg:) Mr. Cernero, if a NACE corrosion
25 specialist certified that -- or prepared a document that

1 said that or stated that that individual had designed a
2 corrosion protection systems for Monroe's and Longtown,
3 would that alter your opinion as to the violations in
4 Counts 17 and 20?

5 A No.

6 Q And why wouldn't that -- that alter your opinion?

7 A My opinion is -- and I don't know if we are supposed
8 to use this exhibit or not, okay? My opinion that a NACE
9 specialist, or NACE corrosion engineer, NACE expert, is
10 designing the corrosion protection system.

11 There is an additional requirement under our
12 regulations that prior to installing a corrosion
13 protection -- a field-installed corrosion protection
14 system, that there must be a determination that the tank
15 has structural integrity, or an integrity test, we call
16 it, or a suitability test, I'll call it.

17 We have no documentation or verification that this
18 person did it or another contractor has done it.

19 Q All right.

20 A Under normal circumstances that we see, that it's
21 usually another company that does the integrity test.
22 That doesn't necessarily mean it has to be that way, but
23 under normal circumstances, a company will come in, review
24 the information, either have someone actually put in the
25 tank and do a test, or do a series of what they call

1 suitabilities test under the NACE requirements. And then
2 a corrosion expert will design it, because the assumption
3 is that the tank does meet the integrity.

4 Now, that doesn't say that a NACE specialist couldn't
5 do it or a NACE engineer couldn't do it, but there would
6 be some documentation verifying that an integrity test had
7 been conducted prior to -- and now given the fact that the
8 tank is 10 years old. If it was less than 10 years,
9 there's other ways you can do it.

10 But if a tank is 10 years or older, there must be
11 some type of verification that the tank meets the
12 integrity requirements, such that a CP system can be
13 designed for that particular system.

14 I had no indication, no verification, no
15 documentation that led me to believe that that was done.

16 Q I -- well, I understand. But this penalty is really
17 only applicable if the test wasn't done, right?

18 A That's correct, if the test was not done.

19 Q And if there were documentation that a NACE corrosion
20 specialist indicated that all the assessments,
21 recommendations, designs, and evaluations had been made in
22 accordance with applicable law, wouldn't you say that
23 would be reasonable for a little store owner to rely on to
24 assume that everything was done properly?

25 A Not without some documentation showing the results of

1 that integrity --

2 Q I'm sorry, sir. My question was a store owner; not
3 an inspector such as yourself. Would a store owner --
4 would it be unreasonable for a store owner to rely on a
5 NACE-certified expert, to rely on his word and assume that
6 he had done it properly?

7 A I can't answer that.

8 Q You have. Thank you.

9 Now, let's go and -- Your Honor, that argument
10 addresses 17 and 20.

11 THE COURT: Yes.

12 Q (By Mr. Kellogg:) Now, let's go back to Count 1, if
13 you would, please.

14 THE COURT: Well, before you do that, let me ask
15 Mr. Cernero -- Cernero, a question.

16 THE WITNESS: Cernero.

17 THE COURT: This integrity test, is that
18 basically a pressure test where they can seal it up
19 and shoot air in it and then see if there -- see if
20 it leaks?

21 THE WITNESS: No, it's -- it's more of a
22 scientific determination of whether there is enough
23 metal, basically, left in that tank, such that adding
24 cathodic protection is going to work.

25 If it -- if it's basically a very -- if the

1 corrosion is such that the metal is no longer thick
2 enough to protect or have structural integrity, then
3 it doesn't make a whole lot of sense to add cathodic
4 protection, and the EPA essentially says pull the
5 tank.

6 THE COURT: Well, I was just trying to --

7 THE WITNESS: Right.

8 THE COURT: -- determine or find out how the
9 test was conducted. And from what you are telling
10 me, it sounds like it's more of a judgment question
11 by some expert who examines the metal.

12 THE WITNESS: Right. The expert would -- would
13 take some sampling of the metal to determine the
14 thickness that still remains. There are other -- I
15 mean you can actually go inside the tank and take
16 those tests, or you can do other scientific tests
17 that will look at the soil around it.

18 You know, it's not -- it's not just something
19 that you can just go in and say, "well, I think it's
20 okay." You have to do sampling and that type of
21 thing. It's a pretty detailed report.

22 THE COURT: So it's basically a judgment
23 question. Well, thank you.

24 THE WITNESS: Okay.

25 THE COURT: You may proceed, Mr. Kellogg.

1 Q (By Mr. Kellogg:) Thank you. Actually, before I
2 leave 17 and 20, Counts 17 and 20, turn to the Corporation
3 Commission Rules, please.

4 A Okay.

5 Q CTX Exhibit 30. And I ask you to turn to page 71.
6 And do you see at the bottom of page 71, where it
7 says, "Operation/Maintenance of Corrosion Protection"?

8 MR. KELLOGG: Judge, in your book, that would be
9 page -- it would be the last page or the next to the
10 last -- no, it's not. What page? What page?

11 MS. BOYD: I don't have the book with me.

12 MR. KELLOGG: Exhibit 51. I don't believe this
13 has changed, Your Honor.

14 THE COURT: All right.

15 MR. KELLOGG: So you will have the same --

16 THE COURT: So it is Exhibit 51? All right.

17 MR. KELLOGG: Respondent's Exhibit 51.

18 THE COURT: I thought you were referring to 30.

19 MR. KELLOGG: Well, do you have -- I'm sorry.

20 Do you have --

21 THE COURT: Yes.

22 MR. KELLOGG: -- EPA Exhibit 30?

23 THE COURT: Yes. I have 51. Proceed.

24 Q (By Mr. Kellogg:) Okay. At the bottom, Mr. Cernerio,
25 do you see the 165:25-2-53? And it says: "Failure to

1 Maintain Records of Cathodic Protection Inspections or
2 Testing."

3 A Yes.

4 Q Do you see that, sir?

5 A Yes, I do.

6 Q And over on the right column, it says "Fine Amount."
7 What is that amount, sir?

8 A It says \$250.

9 Q Thank you. Now, we -- let's -- I'm ready to move to
10 Counts -- start with Count 1.

11 MR. SHIPLEY: Your Honor, before we leave this,
12 I am greatly disturbed that there is some confusion
13 over what has been stipulated to or not. We went
14 over this this morning with counsel for the
15 Plaintiff.

16 We have at least two copies of this list showing
17 that our 39 of the cathodic protection certification
18 was stipulated to.

19 THE COURT: Okay. Well --

20 MR. SHIPLEY: I sat here this morning while we
21 went over it. I'm absolutely astounded and would
22 need to go through this to make sure, because that --
23 this is going to be coming up again and again if we
24 don't have a consistent -- a consistent agreement.

25 But may we take five minutes and see if we can

1 work this out?

2 THE COURT: Yes. And I will just say, again, my
3 notes are rough, but I do not have 39 as amongst the
4 exhibits that Complainant stipulated to.

5 MS. BOYD: If I may, sir, did you have 42 among
6 the exhibits that were stipulated to? Number 42 of
7 Respondent's exhibits.

8 THE COURT: Well, as I said, my notes are rough,
9 so I won't --

10 MS. BOYD: Thank you, Your Honor.

11 MS. DIXON: Your Honor, it was not the
12 Plaintiff's intent to stipulate to either 39 or 42.

13 MS. BOYD: Okay.

14 MS. DIXON: And we made that clear several times
15 even before today.

16 MR. SHIPLEY: Made what? I'm sorry.

17 MR. KELLOGG: They made it clear several times
18 today.

19 MS. DIXON: Before today, through e-mails.

20 MR. SHIPLEY: Well, let's --

21 THE COURT: This can be off the record.

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

24 MR. SHIPLEY: Your Honor, we have gone through
25 the exhibit list and straightened out the -- what has

1 been agreed to and not. Let's make sure that your
2 notes and counsel for Complainant and counsel for
3 Respondents all agree.

