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ENVIRONMENTAL PROTECTION APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C.

ENVIR. APPEALS BOARD

ORIGINAL

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In the Matter of:

EUCLID OF VIRGINIA, INC. : RCRA (3008) App. 06-05

Docket RCRA-3-2002-0303

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1201 Constitution Avenue, NW  
Washington, D.C.

Tuesday, September 18, 2007

The above-entitled matter came on  
for oral argument at approximately 10:35 a.m.

BEFORE:

- THE HONORABLE KATHY A. STEIN
- THE HONORABLE ANNA L. WOLGAST
- THE HONORABLE EDWARD E. REICH

## 1 APPEARANCES:

2 On behalf of Respondent Euclid of Virginia:

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6 On behalf of U.S. Environmental Protection  
Agency:

7

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Washington, D.C.

14

## ALSO PRESENT:

15

EURIKA DURR

16 Clerk of the Board

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1 P R O C E E D I N G S

2 MS. DURR: The Appeals Board of the  
3 United States Environmental Protection Agency  
4 is now in session for the hearing of oral  
5 argument in re: Euclid of Virginia, Inc.,  
6 Docket No. RCRA-3-2002-0303, RCRA (3008)  
7 Appeal Nos. 06-05 and 06-06, the Honorable  
8 Judges Anna Wolgast, Kathie Stein, and Edward  
9 Reich.

10 Please be seated.

11 JUDGE STEIN: Good morning,  
12 counsel. We are hearing oral argument this  
13 morning in the matter of in re: Euclid, as I  
14 understand it, pursuant to the Board's Order.  
15 Each side has 45 minutes for argument, and  
16 Euclid may reserve five minutes of their time  
17 for rebuttal.

18 I would like to begin by asking  
19 each party to state their names and who they  
20 represent.

21 MR. DeCARO: My name is Thomas  
22 DeCaro, and I represent the Respondent, Your

1 Honor.

2 JUDGE STEIN: Thank you.

3 MR. FIELDS: Benjamin Fields, EPA  
4 Region III. I will be arguing for  
5 Complainant. And at counsel table I also  
6 have A.J. D'Angelo from Region III, and Gary  
7 Jonesi from OECA.

8 ORAL ARGUMENT OF THOMAS DeCARO

9 ON BEHALF OF RESPONDENT

10 JUDGE STEIN: Thank you.

11 Mr. DeCaro, would you like to proceed? And  
12 will you be reserving five minutes for  
13 rebuttal?

14 MR. DeCARO: Yes, Your Honor, I  
15 would like to reserve.

16 If it please the Court, the first  
17 issue on your list is the contention that it  
18 was necessary for the Complainant to put on  
19 some kind of evidence that it notified the  
20 three jurisdictions as a jurisdictional  
21 prerequisite for bringing the complaint in  
22 this case.

1 JUDGE STEIN: Am I correct that the  
2 first time this issue was raised was on the  
3 first day of the hearing?

4 MR. DeCARO: Yes, that's correct,  
5 Your Honor.

6 JUDGE STEIN: So how is it that EPA  
7 would have known in terms of putting on  
8 evidence that this was an issue in dispute?

9 MR. DeCARO: Well, Your, Honor,  
10 several ways. Number one is if you read the  
11 Harmon case, and even though it has been  
12 watered down as far as necessity for a  
13 written notification, it is a statute and it  
14 is a jurisdictional prerequisite. As such,  
15 it is the sort of thing that one would have  
16 to plead and prove in order to establish your  
17 right as a sort of a prima facie matter.

18 JUDGE STEIN: Is that the holding,  
19 of the Harmon case?

20 MR. DeCARO: It was the holding of  
21 the cases that were cited, yes. If I may --

22 JUDGE REICH: That was the holding

1 in the case? I don't even remember that  
2 really being a significant issue in the case.  
3 As I remember the case, the whole focus was  
4 on overfiling, and I don't think whether the  
5 notice was writing or not had any materiality  
6 whatsoever.

7 MR. DeCARO: Well, it was about  
8 overfiling, and I think it does have  
9 materiality.

10 JUDGE REICH: It has materiality to  
11 notice but not as to the form of notice.

12 MR. DeCARO: Not as to the form of  
13 notice, and we are not contending that a  
14 written notice is required based on  
15 subsequent developments in the law of which  
16 I'm sure you are well aware.

17 JUDGE STEIN: So it's your position  
18 that oral notice is sufficient?

19 MR. DeCARO: Well, it appears from  
20 the case law that oral notice is sufficient,  
21 provided that some evidence of that oral  
22 notice is provided to the tribunal.

1           JUDGE REICH:  And do you think that  
2   the testimony below of each representative of  
3   each of the three state jurisdictions  
4   involved that talked about the  
5   interrelationship and EPA taking lead  
6   responsibility for the case, you don't think  
7   that provides evidence that they must have  
8   been on notice that this was going on?

9           MR. DeCARO:  Well, there you have  
10  it, Your Honor.  You say "Must have been on  
11  notice."  The notice as required is a notice  
12  of the commencement of this enforcement  
13  proceeding.

14           I don't think you can draw an  
15  inference that is evidentially sufficient.  
16  If you take a look at the case of Holstrom,  
17  the Supreme Court case, it says "Citizen suit  
18  must be dismissed for lack of jurisdiction  
19  for lack of notice."

20           JUDGE REICH:  If the record showed  
21  that the discussion was initially in terms of  
22  who will take the lead, then would that not

1 suggest that that discussion was taking place  
2 before EPA initiated the action?

3 MR. DeCARO: No, I think an equally  
4 valid inference can be drawn from that sort  
5 of language that the lead in the  
6 investigation of the situation, which it was  
7 an extensive investigation, as I'm sure you  
8 are aware, and there was no indication that  
9 EPA was taking the lead on any kind of  
10 enforcement action in the record. I mean, it  
11 just isn't there. I mean, if you read the  
12 actual transcript excerpts. I'm sorry.

13 JUDGE WOLGAST: Well, in your view,  
14 could you describe for us what actual notice  
15 you think is required?

16 MR. DeCARO: Yes. I think it would  
17 have been sufficient if one of each of the  
18 jurisdictions -- had one of the officials  
19 from each of the jurisdictions, including  
20 even the investigators or anyone who is in  
21 any kind of official capacity, had simply  
22 gotten up and testified that they had

1 received notice that the Complainant was  
2 going to be commencing this enforcement  
3 action. And that just simply isn't in the  
4 record.

5 JUDGE REICH: Let me ask, I mean by  
6 way of illustration, the testimony of  
7 Mr. Berko I believe from D.C. in answer to a  
8 question, he said:

9 "It was our understanding that EPA  
10 was going to take the lead role in  
11 enforcement action, so basically we issued  
12 the directive and then we adjust to see what  
13 EPA was going to do."

14 MR. DeCARO: That is EPA is going  
15 to take the lead in enforcement action.

16 JUDGE REICH: In enforcement  
17 action.

18 MR. DeCARO: But if Mr. Berko had  
19 said, "And EPA informed me that they're going  
20 to be filing an administrative complaint in  
21 regard to that enforcement action," then we  
22 wouldn't be arguing this issue as far as D.C.

1 goes. But Mr. Berko didn't say anything like  
2 that, notice of an actual commencement of any  
3 kind of particular form of enforcement.