4 And all -- we have stipulated to all 29 of their
5 exhibits, plus the 2004 OCC regulations, yes?

6 MR. KELLOGG: Yes.

7 MR. SHIPLEY: Okay. Says "upon review."

8 And with respect to their stipulations to our
9 exhibits, they have stipulated to all but our Exhibit
10 Number 2. And let's see. They do not stipulate to
11 Exhibit 39 and 42, but they -- and they do not
12 stipulate to 44. They do not stipulate to 47 or 48.
13 And they do not stipulate to 55.

14 MS. DIXON: Fifty-one; parts of 51.

15 MR. SHIPLEY: I'm sorry. Thank you -- thank you
16 very much.

17 Yes, 51 they stipulated as to the regulations,
18 and no as to the Appendix X.

19 MS. DIXON: S.

20 MR. SHIPLEY: Sorry. The appendices, all right.
21 Sorry. Thank you for correcting me.

22 They do not stipulate to 55, 56, 57, 58, 59, or
23 60. They do not stipulate to 63. Do not stipulate
24 to 65 and 66.

25 All but those that I have read that are not

1 stipulated to are stipulated to -- and y'all correct
2 me if I miss something.

3 But now we are at least working from the same
4 document, Your Honor. And thank you for giving us
5 time to straighten that out.

6 THE COURT: Okay. You may proceed, Mr. Kellogg.

7 MR. KELLOGG: Thank you, Your Honor.

8 Q (By Mr. Kellogg:) Mr. Cernero.

9 A Yes.

10 Q Mr. Cernero --

11 A Yes.

12 Q -- I'd like to go to Count 1 now.

13 A Okay.

14 Q That's Citgo Quik Mart --

15 A All right.

16 Q -- located here in McAlester, is it not?

17 A Right.

18 Q Just up the road.

19 A Uh-huh.

20 Q And this is failure to have spill prevention on the
21 tanks for ports that RAM claims they don't use. Do you
22 recall that?

23 A Yes, sir.

24 Q And you believe, though, that they were capable of
25 being used, right?

1 A Yes.

2 Q Okay. And the violations, sir, of the Corporation
3 Commission rule -- I ask you now to turn to EPA
4 Exhibit 30, and it would be page 24 of that exhibit.

5 A Exhibit 30?

6 Q That's the Corporation Commission rules.

7 A Okay. I got it. What page was it, you said?

8 Q Page 24.

9 MR. KELLOGG: Judge, that would be your page --
10 you have --

11 THE COURT: Fifty-one of your exhibit?

12 MR. KELLOGG: Be page 21 of my exhibit, Judge.

13 THE COURT: Okay.

14 MR. KELLOGG: My Exhibit 51 would be page 21.

15 THE COURT: Okay. Thank you.

16 MR. KELLOGG: The language is the same.

17 Q (By Mr. Kellogg:) The Corporation Commission
18 requirement for fill ports is in Paragraph (a), is it not?
19 It requires that fill pipes have -- wait a minute, am I
20 looking at the right one?

21 I'm sorry, it's 2-39. 25-2-39: "Spill and Overflow
22 Protection." You see that, sir?

23 A Yes.

24 Q Paragraph (a): "Underground Storage Tanks must have
25 spill and overfill protection" on what, sir?

1 A On the tanks.

2 Q On tanks. Now, of the tanks that you inspected, was
3 spill and overflow protection installed?

4 A When this was put out in 2004, the regulations --

5 Q The rules you were following, is it not?

6 A Well, the regulation -- the tanks were put in in
7 1990. So we would have to go with the regulations that
8 were in effect at the time the tank was put in place.

9 Q Please read into the record the language of
10 Paragraph (a) of Rule 2-39.

11 I'm sorry, can you not find 2-39(a)?

12 A Yeah, no, I found it.

13 Q I asked you to read it --

14 A Oh, okay.

15 Q -- into the record.

16 A I'm sorry. "Underground Storage Tanks must have
17 spill and overfill protection" --

18 COURT REPORTER: Excuse me. A little slower,
19 please.

20 THE WITNESS: I'm sorry. "Underground Storage
21 Tanks must have spill and overfill protection on the
22 tanks."

23 And also, "owners and operators of
24 aboveground" -- well, that's aboveground tanks.

25 "Tight fill connections must be used on all

1 deliveries made to the Underground Storage Tanks.

2 "Tampering with" --

3 COURT REPORTER: I can't -- I'm sorry, I'm --

4 THE WITNESS: Okay.

5 COURT REPORTER: -- having trouble hearing.

6 Q (By Mr. Kellogg:) That's fine. You answered my
7 question.

8 Now, does that rule require fill ports to have spill
9 protection equipment?

10 A It requires that there be protection from over --
11 from spills and overflow in all the tanks, you're right.

12 Q Right. Now, looking at the gravity that you found at
13 this Citgo Quik Mart, you found the extent of deviation
14 major, yet all tanks had spill prevention, every tank,
15 right?

16 A I don't agree with that. I agree with the fact that
17 that --

18 Q What tank did not have spill protection?

19 A It did not have protection on all fill ports. It did
20 not have -- the tank did not have protection, because all
21 fill ports did not have spill and overflow. Or spill,
22 anyway.

23 Q Okay.

24 A You're into semantics here.

25 Q Yes, sir. And aren't you?

1 A Well, I mean the fact is that the -- the fill port
2 did not have spill prevention, period.

3 Q And do you find that in the rule?

4 A What -- what you are saying -- what if it had -- I
5 mean all you are saying is I did not agree that it did
6 have spill and overflow protection on the tank. Because
7 you had a port, you had a drop tube that was capable of
8 being filled, and did not have protection. Therefore, I
9 would not agree that it had spill and overflow protection
10 on the tank.

11 Q All right. Let's go a little further.

12 A It didn't say it had to have one; it just said had to
13 have spill and overflow protection on the tanks.

14 Q All right. Putting aside for a moment the fact that
15 there was spill and overflow protection on each tank, the
16 ones that RAM told you were used, did you look at those
17 ports?

18 A Yes.

19 Q And did you see locks on them? Do you recall?

20 A I don't recall if they did or not. I really don't
21 remember if they did.

22 Q So if I told you that there weren't locks on there,
23 you wouldn't disagree?

24 A Could -- yeah, they could have had locks; they could
25 not have had locks.

1 Q All right. And the three ports that RAM told you
2 they did not use, you found a lock on one of them,
3 correct?

4 A Yes.

5 Q But two did not have locks.

6 A Right.

7 Q And of those three that RAM told you were not used,
8 did you notice whether there were tags, colored tags to
9 identify the nature of product that was to go into the
10 tank?

11 A No, I did not.

12 Q No tags?

13 A No.

14 Q How about the three ports that RAM told you they did
15 use? Did you notice whether they had colored tags to
16 identify the nature of the product that goes into the
17 tank?

18 A I don't recall whether they did or not. I don't know
19 if they were color coded or not. I don't recall at this
20 point.

21 Q All right. And if I told you they were color coded,
22 you couldn't dispute that, right?

23 A I don't know.

24 Q Well, you don't know.

25 A Yeah.

1 Q I mean you can't dispute it --

2 A Okay.

3 Q -- if you don't know.

4 A Yeah.

5 Q Now, would you explain, for the record and for
6 His Honor, what color coding for delivery of product
7 means, briefly?

8 A Yeah. It's just for -- so that the drivers will know
9 what product is in the tank. White usually represents
10 unleaded regular, red is premium, blue is mid-grade, and
11 green is diesel.

12 Q And so it's reasonable to assume, is it not, that if
13 a delivery man went to deliver fuel to the wrong port and
14 didn't see a color tag, he wouldn't know where to put it
15 and he might have to go ask, right?

16 A Or he could look at the south side, as you said. If
17 they are color coded, they could have looked there and
18 said, "okay there -- there -- this one is unleaded, and I
19 could drop fuel in this one."

20 Q Or go to that one.

21 A That's true.

22 Q All right. Now, would you look at Paragraph (g) of
23 that same rule? 25-2-39, Paragraph (g). Do you see that?

24 A Yes.

25 Q "Spill and overfill prevention equipment specified in

1 (f) of this section is not required if" --

2 A Uh-huh.

3 Q -- "transfers of no more than 25 gallons occur."

4 A Uh-huh.

5 Q Well, if the fill port isn't used, then it can't --
6 it must be less than 25 gallons, is it not?

7 A No, actually that's -- that's -- my interpretation of
8 that is if you have transfers of 25 gallons or less, you
9 don't need spill and overfill.

10 Q Exactly.

11 A That's referring to used oil tanks, that type of
12 small tanks that do not have a -- a large transfer of
13 product. Now, it doesn't say that, but that's what --
14 that's what our regulations were there for, is that even
15 the EPA regs say that if you have less than 25 gallons of
16 transfer, you do not need spill and overfill in your used
17 oil tanks.

18 Q Now, you are looking at the rules that you enforced
19 on your inspection, 25-2-39. Does that say that that
20 exemption only applies to a small oil tank? Do you see
21 that language?

22 A No, but how -- how do you ensure that you only have
23 25 gallons or less transferred at a time? If a truck
24 comes in and decides they want to drop fuel in a fill
25 port, they are not going to drop less than 25 gallons, I

1 guarantee you they are not, and not when they got a
2 4,000-gallon truck sitting out there.

3 THE COURT: I'm sorry, but I don't find a
4 Paragraph (g) under 25-2-39 in my copy.

5 MR. KELLOGG: Your Honor, I am so sorry for the
6 mix-up in the regulations.

7 THE COURT: But anyway --

8 MS. BEAVER: Your Honor, do you have a copy of
9 Complainant's Exhibit 30?

10 THE COURT: Probably not. Well, anyway,
11 proceed. If you got a copy you can give me, that
12 will be fine.

13 Q (By Mr. Kellogg:) Now, turn, if you would,
14 Mr. Cernero -- to Respondent's Exhibit --

15 MS. BEAVER: Your Honor, I'm sorry. If I may, I
16 can -- well, I have an extra copy of the regs, if I
17 can give His Honor copies of these --

18 MR. KELLOGG: Thank you.

19 MS. BEAVER: -- 2004 regs.

20 Q (By Mr. Kellogg:) Do you have Respondent's
21 Exhibit 5, Mr. Cernero?

22 A Are you talking about this notebook here? Okay.
23 Yes, I have it now.

24 Q Okay. Respondent's Exhibit 5, is that not an
25 inspection sheet from the Oklahoma Corporation Commission,

1 sir?

2 A Yes, it is.

3 Q And does it identify a problem with the spill and
4 overflow protection on the tanks?

5 A No, it says it's okay on this one.

6 Q Okay. Exhibit 6, the very next exhibit, that's also
7 a Corporation Commission exhibit, is it not?

8 A Yes.

9 Q And it was dated July 2nd, '04?

10 A Yes.

11 Q And does it indicate a problem with spill and
12 overflow equipment?

13 A No, it does not.

14 Q All right. It -- okay. And let's see. Is there one
15 more? Exhibit 7. Respondent's Exhibit 7; also a
16 Corporation Commission inspection, right, sir?

17 A Yes, it is.

18 Q From September of 2003?

19 A Uh-huh. Yes.

20 Q And does it indicate a problem with spill and
21 overflow?

22 A No, it does not.

23 Q Thank you. And -- and I understand you may disagree
24 with Corporation Commissions, and I'm not quibbling that.
25 I'm just pointing out the records that exist.

1 Now, the -- who was the inspector for those
2 inspections, sir?

3 A It was Mr. Roberts, John Roberts.

4 Q Same person that accompanied you on your inspection?

5 A Yes.

6 Q All right. And looking back at your calculation of
7 the penalty, you found the extent of the deviation was
8 major, yet it seems to comply with the letter of the
9 language of the rules. Do you -- do you still believe
10 this is a major violation?

11 A Yes, I do.

12 Q All right.

13 A Because there's potential for harm. It's as if it --
14 if it's a -- if the fill port were -- there's no guarantee
15 that a truck driver can come in and drop fuel and still
16 spill right into the environment (sic).

17 Q This is also a commercial area, is it not, sir?

18 A Yes, it is.

19 Q And didn't you also find that the degree -- the
20 history of noncompliance was zero percent in your matrix?

21 A I'm not sure --

22 Q History of noncompliance, zero percent times two.

23 A No, I did not give any plus or minus for history of
24 noncompliance.

25 Q Right. So you didn't have a problem with the history

1 of noncompliance --

2 A No --

3 Q -- of this violation.

4 A -- although there was a history of noncompliance, I
5 just did not choose to increase the penalty because of the
6 history of noncompliance.

7 Q All right. Was there a degree of cooperation?

8 A The degree of cooperation has to do with --

9 Q No, I asked you if there was a degree of cooperation.
10 Did they cooperate with you?

11 A Well, no, they didn't cooperate with me, because they
12 claimed that there was -- there was no cooperate --
13 there's no need to cooperate. I don't know what you mean
14 by how they were cooperating with me.

15 Q It says, "violator-specific adjustments, degree of
16 cooperation or noncooperation."

17 A Yeah. And again, it was neutral. I did not give
18 them a plus or did not give a minus.

19 Q Okay.

20 MS. BEAVER: Your Honor, I would just like to
21 object to the usage of -- well, I would like to make
22 an objection that there's a discrepancy in the usage
23 of term. "Cooperation" as being used by Counsel is
24 different from "cooperation" as being -- as is
25 defined under the penalty policy.

1 Q (By Mr. Kellogg:) Can you explain --

2 A If I --

3 Q -- how cooperation and uncooperation is under the
4 penalty policy?

5 A If I can get the copy of my penalty policy, I could
6 take it right out of the context, so that --

7 MR. KELLOGG: That's an exhibit, right? Is that
8 Exhibit 12?

9 THE WITNESS: It's right there on top of -- that
10 raggedy-looking thing right there on top.

11 MS. BEAVER: Exhibit --

12 MR. KELLOGG: Twelve?

13 THE WITNESS: Yeah, that's it.

14 MS. BEAVER: Exhibit 12, also.

15 THE WITNESS: Oh, Exhibit 12 was on there?

16 MS. BEAVER: Exhibit 12.

17 THE WITNESS: Our Exhibit 12?

18 MS. BEAVER: The Complainant's, ours.

19 THE WITNESS: Okay.

20 MS. BEAVER: Should be a copy of the penalty
21 policy.

22 THE WITNESS: All right. The degree of
23 cooperation, noncooperation, violator-specific
24 adjustment. "The first factor that may be considered
25 in adjusting the matrix value is the violator's

1 cooperativeness and good-faith efforts of Respondent
2 to enforcement actions. In adjusting for the
3 violator's degree of cooperation or non" --

4 COURT REPORTER: Hang on.

5 THE WITNESS: I'm sorry.

6 COURT REPORTER: Can you speak up --

7 THE WITNESS: Sure.

8 COURT REPORTER: -- and read it slowly?

9 THE WITNESS: Do you want me to start over
10 again?

11 COURT REPORTER: No.

12 THE WITNESS: "In adjusting for the violator's
13 degree of cooperation or noncooperation, enforcement
14 staff may consider making upward adjustments by as
15 much as 50 percent, and a downward adjustment by as
16 much as 25 percent of the matrix value.