4 JUDGE STEIN: Where in the statute  
5 do you find the specificity for the kind of  
6 notice that you are urging us to require of  
7 the Agency? I mean, I don't see anything as  
8 to the form or the content of the notice. I  
9 see rather straightforward language that  
10 seems to me silent as to what that notice  
11 might look like.

12 MR. DeCARO: That's true. It says:  
13 "The Administrator shall give notice to the  
14 state in which the violation has occurred  
15 prior to issuing an order to commencing a  
16 civil action under this section."

17 Now, the notice, the record is  
18 simply not clear whether the notice was  
19 given, that's my point. In other words,  
20 nobody testified we got the notice. And the  
21 reason I'm --

22 JUDGE STEIN: Well, why is it that

1 your client is the one that gets the notice  
2 as opposed to the affected states? I mean, I  
3 don't see this as akin to some of the  
4 statutes where notice is given to both the  
5 violator and the state. Here, I see that  
6 notice is given to the state.

7 MR. DeCARO: Right. Notice is to  
8 be given to the state. And under the Supreme  
9 Court case that I just cited --

10 JUDGE STEIN: A citizen suit case.

11 MR. DeCARO: Right, a citizen suit  
12 case which said that the similar notice  
13 language -- in fact the identical  
14 language -- is a jurisdictional prerequisite.

15 JUDGE WOLGAST: I didn't think the  
16 language was identical.

17 MR. DeCARO: I thought it was. But  
18 I mean, I would ask the Panel to look into  
19 that. I can dig the case out of my  
20 materials.

21 JUDGE WOLGAST: In your view, what  
22 is the purpose of the statutory notice

1 requirement?

2 MR. DeCARO: Well, if you take a  
3 look at the -- I'm sorry, the Brenntag case,  
4 Judge Charneski said that it provides a state  
5 which has enacted its own hazardous waste  
6 program an opportunity to participate in the  
7 enforcement action to the extent that it  
8 deems necessary.

9 This is not an overfiling case.  
10 But if someone is an overfiling situation or  
11 if the state has taken the position that is  
12 consistent with the position the EPA is  
13 taking, which we pointed out in a number of  
14 those instances, the state can have some kind  
15 of input into the enforcement action.

16 If the state has an approved, I  
17 guess, underground tank regulation system,  
18 which all these jurisdictions did by the time  
19 the complaint was filed, then under  
20 federalism they are given the opportunity and  
21 they are given the express opportunity under  
22 the statute to have this notice and have

1 whatever input they may desire to have.

2 JUDGE REICH: In terms of the  
3 notice, the actual wording in 906(a)(2) says:  
4 "The Administrator shall give notice to the  
5 state in which such violation has occurred  
6 prior to issuing an order or commencing a  
7 civil action.

8 To me, that language speaks to a  
9 point in time; that is, no later than the  
10 point at which you do those things. It  
11 doesn't explicitly say that they have to give  
12 notice of an intention to issue an order or  
13 initiate a civil action. It just says prior  
14 to the time that they take any of those  
15 actions, it shall have been given notice.

16 Are you suggesting that if they  
17 give notice, but the notice doesn't  
18 explicitly say "Not only are we planning to  
19 take action, but we are going to issue this  
20 particular order," that they have not  
21 complied with that section? And is there a  
22 case that suggests that?

1 MR. DeCARO: Well, I mean, I guess  
2 if you take a look at -- I think all of the  
3 cases do suggest that.

4 JUDGE REICH: Do they make that  
5 distinction, or do they just focus on whether  
6 notice was given prior to the time the order  
7 was issued?

8 MR. DeCARO: Well, I think if you  
9 look at the language of the case, they are  
10 talking about the content of the notice and  
11 they are talking about a notice that the case  
12 is going to be filed. I don't think there is  
13 any other way to read that statute. I mean,  
14 what kind of notice? If you're not giving  
15 notice that the case is going to be filed,  
16 then what kind of notice are you giving.

17 JUDGE STEIN: Well, frankly,  
18 looking at the testimony of Ms. Owen on I  
19 believe January 14th, which describes a  
20 number of meetings that took place between  
21 EPA and the various states, it is hard for me  
22 to envision a circumstance in which short of

1 written notice there would have been more  
2 notice.

3           There were a series of meetings;  
4 there were a series of discussions. There  
5 were discussions about why it is the states  
6 wanted EPA to take the action. This thing  
7 was something that they believed crossed  
8 states lines. The states expressed concerns  
9 about resource issues.

10           I am really having difficulty  
11 following your argument that in this kind of  
12 a circumstance with this kind of a record  
13 that the states were somehow surprised or  
14 didn't get notice of this action.

15           MR. DeCARO: Well, whether they got  
16 notice or not, I mean, you can certainly draw  
17 some kind of inference that they got notice,  
18 but more than that is required to meet the  
19 evidentiary standard.

20           Ms. Owens has said, "And while they  
21 were having one of these meetings, I told  
22 them that we were in the process of preparing

1 the" --

2 JUDGE STEIN: Well, if the  
3 inference can reasonably be drawn from a  
4 particular fact and if the ALJ draws that  
5 inference, I don't see why it is that he is  
6 compelled to draw the inference, an opposite  
7 inference, simply because that possibility  
8 exists. I mean, the ALJ conducted the  
9 hearing; he heard the evidence.

10 MR. DeCARO: Well, if you have a  
11 specific requirement in the statute such as  
12 this, then it's our view that the statute has  
13 to be specifically complied with. And you  
14 cannot in the absence of a simple statement  
15 to the effect that the notice was given, I  
16 don't think you can try to draw some kind of  
17 conclusion out of testimony that had other  
18 import.

19 JUDGE STEIN: But if we were to  
20 give deference to the ALJ's Findings of Facts  
21 and Conclusions of Laws, I mean findings of  
22 facts as to witness credibility, as is the

1 practice of this Board, and if the ALJ found  
2 that in fact notice was given, on what basis  
3 would this Board overturn his findings on  
4 this issue?

5 MR. DeCARO: Well --

6 JUDGE STEIN: How would it be clear  
7 error for him to conclude that the evidence  
8 in this record, as to which there was  
9 testimony, is clearly erroneous?

10 MR. DeCARO: Well, I think that the  
11 ALJ does not come right out and say that  
12 notice was given. I think the ALJ looks at  
13 the testimony and comes up with an inference  
14 that says that surely notice must have been  
15 given. I don't think that meets the  
16 requirements.

17 I'm taking a look now through here  
18 for his -- yes, page 6 of the initial opinion  
19 it says -- page 7 actually -- "In that  
20 regard," the second paragraph, "the record  
21 shows that EPA and the states acted on  
22 concert in bringing the enforcement action."

1           However, there is nothing in the  
2 record that says, and the ALJ never says that  
3 notice was given, a notice that says "We're  
4 going to bring an action."

5           And I think that is required, you  
6 know, if you look at the cases, including the  
7 Supreme Court case that talk about what a  
8 notice actually is and what evidence is  
9 required of that notice.

10           JUDGE STEIN: Okay. If you want  
11 to, move on. Did anyone else have any  
12 questions on the notice issue?

13                           (No verbal response)

14           MR. DeCARO: Okay. With respect to  
15 the second point to the Panel, "Elaborate on  
16 the tank-by-tank requirement imposed by the  
17 ALJ," I would simply point the Board to the  
18 regulations, 40 CFR Section 280.12.