17 "In order to have the matrix value reduced, the
18 owner or operator -- owner/operator must demonstrate
19 cooperative behavior by going beyond what is
20 minimally required to comply with the requirements
21 that are closely related to the initial harm
22 addressed.

23 "For example, an owner or operator may indicate
24 a willingness to establish an environmental auditing
25 program to check compliance at other UST facilities,

1 if appropriate, or may demonstrate effort to
2 accelerate compliance with other UST regulations for
3 which the phasing deadline has not yet passed.

4 "Because compliance with the regulations is
5 expected from the regulated community, no downward
6 adjustment may be made if the good-faith effort to
7 comply primarily consists of coming into compliance;
8 that is, there should be no reward for doing now what
9 should have been done in the first place.

10 "On the other hand, lack of cooperation with
11 enforcement officials can result in an increase of up
12 to 50 percent of the matrix value."

13 So essentially what it's saying is to come up
14 with that, they have a degree of cooperation or
15 noncooperation, it's going beyond the requirements of
16 the regulations.

17 Q Good. And when you determined that he had not gone
18 beyond what the regulations required, what point in time
19 in the penalty process did you make that determination?

20 A There was no indication that they went beyond. I
21 mean what -- I mean they never offered anything to say,
22 "well, we're going to do this, we're going to do that. We
23 would like to get a reduction in the penalty calculation."

24 Q And so if you are here and able to listen to the
25 Respondent's case when it comes in and you hear them say

1 that they have established an auditing policy for all of
2 its facilities, not just for the one you inspected, you
3 would find that to be the sort of thing that would be
4 cooperation, wouldn't you?

5 A It's possible.

6 Q Sure. Thank you. But you made this matrix
7 determination before the Complaint was even filed, didn't
8 you?

9 A Yes.

10 Q All right. Now, when -- tell me about the history of
11 noncompliance. What was that based on? You gave that a
12 zero, too. You didn't say they were noncompliant, but you
13 said that there was noncompliance. What was that based
14 on?

15 A The inspection that Mr. Greg Pashia had done several
16 months before I did my inspection, he did find a violation
17 at the Citgo -- I think it's their mini lube, or -- I
18 don't remember the name of the facility -- and issued a
19 field citation for \$750. That would indicate that there
20 was a history of noncompliance.

21 Q One.

22 A That's a history of noncompliance. Plus --

23 Q Okay.

24 A -- there was a history -- also indicated that there
25 was an aboveground storage tank that had leaked, and there

1 were some fines involved in that, also.

2 Q Do you know how -- how much leak was involved in that
3 spill?

4 A No, I have no idea how much leak was involved in it.

5 Q More than a gallon or two?

6 A But that wasn't the base -- the basis of my
7 determination that there was a history of noncompliance is
8 the fact that we issued a field citation with a penalty,
9 and there was a violation.

10 Q Very good. In 1990, when the penalty policy was
11 developed, how many of the USTs across America actually
12 had the tanks located in tank pits? Do you know?

13 A I'm not -- I'm not really fully understanding your
14 question.

15 Q Let me -- let me look at it a different way. Tanks
16 at this Citgo station here in McAlester are located some
17 in tank pits, are they not?

18 A Yeah, you dig a hole and put it -- yeah, you put it
19 in a pit.

20 COURT REPORTER: I'm sorry?

21 THE WITNESS: You would -- you would dig --
22 normally excavate, and -- a hole, and put your proper
23 backfilling in, put your tanks in, yes. It would be
24 a pit, if that's what you want to call it.

25 Q (By Mr. Kellogg:) All right. And aren't tank pits

1 designed to prevent release into the native soils, or at
2 least minimize it?

3 A No, it has nothing to do with it.

4 Q Tank pits or not?

5 A Tank pits -- the only -- the only need of a tank pit
6 is to fit the tanks in there with the proper backfill. I
7 mean a tank pit has nothing to do with pollution
8 prevention. That's -- that's probably one of the reasons
9 why we're having so much pollution is because people do
10 not put liners inside the tank pit to prevent the
11 releases.

12 Q Okay.

13 A So it is a -- it's a very clear path for pollution to
14 follow from the standpoint of the excavation, unless it is
15 a very tight clay soil where it really wouldn't make any
16 difference.

17 Q Do you know how the tank pits are constructed at this
18 Quik Mart facility here in McAlester?

19 A No, I sure don't.

20 Q You don't know if they have liners or things like
21 that?

22 A No, I don't.

23 Q If they did, would that be another factor that might
24 mitigate the matrix from maybe a major to a moderate?

25 A I couldn't answer that right now, because I don't

1 know what the situation would be. The fact is, we don't
2 want the pollution into the environment, period, so --

3 Q I understand.

4 A Uh-huh.

5 Q You also told us that -- you said you tried to be as
6 lenient as possible. I'm just testing that.

7 A Uh-huh.

8 Q This penalty policy from 1990, though, you don't
9 know, in 1990, how the tank pits were constructed then,
10 compared to modern times.

11 A Um, I --

12 Q All right.

13 A -- the question is -- I can't answer a question like
14 that. It's too nebulous to answer.

15 Q Fair enough. Now, when you were inspecting this
16 Citgo Quik Mart here in McAlester, you were concerned that
17 there could be a spill in an overflow. Did you test to
18 see if there, in fact, had been a spill into that tank
19 pit?

20 A No, I never did test it and I never did say that
21 there was. I said there could have been one because of
22 the staining on the concrete or the -- the coloring of the
23 soil. I didn't say there was a spill, I said there could
24 have been.

25 Q Are you not very concerned if there was a spill?

1 A Of course.

2 Q Well, why didn't you look for one?

3 A Because at the time -- the type of inspection I do, I
4 don't do a soil sampling, that type of thing. We do,
5 however, look for indications of -- of releases, depending
6 on the situation.

7 Q Thank you. I think I'm ready to move on to -- well,
8 no. Count 2, sir. What was Count 2, the penalty based
9 on?

10 A Count 2 was the problem with -- with the --

11 Q Adequate capacity, right?

12 A Inadequate capacity, right.

13 Q The spill buckets had material in them.

14 A Correct.

15 Q Okay. Now, and that regulation is 2-39.1, which I
16 don't have that. 2-39.1, capacity.

17 Well, what regulation, sir -- and you are better at
18 this than I am -- governs the capacity that you found in
19 violation of Count 2? Is that also regulation 25-2-39?

20 A 25-2-39 is "Spill and Overfill Protection." And it
21 says (f)(1). "Spill prevention equipment that will
22 prevent release of the product into the environment when
23 the transfer hose is detached from the fill -- fill pipe;
24 for example, a spill bucket or a drain."

25 Q Ah --

1 A Drain system.

2 Q -- that is the violation that we are charged with,
3 are we not?

4 A I'm sorry, I didn't -- excuse me? I didn't hear what
5 you said.

6 Q That's the violation that we're charged with --

7 A Uh-huh.

8 Q -- right?

9 A Yes, it is.

10 Q Okay. 25-2-39 -- 25-2-39 --

11 A (f) (1).

12 Q -- (f) (1). And what I am looking for, sir, is
13 Appendix S, on page 70.

14 MS. BEAVER: Objection, Your Honor. We have not
15 stipulated to Appendix S of this exhibit. Wait.
16 Have we? Are you talking about the --

17 MR. KELLOGG: Your exhibit. Your exhibit.

18 MS. BEAVER: That's fine. What is -- there's a
19 confusion of the issues, because we are enforcing
20 EPA's penalty policy, not Oklahoma's penalty policy.

21 MR. KELLOGG: I understand. I'm not asking --

22 MS. BEAVER: I object to the relevance and the
23 materiality of OCC's penalty policy, when that's not
24 what's been adopted by EPA, and that's not been
25 what -- it's not been adopted by EPA.

1 THE COURT: Well, that's a --

2 MS. BEAVER: I understand it's part of the
3 exhibit.

4 THE COURT: That raises a very interesting
5 argument. If EPA is -- and that's the argument
6 Mr. Kellogg is making. If EPA is enforcing the
7 Oklahoma regulations, why doesn't the Oklahoma
8 penalty policy apply?

9 But that's an argument that we'll have to settle
10 later. But the point is now you may proceed,
11 Mr. Kellogg, and make your record on this point.

12 MR. KELLOGG: Thank you.

13 Q (By Mr. Kellogg:) Look at -- on page 70,
14 Mr. Cernero.

15 A Uh-huh. Yes.

16 Q I see there's a listing for 25-2-39.1: "Tank
17 owner/operator accepting delivery into UST that does not
18 have spill protection."

19 And what would the Corporation Commission, assuming
20 they issue the fine, what would that amount be under
21 Corporation Commission regulations?

22 A I'm sorry, I haven't found out what you are talking
23 about.

24 Q Top of page 70.

25 A Top of page 70? A thousand dollars, it says.

1 Q Thank you. Looking at your matrix, the extent of
2 deviation was major, correct?

3 A Yes.

4 Q And if there were no overflow collection device
5 installed at all, would that be a major violation?

6 A Yes.

7 Q Okay. And here, there was an overflow receptacle,
8 was there not?

9 A Yes, but it was such that it was almost like it
10 didn't have a spill tank, the capacity was so reduced.

11 Q But it's not as though this Respondent ignored the
12 rule and didn't put a spill bucket on there; it just had
13 debris in it, right?

14 A But the debris was such that it would cause the
15 capacity to be reduced, that it -- it's almost essentially
16 the same as not having a spill bucket at all.

17 Q But in this day and age, when gasoline is as
18 expensive as it is, don't you think they'd pay a little
19 more attention to their lines?

20 A You would think they would.

21 Q Good.

22 A But --

23 Q And of course, I don't want to forget that you tried
24 to be as lenient as possible, so you wouldn't want to move
25 that down to moderate?

1 A No, I wouldn't, because the -- essentially, the spill
2 bucket has been made inoperable.

3 Q Thank you.

4 A It's just like if you had a facility or a piece of
5 equipment that was taken out of service.

6 Q Well, now, wait a minute. You said "made
7 inoperable." Does that mean there was no capacity?

8 A Well --

9 Q Is it your testimony that there was no capacity in
10 the spill bucket?

11 A I said very little capacity.

12 Q Thank you.

13 A Significantly -- or the capacity has been
14 significantly altered.

15 Q Thank you. All right. I think I'll quit and move on
16 to Count 3. This was "Failure to Conduct Release
17 Detection for a Temporarily Closed Tank," right?

18 A Right.

19 Q And we're still at Citgo in McAlester, are we not?

20 A Correct.

21 Q Okay. Now, I have got to find the correct rule.
22 It's 25-3-62. 25-3-62. Page 47, if that helps.

23 I'm sorry, Judge. In the confusion of going back and
24 forth through all this, let me skip that for now and move
25 on to backup tanks, which is rule 25-1-24. Should be

1 closer to the front. That's on page 13, sir.

2 A Okay. You said it was 25 --

3 Q 25-1-24.

4 A Okay.

5 Q "Exclusions."

6 A Okay.

7 Q And see if there's a provision for an emergency
8 backup tank.

9 MS. BOYD: It's 10. Turn the page.

10 MR. KELLOGG: It's what?

11 MS. BOYD: Ten.

12 Q (By Mr. Kellogg:) Ah, paragraph 10 on the top of
13 page 14. Could you tell me what you understand that rule
14 to mean?

15 A You're talking about emergency backup tanks. That's
16 the tank for collecting spills. That's not -- has nothing
17 to do with emergency for low fuel supply.

18 These are exclusions that EPA has, also, that any
19 time you have an emergency backup tank to collect -- if
20 you have a spill somewhere in a building and you have an
21 underground tank to collect that, EPA does not regulate
22 that, provided that it's only in there for a short period
23 of time, and it's expeditiously emptied; in other words,
24 within a very short period of time that emergency tank --
25 an emergency tank, in this situation, means a backup tank

1 for spills.

2 It has nothing to do with a gas station or a filling
3 station or a convenience store that has a tank in
4 temporary closure. It's not -- has nothing to do with an
5 emergency, a shortage of fuel. And I don't know where you
6 are coming from on that one, but --

7 Q All right. Let me ask you a question, then.

8 A Uh-huh.

9 Q If the owner were to testify that he used this tank
10 for temporary overflow and that he removed the materials
11 using commonly employed practices, as rapidly as possible,
12 and occasionally a little more than an inch was
13 inadvertently left behind, would that be enough of a
14 mitigating factor to get below a major?

15 A No, because this has nothing to do with -- the tank
16 that was there at that facility was storing product for
17 sale; it was not storing product from a spill.

18 If he could document that that tank is used to
19 collect spills at his facility and shows that, then that
20 would be a different story.

21 But that was basically a 12,000-gallon diesel tank
22 used for product sales. Why he wasn't using it, I don't
23 know. It wasn't actually even registered with the State
24 of Oklahoma as a temporary closed tank. That's what they
25 told me.

1 Q Okay. Now, let's look at exhibits -- we've been
2 through these before. Let's go back to Respondent's
3 Exhibit 5, 6, 7, and 8. Those are the OCC inspections,
4 are they not?

5 A Yes, they are.

6 Q All right. Can you tell me whether, from this
7 inspection sheet, you can determine whether the OCC
8 notified the Respondent that he was in violation of this
9 provision?

10 A Well, it looks like he passed the -- passed the
11 inspection. That doesn't mean -- you know, I don't know
12 if it was in temporary closure at that time.

13 It's just at the time -- it may not have been in
14 temporary closure at the time that I did my -- my
15 inspection was conducted prior to this date of July 15th
16 of '05.

17 Q Okay. Let's go on to Exhibit 6.

18 A Okay. July the 2nd of '04. Now, this -- this
19 particular report by Mr. Robertson -- Roberts, I'm
20 sorry -- showed that the inventory control -- inventory
21 reconciliation was passed.

22 Now, unfortunately, the method of release detection
23 for these tanks was not even appropriate even for the OCC,
24 so --

25 Q But -- but let me interrupt you, sir.

1 A Uh-huh.

2 Q My question was, can you determine whether the OCC,
3 in -- notified the Respondent that he was in violation of
4 this requirement? That's my question.

5 A I -- I see no indication that he has.

6 Q All right.

7 A That doesn't mean that it's not in violation.

8 Q You can imagine that it might be a surprise to the
9 Respondent to see your inspection finding otherwise.

10 And how many -- you only found one day of
11 noncompliance here. What was the period of time,
12 Mr. Cernero, in your matrix?