19                           40 CFR Section 280.12, is a  
20 definitional section, and it defines:  
21 "Underground storage tank or 'UST' means any  
22 one or a combination of tanks including

1 underground pipes connected thereto that is  
2 used to contain an accumulation of regulated  
3 substances."

4           So there is no -- there is nothing  
5 in the regulations that says  
6 specifically -- I mean, if you have a  
7 regulation that says "You have to perform  
8 these tests on a tank-by-tank basis," there  
9 is nothing in the regulations that says that.

10           The EPA guidance book provides a  
11 method of detection that is not on a  
12 tank-by-tank basis. But the regulations  
13 themselves just don't have anything that says  
14 that you have to go tank-by-tank.

15           JUDGE STEIN: How does 280.43(a)  
16 relating to inventory control square with  
17 your argument? What is the significance of  
18 the language in some of the subsections of  
19 that that deal with measuring things in "the  
20 tank," which is in a number of places?

21           MR. DeCARO: Well, once again the  
22 regulations, if you look at the definition of

1 "the tank," you're talking about an  
2 underground storage tank and "underground  
3 storage tank" is defined as a multiple  
4 tank -- you know, multiple tanks, number one.

5           Number two, it does not -- the  
6 regulations, although they say "the tank,"  
7 they don't say anywhere, "And you have to  
8 perform a test discretely on each separate  
9 tank." They just don't say that.

10           JUDGE STEIN: I want to come back  
11 to the language of the regulations in a  
12 minute. But how is it that measuring things  
13 on a facilitywide basis would enable you to  
14 detect small leaks, which is one of the goals  
15 of the regulations as I understand it?

16           MR. DeCARO: Well, the tests that  
17 were actually performed by the Respondent  
18 came up with discrepancies as small as a  
19 gallon. So, you know, the methodology that  
20 they used actually did come up with that kind  
21 of a level.

22           A facility, Respondent's facility,

1 has anywhere between two and four tanks for  
2 sales of product. You know, two tanks, they  
3 could have a premium tank and a regular tank  
4 which are blended into four mid-grade. They  
5 could have premium, mid-grade, super, and  
6 diesel. That would be the largest facility.

7 So you have a situation where the  
8 throughput for this organization is very  
9 carefully controlled, if for no other reason,  
10 they are buying the gasoline for resale.  
11 They have a direct economic interest in  
12 making sure that there is no product loss.

13 JUDGE STEIN: So you're saying that  
14 there are a maximum of two to four tanks at  
15 each of the 23 facilities?

16 MR. DeCARO: That's right. There  
17 are a maximum of two. I mean, there have to  
18 be at least two tanks because you have to  
19 have mid-grade, if you are selling mid-grade  
20 gasoline. You could have a maximum -- there  
21 are a maximum of four product tanks. I'm not  
22 talking about waste oil tanks. I'm talking

1 about a tank for, you know, selling gasoline  
2 to the public.

3 So the reconciliation that the  
4 Respondent came up with came within the  
5 guidelines all but maybe once or twice during  
6 the period. That reconciliation is used not  
7 only to determine whether there is a leak, it  
8 is also used to determine how much they are  
9 getting from their supplier.

10 I mean, the supplier comes and they  
11 say, "Well, we just sold you 8,000 gallons of  
12 gasoline."

13 So, "Prove it." "Okay, well, here  
14 is the proof."

15 JUDGE STEIN: So then what you  
16 would need to do, under your contention that  
17 you can do it on a facilitywide basis, is  
18 once you realize there is a discrepancy, you  
19 would have to go to each of your tanks and  
20 figure out which one is leaking; is that  
21 correct?

22 MR. DeCARO: If the discrepancy is

1 large enough, you would have to determine the  
2 reason for the discrepancy and provided in  
3 the regulations, and that would of course  
4 require you going to each tank.

5 JUDGE STEIN: Well, let's assume  
6 that your facility, instead of having two to  
7 four tanks, was a big station and it had 50  
8 tanks. How would this system work under  
9 that, that if the regulations permit you to  
10 do facilitywide inventory control, then once  
11 you think there is a discrepancy, you would  
12 have to go teach of the 50 tanks to figure  
13 out what the problem is?

14 MR. DeCARO: Not at all. Because a  
15 tank wagon -- you know, those trucks that you  
16 see driving down the road with a tank on it  
17 full of gasoline, hold a finite number of  
18 gallons of gasoline. They hold somewhere  
19 around 20,000 gallons of gasoline.

20 So in an underground storage tank,  
21 if you have a 50-tank facility, you are  
22 probably looking at a minimum of

1 12,000-gallon tanks. They have 20,000-gallon  
2 tanks, but, I mean, let's just say you're  
3 using a 12,000-gallon tank.

4           The discrepancy would exist -- in  
5 other words, you would use the delivery, the  
6 factory (sic) -- excuse me. The factor of  
7 delivery would factor into the process, and  
8 so you would know where the gasoline was  
9 delivered and you would not have to check all  
10 50 tanks.

11           You would have at the most two or  
12 three tanks that you would have to check  
13 because there is no tank wagon large enough  
14 to deliver gasoline to 50 different  
15 underground storage tanks. There are only  
16 two grades of gasoline, regular and super,  
17 that are sold and they are blended together.

18           JUDGE STEIN: Well, but when I look  
19 at your argument as to what the regulations  
20 mean, I'm just not looking at how it may  
21 impact your particular case. I am looking at  
22 if we are to adopt your interpretation of the

1 regulations that would allow for a  
2 facilitywide approach, then I would assume  
3 that it would apply to any tank facility, not  
4 just yours. Is that correct?

5 MR. DeCARO: Underground tank  
6 facility, it would apply to an underground  
7 tank facility storing regulated substances,  
8 that's right. Unfortunately, the regulations  
9 if they had wanted to say "You have to do it  
10 on every single tank," then they would have  
11 said that.

12 So if you bring it back to our  
13 specific example, I think this particular  
14 respondent is entitled to rely on the actual  
15 language in the regulations to justify the  
16 method that it used.

17 If the regulations have a problem,  
18 which they do, by the way -- I mean,  
19 I -- after going through this process, I  
20 think there are a number of places where I  
21 personally would like to tighten up the  
22 regulations. But that's neither here nor

1 there as far as this argument is concerned.

2 JUDGE WOLGAST: Let me ask you a  
3 question about the regulations, again looking  
4 at the terms of 280.43(a), and it talks about  
5 the fact that monthly tests have to be  
6 conducted to detect a release of at least  
7 1 percent flow-through plus 130 gallons.

8 Now, is it your contention that you  
9 must perform tests to that standard? That  
10 standard applies to the entire facility as  
11 opposed to a tank?

12 MR. DeCARO: That standard applies  
13 to the entire facility because the  
14 flow-through for the entire facility -- and  
15 if you have four tanks in a facility, you  
16 have four tanks that are flowing through  
17 product and you have four tanks with their  
18 respective volumes and so forth. And so you  
19 could apply it on a facilitywide basis, yes.

20 JUDGE STEIN: Are these tanks  
21 attached to each other?

22 MR. DeCARO: The tanks are I

1 believe -- with few exceptions, the tanks  
2 are, generally speaking, not attached to each  
3 other.

4 JUDGE STEIN: Not?

5 MR. DeCARO: No. No, they are  
6 separate. It's a separate tank, and they are  
7 blended at the surface. They are blended by  
8 a machine, a pump, underneath the -- you  
9 know, just below the surface of the  
10 dispenser.