13 A Are you talking about for the --

14 Q For your penalty.

15 MS. BEAVER: Your Honor --

16 A I believe I said one year.

17 MS. BEAVER: -- for the record, I would like to
18 object. Complainant would like to object to --
19 again, that testimony of the differences in penalties
20 between the state and EPA is irrelevant and
21 immaterial based on the EAB's decision in Titan Wheel
22 Corporation. And I'd like to preserve that objection
23 on the record.

24 THE COURT: That is noted. You may proceed,
25 Mr. Kellogg.

1 MR. KELLOGG: Thank you, Your Honor.

2 Q (By Mr. Kellogg:) By the way, the MOU between EPA
3 and the Oklahoma Corporation Commission, you've testified
4 to that earlier, and that's Exhibit 52. Respondent's, I
5 think, Exhibit 52, sir.

6 A I don't think I testified to that. I think that was
7 Mr. Pashia, wasn't it? I found it.

8 Q Page three, "State Program Review." Would you read
9 the first sentence into the record, please.

10 A Okay. It says: "The Regional Administrator will
11 assess the state's administration and enforcement of the
12 UST program on a continual basis for stringency with the
13 Subtitle I requirements, adherence to this MOA, and
14 conformance with all applicable federal requirements and
15 policies and for adequacy of enforcement."

16 Q I'm sorry, at the end did you say "for adequacy of
17 enforcement"?

18 A Yes.

19 Q Thank you. Now --

20 A Which we're doing.

21 Q -- did you notify the Oklahoma Corporation Commission
22 and complain about the adequacy of its enforcement?

23 A No, we didn't. As far as I -- I don't really can
24 answer that (sic), because I'm not an Oklahoma program
25 officer.

1 Q Why were you inspecting in Oklahoma?

2 A Because Mr. Pashia could not make that schedule, so I
3 filled in for him to do that inspection.

4 Q Where do you normally inspect?

5 A Arkansas. Actually, anywhere. It really doesn't
6 matter; I can go anywhere.

7 Q Was this your first trip to inspect in Oklahoma?

8 A No.

9 Q A UST?

10 A No.

11 Q All right. Thank you. I think we can move on to --
12 well, let me make sure. Count -- we're up to 4 now.

13 Or no, wait a minute.

14 You testified, sir, that it was a product tank and
15 not an emergency backup tank. Do you know how much
16 product was in the tank? Did you measure it?

17 A Yes, we measured it. I think it was approximately
18 nine inches of product in the tank.

19 Q Okay. What is that, in gallons?

20 A I really don't know, but the definition of empty is
21 no more than one inch of product in the bottom of the
22 tank. So anything more than one inch was not considered
23 empty.

24 Q I understand, but there was some liquid in there up
25 to nine inches, correct?

1 A Correct.

2 Q And how many inches in the diameter of the tank?

3 A I really don't know, because a 12,000-gallon tank,
4 I'm not really sure of the diameter. But that has no
5 relevance --

6 Q No, answer my question, please. How did you
7 determine the depth of liquid? Did you poke a stick in
8 there?

9 A Yes.

10 Q All right. And did you look at the top of the stick
11 to see where it intercepted the tank to see how many
12 inches that was?

13 A No. It didn't matter whether -- we don't really care
14 the diameter of the tank; we are looking at the depth of
15 product in the bottom of the tank.

16 Q You can't tell me what percentage of the volume of
17 that tank was occupied by fluids, can you?

18 A It doesn't matter, as far as our -- our violation was
19 concerned.

20 Q But wouldn't it matter under the matrix as to whether
21 it was a major or a minor violation?

22 A Not in my opinion.

23 Q Or a moderate?

24 A Not in my opinion.

25 Q And that's because you tried to be as lenient as

1 possible, correct?

2 A Yes.

3 Q Now, I think I can -- I'm sorry, I can move on to the
4 next count. Are we still at Citgo Monroe's -- Quik Mart,
5 I mean --

6 A Yes, Citgo's Quik --

7 Q -- Citgo Quik Mart in McAlester?

8 A Yes.

9 MS. BOYD: Yes.

10 Q (By Mr. Kellogg:) And that's where -- Count 4; is
11 that correct?

12 A Uh-huh.

13 Q "Failure to Conduct Monthly Release Detection
14 Monitoring for Tanks."

15 A Correct.

16 Q Now, the extent of deviation, you found to be major.
17 Do you recall?

18 A Yes.

19 Q And so if they weren't doing any monitoring, that
20 would be a major deviation, would it not?

21 A Correct.

22 Q What if they were doing the wrong kind of monitoring?

23 A Well, that's what they were doing, the wrong kind of
24 monitoring.

25 Q All right.

1 A They were not -- they did not have a method that was
2 approved by the EPA or the OS -- OCC.

3 Q But they were following a method, were they not? It
4 was just the wrong method.

5 A Yes, they were doing -- they were doing some type of
6 inventory.

7 Q Thank you. So they didn't just blow it off. They --
8 they tried something, it just wasn't measured up to par.

9 Let's look at the OCC inspections again. I guess
10 that would be Exhibits 5 through 8; we've been there
11 before.

12 Do you see in these inspections, Exhibits 5, 6, 7,
13 and 8?

14 A Yes.

15 Q Those are OCC inspections. Did they notify the
16 Respondent that he was in violation of monthly release
17 detection monitoring?

18 A Not that I could see from these documents, no.

19 Q All right. And yet in your matrix calculation, how
20 far back in time did you go, sir?

21 A I believe I went back a year.

22 Q Actually, it was a year and a day, wasn't it?

23 A A year and a day.

24 Q But the last inspection before you were there wasn't
25 a year and a day, was it? It was less than that. It

1 was -- Exhibit 7 was July 2nd, 2004.

2 A I'm not finding July --

3 Q Exhibit 6, sir.

4 A Exhibit 6?

5 Q Right.

6 A Yeah. Shows that in July 2nd of '04, there was no
7 indication of violations.

8 Q And the inspector was, again, John Roberts, was it
9 not?

10 A Yes.

11 Q Thank you. In your penalty -- well, a year and a
12 day? Okay. Let's see. What -- do you recall doing the
13 inspection with Mr. Roberts here?

14 A Yes.

15 Q Did he point out to you that he had inspected it and
16 not found a problem?

17 A I do not recollect that he said anything about those
18 inspections to me.

19 Q Did -- did you ask him about the inspection history?

20 A No. It was irrelevant to me.

21 Q All right. Did you ask Mr. Roberts anything about
22 RAM?

23 A No.

24 Q Did he do any of the inspection work himself, or did
25 he just observe you?

1 A No, there was things -- certain things that we did
2 together, certain things that basically I take the -- I
3 took the lead on the inspection.

4 Q All right.

5 A And he did provide -- when we did the sticking of
6 the -- when we did the sticking of the 12,000-gallon
7 temporary closed -- supposedly temporary closed tank, we
8 were there when we took the readings.

9 Q All right.

10 A To verify that both of us make the -- took the
11 readings. Same thing in Monroe; we verified that those
12 readings were -- were the same. The cathodic protection
13 systems that were failed, we all observed the same thing.
14 I was sure that he would have observed the same thing that
15 I observed.

16 Q Very good. So he appeared to be competent to you in
17 sticking tanks and checking the cathodic protection
18 systems, right?

19 A I have -- I am not answering that question. I am not
20 here to tell anybody's competency.

21 Q I am asking you, didn't he appear to be competent, if
22 you trusted him to assist you in your inspection with the
23 sticking of tanks and the checking of cathodic protection
24 systems?

25 A I'm not answering that question.

1 Q I think you have. Thank you.

2 All right. Now, let's move on to the next town.

3 That would be -- 5 was passed, 6 was passed, and we're now
4 up to a new facility, Thrif-T-Mart also in McAlester, the
5 same town. Count 7. Count 7.

6 Just a moment, Your Honor. I'll try to find my
7 notes. We've -- we've switched here.

8 Okay, got it.

9 And this OCC regulation that we're looking at, would
10 that be 25-3-52? And I'll see if I can help you find the
11 page. 25-3-52.

12 MS. BOYD: No.

13 MR. KELLOGG: No? Huh?

14 MS. BOYD: 2-52.

15 Q (By Mr. Kellogg:) 2-52.

16 A Page 45? No, that's not it.

17 Q These get confusing, don't they?

18 A 25-3-52?

19 Q 2-52.

20 A Oh.

21 Q I'm sorry, all these rules. Page 27, sir.

22 A Thank you.

23 Q The requirement here is "Compliance with Corrosion
24 Protection Requirements and Manufacturer's
25 Specifications." Is that the same rule that's alleged in

1 Count 7 as to be in violation?

2 A Yes, that's the same one.

3 Q All right. Now, we've got to find those inspection
4 sheets.

5 Well, actually, before we do that, let's turn back to
6 Appendix S and see if we can find the Corporation
7 Commission's rule that specifies a fine for that
8 violation. That's 25-2-52.

9 MS. BEAVER: Your Honor, at this time, I would
10 like to note a standing objection in the record to
11 any testimony or any questions that elicit testimony
12 that compare EPA's penalty policy with OCC's penalty
13 policy, as being irrelevant and immaterial.

14 THE COURT: Your objection is noted.

15 Proceed, Mr. Kellogg.

16 Q (By Mr. Kellogg:) Bottom of page 71, Mr. Cernero.

17 A Okay. Got it.

18 Q 25-2-52 and 53. What would -- what is listed there
19 for OCC's penalty?

20 A 53, it shows \$250.

21 Q All right. And your penalty for Count 7, sir, was
22 how much?

23 A \$11,250.

24 Q All right.

25 A However, this is a totally -- not -- you are not

1 comparing the same type of enforcement action or penalty
2 calculation. These are two different animals, just as our
3 field citation is totally different than our standard
4 compliance enforcement also.

5 Q We'll come back to that later, perhaps tomorrow, but
6 we do want to visit with you about those two animals.

7 Now, the inspection reports by OCC are contained in
8 Respondent's Exhibit -- oh, Exhibit 18. Respondent's
9 Exhibit 18. Do you have that, sir?

10 A Yes.

11 Q Does that appear to be the Corporation Commission
12 inspection of this facility?

13 A Yes.

14 Q And the date of the inspection, sir, was what?

15 A January 11th of 2005. Before my inspection.

16 Q I'm sorry?

17 A It was before my inspection.

18 Q Right. About a month in advance of yours?

19 A Yes.

20 Q Roughly? All right. And did it indicate
21 noncompliance with this requirement?

22 A No, it shows it's in compliance.

23 Q In compliance?

24 A Or no violations have been noted; let's put it that
25 way.

1 Q All right. And now, in your matrix -- let's see.
2 How long a period of time was your violation, your
3 calculation?

4 A For Count 7?

5 Q Count 7.

6 A Mine shows for 334 days.

7 COURT REPORTER: Three hundred what?

8 A It's 334 days.

9 Q (By Mr. Kellogg:) That's not consistent with the
10 OCC's, is it?

11 A Well, it all depends on whether you accept the OCC's
12 inspection report.

13 Q Well, now, I asked you if you had written to the
14 Corporation Commission and told them that their inspection
15 systems or their enforcement program was substandard, and
16 you said no.

17 A I didn't -- I didn't say anything.

18 MS. BEAVER: Objection, Your Honor. It's not
19 Mr. Cernero's responsibility, it's not in his duties
20 to tell OCC what they are doing or not doing.

21 MR. KELLOGG: I think the MOU rather speaks for
22 itself, Your Honor.

23 MS. BEAVER: He's -- that's not his title, his
24 job description.

25 THE WITNESS: I was not -- I did not review --

1 MR. KELLOGG: The Judge hadn't -- hasn't allowed
2 you to answer the question.

3 THE COURT: Well, you can answer it, but
4 apparently you are not the one in charge of that
5 particular duty, so -- but anyway, you may answer the
6 question.

7 THE WITNESS: I was not the responsible, I
8 guess, enforcement officer to -- or program officer
9 to evaluate the effectiveness of the OCC
10 requirements.

11 The purpose of me going to Oklahoma and doing
12 the inspection was to determine compliance with the
13 facilities, irregardless of what OCC or any private
14 inspector had determined. It was purely an EPA-led
15 joint inspection with OCC.

16 Q (By Mr. Kellogg:) Since you have done that
17 inspection, and issued this Complaint, and involved in the
18 State of Oklahoma, have you demanded that correspondence
19 go to the Oklahoma Corporation Commission informing them
20 that their inspection and enforcement program is
21 substandard?

22 A No, I have not done that.

23 Q Thank you. Now, I ask you to look at Respondent's
24 Exhibit 23. Does this appear to be the same facility,
25 sir?

1 A Yes, it is.

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

4 Q (By Mr. Kellogg:) And does this bear a date, sir?

5 A Yes, it's March 19th, 2004.

6 Q And is this a test of the CP system?

7 A Yes, it appears to be.

8 Q And does it say anything about whether it passed or
9 it failed?

10 A Yes. This was brought out previously when I was --

11 Q And it says what, sir?

12 A Yes, it has -- showed that it has passed.

13 Q And is -- the period of noncompliance that you
14 assessed in Count 7 was a year and a day, right?

15 A No, 300 -- for Count 7?

16 Q Yeah.

17 A Shows 334 days.

18 Q All right. 333 days?

19 A No, 334 days.

20 Q So you -- you only dated your penalty back to the
21 date of this passing inspection; is that right?

22 A Yes.

23 Q So sometimes you accept records with the name
24 "Oklahoma Corporation Commission" on the top, right?

25 A This -- this was not done by the Oklahoma Corporation

1 Commission. This was done by a private contractor.

2 Q But it says "Corporation Commission" on the top.

3 A That's their form.

4 Q Okay.

5 COURT REPORTER: I'm sorry?

6 THE WITNESS: That's their form.

7 Q (By Mr. Kellogg:) While we are talking about
8 corrosion protection, isn't it true that the average life
9 of a steel tank without correct corrosion protection is
10 about 20 to 30 years?

11 A No, I don't know. I would not be able to answer
12 that.

13 Q All right.

14 A I'm not a corrosion expert.

15 MR. SHIPLEY: While we're moving on, in response
16 to EPA's standing objection, with respect to
17 Respondent's Exhibit 51, Your Honor, which they
18 acknowledge and admit 51, except they are trying to
19 keep Appendix S, which is Oklahoma's -- the Oklahoma
20 Corporation Commission's table of fines; it's listed
21 in the up-front part of this.

22 It is obviously incorrect and inapplicable to
23 ask that they selectively be allowed to choose which
24 of the Oklahoma Corporation Commission's Title 165,
25 Chapter 25, Underground Storage Tanks, this Court may

1 consider.