11 But they are not manifolded, which  
12 is a pipe that connects the two different  
13 tanks together. In other words, all these  
14 tanks, none of these facilities has more  
15 than a need for one tank containing each  
16 grade of product.

17 So if you had, for example, a  
18 facility on a major highway, you may want to  
19 manifold two tanks together so you could have  
20 40,000 gallons of regular available as  
21 opposed to 20,000 gallons of regular  
22 available. But in this case, none of these

1 were in that situation so they are all,  
2 generally speaking, discrete. I think there  
3 are a couple that are manifolded.

4 JUDGE STEIN: Your argument about  
5 280.12, was that raised below?

6 MR. DeCARO: Yes, it was.

7 JUDGE STEIN: And did the ALJ  
8 address that argument in his initial  
9 decision?

10 MR. DeCARO: Well, I believe the  
11 entire discussion of the -- regarding the  
12 regulations governing -- you know,  
13 facilitywide basis addresses our argument.  
14 Because that was directed toward our  
15 argument. It was not -- it was directed  
16 toward our argument.

17 JUDGE STEIN: I am still having  
18 difficulty understanding how 280.12 by  
19 itself, which allows for the possibility that  
20 there is more than one tank, somehow  
21 supplants the language in 280.43, which is  
22 very specific as to the tank.

1           I mean, I understand how if you've  
2   got two tanks kind of manifolded together  
3   that you might have a different circumstance.  
4   But in those cases, which I guess is the  
5   majority where they are not, I'm having  
6   difficulty seeing how 280.12 trumps 280.43.

7           MR. DeCARO: Well, I think you have  
8   to read them together, because we have plain  
9   language that doesn't require a separate  
10  tank-by-tank inspection. The definition of  
11  "tank," if you say "the tank," well, you have  
12  the definition section defining tank as the  
13  entire underground facility. So I think it  
14  is reasonable for a Respondent to read the  
15  regulations that way and conduct the kind of  
16  inventory control that they were conducting.

17           JUDGE STEIN: Did your client ever  
18  ask any of the agencies whether its  
19  interpretation of a facilitywide inventory  
20  control was an improper interpretation?

21           MR. DeCARO: I would say yes,  
22  because this Respondent has been in business

1 for decades. They have been inspected many,  
2 many times by all of the -- well, Virginia  
3 less so because they only have a few  
4 facilities there, but Maryland and Virginia  
5 have inspected their facilities repeatedly  
6 back into the '90s.

7 The issue first came up, and I was  
8 in the meeting -- I don't mean to testify,  
9 but I was in the meeting when the issue first  
10 came up about the facilitywide  
11 reconciliation.

12 They were providing documentation  
13 regarding inventory reconciliation to the  
14 other jurisdictions and nobody said anything  
15 about, "You have to be doing this on a  
16 tank-by-tank basis."

17 JUDGE STEIN: No, I'm looking for  
18 evidence that's in the record already that  
19 would show that your client made an  
20 affirmative request to one of the states or  
21 to EPA as to the interpretation that  
22 facilitywide basis is permissible.

1           Is that in the record?

2           MR. DeCARO: That's not in the  
3 record. What is in the record is what I just  
4 suggested, that the states had  
5 actually -- not the EPA, the EPA's first  
6 involvement was in the early 2000s -- but the  
7 states themselves looked at these records and  
8 didn't say, "Oh, you should be doing this on  
9 a tank-by-tank basis, nor did they fine them  
10 for not going on a tank-by-tank basis. So  
11 it's sort of a negative request, if you will.

12           JUDGE STEIN: Okay.

13           MR. DeCARO: If I may -- I believe  
14 if it's appropriate to move on -- an  
15 automatic tank gauge is a very sophisticated  
16 device. It is a computer analyzer that  
17 analyzes sensors. The sensors are in the  
18 tank and they can detect changes in the  
19 characteristics of the liquid that is in the  
20 tank. The various characteristics they try  
21 to check, but the main thing is a leak.

22           If there is a leak, the automatic

1 tank gauge will -- if you run a tank test it  
2 will, theoretically the new ones will detect  
3 a leak. They do that by measuring all of the  
4 physical characteristics of the liquid in the  
5 tank and they say, "Well, the volume of the  
6 liquid has decreased by a certain amount,  
7 indicating a leak."

8 I mean, in other words, heat, if  
9 the stuff heats up, it expands; if it cools  
10 down, it contracts, all those kind of things.  
11 But all that, the latest version of the  
12 automatic tank gauging system will do that  
13 reliably, that the TLS-350.

14 JUDGE STEIN: Is that the system  
15 that is in place here?

16 MR. DeCARO: Every facility now has  
17 the latest and the greatest. But back in the  
18 day, there was the previous model, which was  
19 the TLS-250. The TLS-250 gave my client  
20 problems by not providing, even in situations  
21 where there was not like a, where the tests  
22 were --

1           JUDGE STEIN: I would really  
2 appreciate it if you could confine what you  
3 are telling us about to what's in this record  
4 because I'm getting a little confused about  
5 what's in the record and what -- you know,  
6 problems that your client might be having  
7 that may or may not be in the record.

8           MR. DeCARO: Well, what's in the  
9 record, the testimony in the record does  
10 discuss the use of a TLS-250 and the problems  
11 that the Respondent had obtaining accurate  
12 readings from the TLS-250. And so until the  
13 350 came out, the client -- this is also,  
14 everything I'm saying now is in the record,  
15 okay.

16           JUDGE STEIN: Okay. Thank you.

17           MR. DeCARO: The client continued  
18 to use the inventory control method because  
19 they did not trust the TLS-250, I think. The  
20 Respondent's experts talked about that quite  
21 a bit.

22           JUDGE STEIN: So is it your

1 position that you're not relying on automatic  
2 tank gauging for any of the counts in this  
3 complaint to show that you complied with,  
4 your company -- your client complied with the  
5 release detection?

6 MR. DeCARO: Not from beginning to  
7 end, from beginning to end of the five-year  
8 period involved in the complaint, there was a  
9 transition from inventory control to  
10 automatic tank gauging. But in the  
11 beginning, they used inventory control. They  
12 had an automatic tank gauge, but they did not  
13 use that exclusively for leak detection.

14 JUDGE REICH: Is the statement that  
15 the region makes that the ATG stores most  
16 recent 12 passing test results, is that  
17 essentially an accurate statement?

18 MR. DeCARO: That's an accurate  
19 statement. Yes, it is.

20 JUDGE REICH: If an ATG shows no  
21 passing test results, what does that suggest?  
22 Does that suggest that there were no tests,

1 or could there have been failed tests? What  
2 reasonable inferences can you draw from the  
3 absence of a stored past test?

4 MR. DeCARO: Well, if you have a  
5 stored past test, you have a pass as far as  
6 that ATG is concerned. If you don't have any  
7 stored past tests or if you have fewer than  
8 12, then you would have had a failed test.  
9 Failed tests are not stored by the ATG.

10 So if you have a failed test, what  
11 you have to do is determine, use whatever  
12 method is promulgated to determine whether  
13 there was an actual leak. Since there were  
14 no actual leaks in this case, I guess that is  
15 an inference.

16 JUDGE REICH: And then there is no  
17 obligation to retest?

18 MR. DeCARO: Obligation to retest  
19 could be, could exist. But if the test shows  
20 a failed result and you determine that the  
21 leak -- you determine from extrinsic  
22 examination that there was no leak, then your

1 test request requirements are -- that's the  
2 end of your test requirements under the  
3 regulations.

4           So, I mean, that's -- you know, the  
5 procedure that was used. Once again that  
6 procedure was not exactly blessed but  
7 certainly not cursed by the jurisdictions  
8 over the years leading up the filing of this  
9 complaint.

10           JUDGE WOLGAST: If you don't have a  
11 past test result that is stored, meaning you  
12 don't have a test or you have a failed test,  
13 then you are saying your fallback is a manual  
14 test and the manual test is the inventory,  
15 facilitywide inventory system?

16           MR. DeCARO: That's one of the  
17 tests, that's one of the things that you can  
18 do. That's one of the methods that you could  
19 use to determine if there has been a leak.

20           JUDGE WOLGAST: And what other  
21 methods did Euclid use?

22           MR. DeCARO: Well, I think they had

1 some contractors on staff. I would imagine  
2 that they would come out and they could  
3 perform a tank tightness test to determine if  
4 the tank is tight. I think that was done  
5 rarely, but I think there were a few of  
6 those.

7 JUDGE WOLGAST: And is that in the  
8 record?

9 MR. DeCARO: Yes. Yes, it is. You  
10 could perform a -- you could check -- you  
11 know, perform a retest.

12 JUDGE STEIN: Am I correct in  
13 understanding that there are seven counts for  
14 which your client was held liable in which  
15 you are claiming to base your release  
16 detection on ATG? Is that a correct  
17 understanding?

18 MR. DeCARO: Seven counts at least  
19 partially on ATG. I don't remember the  
20 number of counts, but yes.

21 (Simultaneous discussion)

22 JUDGE STEIN: When you say

1 "partially," can you --

2 MR. DeCARO: Well, because the ATG  
3 did not -- the ATG did not become I guess the  
4 sole method of testing until some point, at  
5 some point during the period at issue, and  
6 so --

7 JUDGE STEIN: But you can't tell me  
8 which counts?

9 MR. DeCARO: I could, Your Honor.  
10 I could if you want me to take a minute and  
11 take a look at the --

12 JUDGE STEIN: Sure, why don't you  
13 take a minute.

14 (Pause)

15 MR. DeCARO: Let me see. Count 1  
16 is a tank release detection, Count 6,  
17 Count 9, Count 15, Count 22.

18 JUDGE STEIN: Are you just giving  
19 me release detection or things where you're  
20 relying on ATG?

21 MR. DeCARO: To give you the exact  
22 counts that we relied on ATG, I would have to

1 dig through the brief.

2 JUDGE STEIN: Okay.

3 MR. DeCARO: I'm sorry. I would  
4 like to address that on rebuttal --

5 JUDGE STEIN: That's all right.

6 MR. DeCARO: If you would like. If  
7 you don't mind, I wouldn't mind. You know, I  
8 could easily do that.

9 To the extent that they did rely on  
10 ATG we have -- essentially, if you have a  
11 passing test result based on an ATG reading,  
12 then the only reason to retain, there is a  
13 one-year record retention requirement in the  
14 statute.

15 So if you have a passing test  
16 result, that means the tank, a tank, an  
17 underground storage tank if it develops a  
18 leak, the only thing you basically do is pump  
19 the tank dry and dig it out of the ground.

20 You cannot -- because of the nature  
21 of gasoline, you can't fix the leak in the  
22 tank. And so if I go out there today and go

1 to the same tank that existed in 1998 and I  
2 pull a passing ATG test result, then that  
3 indicates that that tank hasn't leaked from  
4 that day to this, from the day it was  
5 installed until today.

6 JUDGE STEIN: But looking at the  
7 obverse of that, if I understand it, you have  
8 stipulated or conceded that there were no  
9 passing test results for the ATG, and that  
10 the machine itself stores the most recent 12.

11 MR. DeCARO: Right.

12 JUDGE STEIN: So if there are no  
13 passing test results, what is that? What  
14 does that infer?

15 MR. DeCARO: Well, if there are no  
16 passing test results and there is no leak,  
17 that infers that the Respondent went out and  
18 ensured that the failed test  
19 result -- followed up on the failed test  
20 result to determine if it was caused by a  
21 leak.

22 JUDGE STEIN: How do we know that?

1 I mean, is there evidence that that's exactly  
2 what happened in this case, that upon getting  
3 a failed test result, that your client -- you  
4 know, did X, Y, and Z, or is this just  
5 speculation on your part?

6 MR. DeCARO: Well, I don't think  
7 there is -- there is not evidence as to every  
8 single failed test result 12 to the year for  
9 23 facilities -- you know, so speak.

10 However, there was evidence that  
11 the Respondent had people that it hired to go  
12 out and make sure that there was no leak, and  
13 those people testified. And so to that  
14 extent there is evidence in the record.

15 JUDGE REICH: I'm just a little  
16 confused about -- and I admit I don't follow  
17 all the technical stuff. But if you kept  
18 getting failed results month after month that  
19 caused you to go through a process of having  
20 people come out and evaluate it, at some  
21 point, is there not some way to address the  
22 accuracy of the ATGs, whether by putting in a

1 newer version or something else, so you don't  
2 repeatedly subject yourself to this,  
3 presumably, unnecessarily?

4 MR. DeCARO: Absolutely. And  
5 that's what happened during the course of  
6 this period and after the period of course,  
7 which is not germane. What happened was when  
8 the 350 came out, they started installing  
9 them in the various locations.

10 JUDGE REICH: And once you put the  
11 350 in, you started getting passing results?

12 MR. DeCARO: Once you put the 350  
13 in, you start getting a lot more data. They  
14 did not always get passing results when they  
15 put the 350 in. However, they followed up on  
16 those failing results as well. They did get  
17 some passing results from the 350.

18 JUDGE REICH: Do you know when they  
19 got failing results where they turned out to  
20 be valid?

21 MR. DeCARO: They did not turn out  
22 to be valid because, I mean, the simple test

1 is a tank does not stop leaking. So if it  
2 didn't leak -- you know, if you got a failed  
3 test result, that would have indicated a  
4 leak. You would have had a deteriorating  
5 situation, which doesn't exist.

6           So -- you know, that is I guess the  
7 most level of certainty you can get from any  
8 of these various methods of testing a tank.  
9 The method that is described in the  
10 regulations is to actually check and see what  
11 is causing the failed test result. There is  
12 evidence in the record to the extent that the  
13 Respondent did that.

14           JUDGE WOLGAST: Could I ask you to  
15 speak to the regions' argument that a failing  
16 result should be regarded as prima facie  
17 evidence that a release may have occurred?

18           On that they rely, as I understand  
19 it, on 280.50 that says that "Monitoring  
20 results from a release detection method that  
21 indicate a release may have occurred unless,"  
22 and then it talks about the monitoring device

1 is faulty or whatever. But they say that  
2 infers that that is prima facie evidence that  
3 a release may have occurred.

4           Could you speak to that?

5           MR. DeCARO: Well, it does say that  
6 if you have a failed test result, you have to  
7 follow up on it, and so the way to get around  
8 or prove that there was not a leak is to  
9 perform some kind of additional check on the  
10 failed test result.