2 We'd like to move that this Court take
3 Respondent's Exhibit 51, which is the Oklahoma
4 Corporation Commission's Underground Storage Tanks
5 regs, including its appendix, which has the matrix
6 and the fines in it so we can stop this facade of
7 being able to let them pick and choose which of the
8 Oklahoma plan they can adopt and allow you to look
9 at.

10 THE COURT: Well, I think in order to cut short
11 this argument, I think Complainant's argument is that
12 under Board precedent, the EPA penalty policy, rather
13 than the OCC penalty policy, is the one that's
14 applied in this case.

15 But my ruling is that you are going to be
16 permitted to make this argument, so I am accepting
17 the entirety of Exhibit 51 into evidence.

18 MR. SHIPLEY: Thank you, Your Honor.

19 THE COURT: And you may make an objection if you
20 so desire, Ms. Beaver.

21 MS. BEAVER: I would like to renew our objection
22 to 51 because Respondent's Exhibit 51 is a 2005
23 regulation, it's not the 2004 regulations.

24 The regulations that were used at the time of
25 the inspection were the 2004 regulations, and as was

1 testified, any applicable regulations at that time
2 that predate what's offered under Respondent's
3 Exhibit 51, so that the objection remains that it's
4 irrelevant and immaterial.

5 THE COURT: Because it relates to a subsequent
6 regulation; is that the --

7 MS. BEAVER: Correct. And I -- I'm not familiar
8 with the scope of the 2005 regulations, what
9 amendments there may be, I'm not familiar with that,
10 because I didn't review those in preparation for this
11 hearing, because the 2004 regulations are what were
12 used in the inspection.

13 MR. SHIPLEY: Well, Your Honor, in response,
14 when they filed their Complaint, they themselves
15 referred to and said that EPA -- this is on page 2 of
16 their Complaint -- EPA's enforcing the authorized
17 state UST regulations found under Title 165, Oklahoma
18 Corporation Commission, Chapter 25, et cetera.

19 Which if they want to use the 2004, I guess that
20 would be fine, but this document was filed after the
21 publication of what she's complaining about at this
22 moment.

23 MS. BEAVER: The date of the OCC -- the
24 inspection -- I'm sorry.

25 The date for the Exhibit 51, Respondent's

1 Exhibit 51, is July of '05. Our inspection was done
2 in February of '05, which -- which relied on the
3 existing regulations at that time, which were not set
4 July of '05.

5 And so the reference to the Complaint, in the
6 Complaint, as far as the regulations that were used
7 for the inspection are the regulations that were in
8 effect at that time.

9 MR. SHIPLEY: Your Honor, again, they should
10 stick by the document that they are bringing this
11 whole case on, which is the Complaint filed in August
12 of 2005, eight months after this document was
13 proposed.

14 THE COURT: Well, does the Complaint
15 specifically -- the Complaint doesn't reference a
16 date for those regulations, does it?

17 MR. SHIPLEY: That's true, Your Honor. That's
18 true.

19 MS. BEAVER: The Complaint was filed in August
20 of '05. However, the filing date does not in and
21 of -- does not mean that the July '05 regulations are
22 applicable.

23 The July regulations are applicable after they
24 are in effect. What was in effect at the time of the
25 inspections were the previous regulations, 2004.

1 MR. SHIPLEY: We understand your ruling, Your
2 Honor. And it's admitted, so that's all for the
3 record. Thank you, sir.

4 Q (By Mr. Kellogg:) One last question about Count 7,
5 Mr. Cernerero.

6 A Okay.

7 Q They were conducting release detection, right, at
8 Thrif-T-Mart in McAlester?

9 A I believe so.

10 Q It's not that they totally ignored it, right?

11 A Are we talking about Count 7?

12 Q Count 7: "Failure to Operate Cathodic Protection
13 System Continuously."

14 A Yes.

15 Q They were doing -- doing release detection. And the
16 cathodic protection system itself, the system itself, was
17 pretty close to the voltage, if I remember your testimony
18 right. And you just told me that you are not a corrosion
19 expert; yet, this is charged, in your gravity matrix, the
20 extent of deviation is a major.

21 A Yes, because the cathodic protection system was not
22 on. It wasn't even operating.

23 Q If they didn't even have one, it would still be
24 major, right?

25 A Yes, it would; it's as if they didn't have one.

1 Q Okay. Moving on to Count 8 and 9. Now, I think
2 we're still in the Thrif-T-Mart; 8 and 9. We're still
3 Citgo Thrif-T-Mart in McAlester, Counts 8 and 9. This
4 will finish this facility.

5 And it might end up, Your Honor, being a good place
6 for me to stop tonight.

7 THE COURT: Yes. I understand.

8 Q (By Mr. Kellogg:) The violation for Count 8 was
9 "Failure to Test Automatic Line Leak Detectors Annually,"
10 correct?

11 A Correct.

12 Q Let me find 3-6.

13 looking at Exhibit 30, Rule 25-3-6; 25-3-6.

14 MS. BOYD: 38.

15 MR. KELLOGG: What? 38? Three-38?

16 MS. BOYD: No, page 38.

17 MR. KELLOGG: Page 38? Thank you.

18 Q (By Mr. Kellogg:) Page 38, sir.

19 A That makes things a whole lot easier.

20 MR. KELLOGG: And Your Honor, I promise, by
21 tomorrow, I will get these cites down and I will be
22 using the right exhibit and we will breeze through
23 this. I won't be laboring under my confusion that I
24 have today.

25 THE COURT: Yes. Well, I can understand --

1 Thrif-T-Mart in McAlester?

2 A Yes.

3 Q And does this have a bearing on this violation?

4 A The test was conducted after the 12 months were up.

5 Q Does it tell you when it was conducted?

6 A It was conducted on January 10th, '05. It was
7 supposed to have been conducted on November 14th of 2004.

8 So it was approximately --

9 Q So it was, what, about a month --

10 A -- 90 days --

11 Q -- and a half late? November to January? Did it
12 pass?

13 A Yes, it did.

14 Q A little bit late, but it passed? Okay. Cool. But
15 this, you found to be a major violation.

16 A Yes.

17 Q And that's consistent with what you've done in the
18 past, trying to be as lenient as possible, right?

19 A Yes, it is lenient, because it requires it be done
20 every 12 months, not every 14 months, or 11 months, or
21 every 10 -- every 13 months, it is 12 months.

22 MR. SHIPLEY: Excuse me. Due to the noise here,
23 I can't hear the witness. I'm sorry.

24 THE WITNESS: The requirements -- because the
25 pressurized system must be checked once every 12

1 THE COURT: Yes. We will adjourn till 9:00 in
2 the morning.

3 MR. KELLOGG: Thank you, Your Honor.

4 MR. SHIPLEY: Thank you, Judge.

5 *****

6 (For further proceedings, refer to Volume II.)
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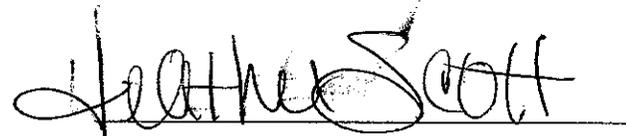
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IN THE MATTER OF)
RAM, INC.,) Docket No.
RESPONDENT) SWDA-06-2005-5301

CERTIFICATE OF COURT REPORTER

I, Heather Scott, Certified Shorthand Reporter in the State of Oklahoma, do hereby certify that the foregoing transcript in the above-styled case is a true, correct, and complete transcript of my shorthand notes of the hearing in said cause.

Dated this 22nd day of May, 2006.



HEATHER SCOTT, CSR, RPR

I.D. #01598

Heather Scott
Oklahoma Certified Shorthand Reporter
Certificate No. 1598
Exp. Date: December 31, 2006