11           JUDGE WOLGAST: Also, specifically  
12 I'm asking about your position on the proper  
13 allocation of burden. Because as I  
14 understand it, the region is saying the  
15 failed test would suggest prima facie  
16 evidence of a potential release, and then  
17 presumably I assume they are saying the  
18 burden would shift to the company to show  
19 that in fact a release hadn't occurred or  
20 that they had tested properly and that a  
21 release hadn't occurred.

22           MR. DeCARO: That's right, that's

1 right. I mean, because the regulations  
2 simply say that if you have a failed test you  
3 have to check it out. I have 34 seconds  
4 left.

5 JUDGE REICH: I just want to make  
6 sure when you say "that's right," are you  
7 saying that's right, that's what they are  
8 arguing; or that's right, that's a proper  
9 interpretation?

10 MR. DeCARO: Well, that's a proper  
11 interpretation.

12 JUDGE REICH: Okay.

13 MR. DeCARO: Yes. Thank you. I  
14 mean, shall I continue or --

15 JUDGE STEIN: Maybe just finish  
16 your sentence, and then you will pick it up  
17 on rebuttal, I think.

18 MR. DeCARO: Thank you very much.

19 ORAL ARGUMENT OF BENJAMIN FIELDS ON BEHALF  
20 OF ENVIRONMENTAL PROTECTION AGENCY

21 JUDGE STEIN: Good morning.

22 MR. FIELD: Good morning. If I

1 may, Your Honors, I would like to start with  
2 kind of a brief introduction and go very  
3 briefly through each of the specific  
4 questions tell EPA's overall position, and  
5 then go back and talk about each issue in  
6 detail.

7           Basically, Euclid is a company with  
8 an empire of approximately 23 gas stations.  
9 I understand they have been adding some  
10 stations. Despite having all these gas  
11 station, compliance with UST regulations was  
12 not a priority.

13           They apparently made no effort to  
14 understand how to comply and they made no  
15 effort to understand how to use the proper  
16 equipment. In some instances, they had  
17 potentially proper equipment, but it was not  
18 being used properly.

19           In addition, the violations  
20 continued after numerous warnings from EPA  
21 and the states after numerous meetings trying  
22 to explain to Euclid how to use the equipment

1 and explain how to follow EPA's regulations  
2 and the state regulations.

3 Even after EPA filed this case,  
4 Euclid appeared to be not willing to spend  
5 the necessary money in obtaining the proper  
6 equipment and the proper technical expertise  
7 to come into compliance.

8 In the response, Euclid in their  
9 brief and at the hearing tries to blame  
10 everyone but themselves: the states; their  
11 contractors, installation contractors; the  
12 equipment manufacturers.

13 I would ask that the Board uphold  
14 Judge Charneski's finding, that in fact  
15 Euclid did violate the regulations, and  
16 violated them in a somewhat -- with enhanced  
17 culpability because of all these warnings  
18 except for Count 47 and parts of Counts 54  
19 and 57.

20 Judge Charneski made what appears  
21 to be a relatively small mistake penaltywise,  
22 but it's actually important in terms of

1 correcting the record of Euclid's purported  
2 inventory control methods.

3 JUDGE STEIN: May I ask you a  
4 question about the cross-appeal. I'm a  
5 little confused by your brief as to whether  
6 you are seeking an increase in the penalty  
7 amount or simply a correction of the  
8 liability finding.

9 MR. FIELDS: All right. EPA is  
10 seeking an increase in the penalty. In the  
11 brief, we explain that even though the  
12 penalty is already large and the increase is  
13 small, the importance of the cross-appeal  
14 exists even though it is only a small  
15 additional penalty. But EPA did prove the  
16 violations and feels it is entitled under the  
17 penalty policy and under our guidances to the  
18 additional penalties.

19 Now, in terms of notice, I can't  
20 imagine a case in which the notice to the  
21 states could have gone anything beyond this  
22 case. There was a case involving unusually

1 close cooperation and decision making between  
2 EPA and three states.

3 JUDGE REICH: Can I ask, while  
4 you're at that point, given that clearly  
5 notice of the state is a statutory  
6 requirement and therefore a requirement of  
7 some significance, does the region have a  
8 policy on how it documents how notice is  
9 given?

10 For instance, if it is given orally  
11 in the course of a conversation, is there a  
12 requirement to document that in writing some  
13 place as to the notice that was given and to  
14 whom and what it said?

15 MR. FIELDS: Well, our region has  
16 no formal written policy. Certainly, after  
17 this case, we have made a specific point of  
18 including a written document in the case  
19 files telling the states EPA plans to file an  
20 appeal.

21 JUDGE REICH: So, as to this  
22 particular case, there were no written

1 documents in the case file --

2 MR. FIELDS: There were no written  
3 documents specifically telling a person.

4 JUDGE REICH: To give notice?

5 MR. FIELDS: There were certainly  
6 documents documenting the meetings. There  
7 were people's notes documenting things that  
8 were talked about. But in this case, it just  
9 appeared to us that there was no issue. The  
10 states were cooperating all along. You knew  
11 the states were cooperating.

12 In the case of D.C., we held  
13 meetings with Euclid in D.C.'s office. There  
14 were no documents saying this is the  
15 statutory notification had been created, but  
16 EPA clearly gave multiple  
17 explanations (sic) -- no, multiple  
18 notifications to the state.

19 And the testimony at the trial by  
20 three different state employees said that  
21 they, in fact, stopped their enforcement  
22 actions because it was their understanding

1 that EPA was going to be taking over.

2 I believe on cross-examination,  
3 there was a specific question Mr. DeCaro  
4 asked, "How come you didn't follow up if you  
5 thought these violations were so serious?"

6 And each of the state witnesses  
7 said "We did think they were very serious,  
8 but EPA assured us they were doing something  
9 about it by filing an action."

10 JUDGE REICH: Also, was there at  
11 the time any policy as to whom within the  
12 state you had to notify, and at what level?  
13 Was it an inspector, or did it have to be  
14 somebody at a supervisory level? Was there  
15 any guidance as to the appropriate level for  
16 making this notification?

17 MR. FIELDS: I don't think that  
18 there is any guidance whatsoever. I think  
19 that our general policy is to make sure that  
20 the proper enforcement authorities, usually  
21 at the branch chief level or higher, are  
22 aware of the fact that EPA plans to bring a

1 case.

2           Certainly, in this instance, the  
3 people who were at these meetings included  
4 high-level people and even office heads. As  
5 was pointed out on Euclid's argument, they  
6 specifically wanted EPA to bring this case  
7 because it was a resource drain and it was a  
8 multistate case.

9           JUDGE STEIN: With respect to the  
10 series of questions that Judge Reich just  
11 asked, I believe he focused on any kind of a  
12 regional policy. And I'm wondering whether  
13 there is any kind of a national policy, or  
14 whether you are aware of regions that do give  
15 notice in writing as opposed to orally?

16           MR. FIELDS: Well, our region now  
17 does give a formal notice in writing.  
18 However, by the time that notice is given,  
19 the states have really been notified.  
20 Because EPA works -- I mean, certainly in the  
21 UST Program I can speak to EPA and the states  
22 discuss the inspections that are happening.

1 They discuss violations found. Each month,  
2 each state and EPA have a conference call  
3 talking about the status of any enforcement  
4 actions being taken by EPA.

5 But in response to any concerns,  
6 EPA makes sure that a formal written notice  
7 is given. But I don't believe that that  
8 notice is necessary at that point to satisfy  
9 the otherwise clear statutory guidelines that  
10 notice must be given, but in no particular  
11 specified form.

12 JUDGE WOLGAST: And in your view,  
13 what is the best-case precedent to look to  
14 resolve this question of what notice is  
15 sufficient for purposes of the statutory  
16 requirement

17 MR. FIELD: Well, I think that the  
18 ALJ opinion in Brenntag is certainly on  
19 point. Now, obviously it's not binding on  
20 the Board.

21 But I think in Brenntag the case is  
22 very similar, that the evidence showed that

1 EPA and the states cooperated, and that the  
2 states asked EPA to take some action.

3 In that case, it was ruled that  
4 giving an additional notice seems to be just  
5 surplus. The states clearly knew EPA was  
6 going to act because they asked them to do  
7 so.

8 Now, in terms of other actions, I  
9 don't believe this issue has been litigated.  
10 In some instances, there have been  
11 questions -- there have been citizens with  
12 cases in which no notice had been given. And  
13 if no notice had been given, that is  
14 certainly a problem.

15 But generally citizens who are  
16 plaintiffs don't work cooperatively with EPA,  
17 and EPA does not ask private citizens to file  
18 a suit so that any of those cases are  
19 completely off point.

20 JUDGE STEIN: Is there any  
21 legislative history in RCRA which would bear  
22 on the purpose of the notice requirement?

1           MR. FIELDS: I believe there is  
2 some history talking about the need for  
3 states who have authorized programs to be  
4 aware of. And I am not prepared to cite it  
5 right now.

6           JUDGE STEIN: Additionally, are you  
7 aware of whether any other federal  
8 environmental statutes besides RCRA require  
9 that the notice that we're talking about here  
10 be given in writing to a state? Are you  
11 aware of other statutes where that might -- I  
12 realize it's not specific as to that point  
13 under RCRA.

14          MR. FIELDS: I am not aware of any  
15 one that specifically does. I mean, I  
16 haven't really examined all of them. I do  
17 know that some of the citizen suit provisions  
18 do specifically require the notice to EPA to  
19 be in writing.

20          JUDGE STEIN: Thank you.

21          MR. FIELDS: With regard to the  
22 inventory control questions raised, I believe

1 the regulations clearly show that that was  
2 intended to be tank-by-tank. I think that if  
3 you have a combination of tanks, as claimed  
4 by Euclid, then EPA has made it clear that  
5 combinations, not aggregations but  
6 combinations of tanks, tanks that are liked  
7 together so that the contents cannot be dealt  
8 with separately, EPA's own guidance says that  
9 those tanks but only those tanks can be  
10 combined for purposes of inventory control.

11 On the cross-appeal issues, just  
12 real briefly and then I can --

13 JUDGE STEIN: Before you go to the  
14 cross-appeal, what about 280.12? How do you  
15 respond to their argument?

16 MR. FIELDS: Well, I think 280.12,  
17 as I said the word "combination" of tanks is  
18 clearly addressed in the EPA guidance and  
19 also in the American Petroleum Institute  
20 guidance that is specifically cited in the  
21 regulations talks about tanks in which the  
22 tanks are joined together so that product

1 flows between those tanks. I think that  
2 would constitute a combination of tanks.

3 Euclid is talking not about a  
4 combination but an aggregation. It just  
5 feels it would like to take a bunch of tanks  
6 and do them all together because it is easier  
7 that way.

8 And it is also important to point  
9 out that inventory control is a method used  
10 by gas stations to do things other than  
11 release detection. One of the key issues is  
12 just being able to predict when to send  
13 deliveries of gasoline. It is also used for  
14 economic accounting on cash flows between  
15 lessees and lessors.

16 And the fact that a system of some  
17 sort of inventory control is in place does  
18 not mean that that system was intended for an  
19 actually used to comply with EPA's  
20 regulations.

21 I would also remind the Board that  
22 in most instances for most periods of time

1 inventory control was not an allowable  
2 tank-release protection method. It was  
3 specifically set up as a method that was to  
4 expire.

5 It was allowed in the initial  
6 regulations because there was a need to get  
7 regulations out quickly and to order people  
8 to begin doing something immediately.

9 And it was impossible in 1987 or  
10 '88 to immediately have gotten ATGs at every  
11 facility and so EPA rushed the regulations  
12 out and said, "Do this now for the next 10  
13 years. And then after that, only if you have  
14 a new tank can it be used and only for a  
15 certain period of time."

16 Now, on the cross-appeal, part of  
17 the thing we point out is that after Judge  
18 Charneski ruled that Euclid was not doing a  
19 tank-by-tank inventory control, he pretty  
20 much stopped and didn't address the other  
21 arguments one way or another.

22 There were two very critical

1 problems with Euclid's inventory. First of  
2 all, the inventory was not comparing any  
3 results to the monthly standard. In  
4 addition, Euclid's inventory control was not  
5 actually being done monthly. It was being  
6 done on a cumulative basis. And I will get  
7 back to that as I get to that.

8 JUDGE WOLGAST: Could you explain  
9 the first --

10 MR. FIELDS: Well, I mean, I can  
11 just skip the introduction and actually go  
12 directly into it. Euclid's inventory control  
13 was being performed on a particular sheet. I  
14 will put up a copy of this here, if I can get  
15 it to work here. This is on Complainant's  
16 Exhibit Y-30.

17 JUDGE STEIN: I think we're going  
18 to need some technical assistance from -- I  
19 mean, I think we can get that assistance for  
20 you, if you could put it back on the screen.

21 MR. FIELDS: What I would like to  
22 do first is put on the screen an example in a

1 guidance document that came out in 1993 from  
2 EPA, and this example is very similar to the  
3 example in the API document that was cited in  
4 the regulations.

5           Essentially, at the bottom here  
6 each month, EPA recommends adding up a daily  
7 inventory, and at the end, you get totals for  
8 a suspected loss. That loss on the bottom  
9 line here has to be compared to that month's  
10 throughput, that month's sales, to determine  
11 if it is within the regulatory standard of  
12 1 percent of throughput plus 130 gallons, or  
13 in Maryland half of 1 percent.

14           On Euclid's inventory sheets, there  
15 was absolutely no calculation showing a  
16 comparison of Euclid's calculated losses to  
17 the monthly standard. In fact, as was  
18 discussed at length in the brief, in the  
19 post-hearing brief and the appeal brief, the  
20 actual documents in Complainant's  
21 Exhibit Y-30 show strange anomalies that  
22 shows something completely different from the

1 type of inventory control contemplated by the  
2 regulations.

3 For instance, if you look up here  
4 at the Rhode Island Avenue book amount, which  
5 is the amount calculated to be in the tank,  
6 the amount is actually negative.

7 Now, any way you do inventory  
8 control you are not going to get a negative  
9 book amount. That is the amount that is  
10 calculated to be in there. It is hard to  
11 understand what Euclid was actually doing  
12 with these documents.

13 But when EPA asked repeatedly many,  
14 many times, "Show us your inventory control  
15 documents," for two or three years when EPA  
16 and the states asked, they got nothing.

17 Eventually, this is what Euclid  
18 came up with and said, "This is it. This is  
19 what we do." These documents are, in effect,  
20 incomprehensible, and they clearly do not  
21 show a comparison of any result to the  
22 monthly standard.

1           Now, in addition, Euclid's General  
2   Manager, Mr. Buckner, was very clear that the  
3   monthly calculated amount did not start with  
4   the on-hand in the previous month. The  
5   monthly calculated amount was a calculation  
6   based on all the inputs and all of the sales  
7   since the beginning of a tank being put into  
8   service.

9           If you are doing that, you are not  
10   doing any monthly reconciliation. All of the  
11   guidances, all of the documents shown, cited  
12   in the regulations, and all of the logical  
13   industry practices have to be that if you are  
14   calculating your loss for month, you have to  
15   start with the amount that you measured in  
16   the tank at the beginning of the month.  
17   Euclid admitted that it did not do that.

18           So basically what it is getting  
19   here is gobbledygook. It is getting  
20   something that on the face of Complainant's  
21   Exhibit Y-30 is showing huge shortfalls that  
22   are clearly beyond the regulatory standard

1 for declaring a leak. But somehow in  
2 Euclid's own mind, for whatever purposes it  
3 did inventory control, it was not concerned.

4 I think that Euclid's President,  
5 Mr. Yuen, testified very clearly that he  
6 thought his method, however it was being  
7 done, was just better than anything EPA  
8 required and the regs. So that's what he  
9 did, despite anything in EPA's regs.

10 JUDGE STEIN: One of the things we  
11 are particularly interested in hearing about,  
12 Mr. Fields, is ATG. We are struggling with  
13 trying to understand what is required, what  
14 is the relationship between not having  
15 passing results and not monitoring, what is  
16 the significance of not having recorded  
17 results, and how you can use it to show  
18 testing?

19 So keeping mind the questions that  
20 we asked Euclid's counsel, if you could  
21 elaborate on that point, those points for us,  
22 that would be appreciated.

1           MR. FIELDS: I could just put up an  
2 exhibit here, if I can, just showing you what  
3 an ATG looks like.

4           An "ATG" is basically a computer,  
5 and it can be used for many purposes. The  
6 ATG main unit or the "head unit," as it's  
7 called, sits on the wall and is hooked up to  
8 whatever probes you want to hook up to it.

9           Now, as contemplated by the EPA  
10 regulations, the ATG will run a specific  
11 test. But in fact, ATG's are commonly used.  
12 In fact, Euclid's personnel admitted on the  
13 record in the transcript that they used to  
14 take inventory readings.

15           Essentially, as was explained, it's  
16 a machine that tells you how much gasoline is  
17 in the tank at that moment. It will take a  
18 tank level and it will convert that to  
19 gallons and it will tell you at that moment  
20 "Here's how much is in there."

21           If you are doing a standard ATG  
22 test to comply with the EPA rules, the ATG

1 has to have a period of time -- depending  
2 upon the size of the tank, it can range from  
3 two to four hours, two to five hours -- in  
4 which it measures the tank level to adjust  
5 for minor changes in pressure and temperature  
6 and sees if that level is going down in any  
7 significant amount.

8           Euclid in a lot of instances had  
9 ATGs on the wall. They were apparently using  
10 them to, I'll call it, "stick the tanks" to  
11 find out the inventory level at the end of  
12 the day, but they were not getting any test  
13 results because it was not programmed to run  
14 those tests.

15           Once EPA confronted Euclid's on  
16 Euclid's contract, who they hired only after  
17 EPA started to really put the vices on,  
18 attempted to program them and to get results.

19           But to run this kind of a standard  
20 test, you need to have two to five hours  
21 where the tank is not being filled and it is  
22 not being pumped out of. In fact, most of

1 Euclid's stations were operated 24 hours, and  
2 so they were unable to validly do this.

3           Also, in the record, Euclid's  
4 contractor then explained that he finally,  
5 when the case was getting close to going to  
6 hearing, instituting a system where he would  
7 go to each station once a month and shut down  
8 the station and try to get a valid test.

9           But in fact that didn't work,  
10 because to get a valid test you need the  
11 right conditions. You need to have the tank  
12 be filled to a certain level. You need to  
13 have stable temperature conditions.

14           For instance, if you deliver  
15 gasoline shortly before a test, that gasoline  
16 coming out of the truck is going to be a very  
17 different temperature than the ground  
18 temperature.

19           Then, it will change in temperature  
20 during the course of the test and the machine  
21 will say, "That's too much of a temperature  
22 change. I can't calculate that." The test

1 comes out invalid.

2 In other facilities, and there was  
3 expert testimony that at other facilities'  
4 ATGs could be made to work if they were used  
5 appropriate to the facilities. If you are  
6 trying to do a standard test and you have a  
7 station that is not open 24 hours, you have  
8 to run the test multiple times during the  
9 course of a month so that on at least one of  
10 those days you are going to get the right  
11 conditions for the test to be valid instead  
12 of invalid.

13 Euclid finally attempted to run a  
14 test once a month. They weren't getting  
15 consistent results doing it that way. The  
16 other method you can use to deal with this  
17 problem is installing a particular type of  
18 software that is relatively expensive, it's a  
19 couple of thousand dollars for a chip, to do  
20 what is called "continuous statistical leak  
21 detection."

22 The same machine is able to take

1 shorter periods, 15-minute periods, where the  
2 tank is not being used and aggregate them.  
3 At some point in the month, if enough of  
4 these periods are present, the machine says,  
5 "Now we've aggregated enough, used a  
6 statistical model, and determined the tank  
7 for this month is not leaking."

8           At the time of the hearing only one  
9 of Euclid's stations had been outfitted with  
10 CSLD, and I believe it was in September 2003,  
11 shortly before the hearing. Lo and behold,  
12 from September through December that facility  
13 had valid results.

14           None of the other facilities had  
15 been outfitted with CSLD. In fact, Euclid's  
16 contractor testified that he was under orders  
17 to try to do anything other than spend the  
18 money, try to find some other way to do it  
19 without installing CSLD, and only install  
20 CSLD if there was no other way to do it.

21           Now, to the extent that CSLD has  
22 been installed, this is far too little, far

1 too late. Euclid had --

2 JUDGE WOLGAST: But you saying that  
3 CSLD isn't a regulatory requirement; correct?

4 MR. FIELDS: CSLD is a way to get a  
5 valid ATG result. Getting some sort of valid  
6 result in one of the enumerated methods is  
7 required by the regulations. Euclid was not  
8 getting any valid result under any of the  
9 various choices and their response is, "Well,  
10 the ATGs don't work."

11 Well, the ATGs could have worked  
12 for their facility. But there are some  
13 facilities where even CSLD doesn't work. The  
14 throughput is too high. Those facilities are  
15 required to find another method in the  
16 regulations and implement that method. There  
17 are plenty of choices, double-wall tanks with  
18 probes between the tank is one choice.

19 Euclid would have had to retrofit  
20 several of its facilities to do that. In  
21 fact, at Euclid's facilities using CSLD would  
22 have gotten them a valid result in most

1 instances and would have complied with the  
2 regulations.

3 JUDGE REICH: Does a valid result  
4 mean either a passing or a failing result?

5 MR. FIELDS: Well, a fail, I would  
6 argue, yes, is a valid result, but it  
7 triggers a whole bunch of other requirements.

8 JUDGE REICH: But can you have a  
9 situation, as Mr. DeCaro seemed to suggest,  
10 where you could have a failing result which  
11 is a valid result that would lead to an  
12 investigation that would not then lead to a  
13 retest showing a passing result?

14 MR. FIELDS: No. If you have a  
15 fail, you must either get some sort of result  
16 showing that it is not leaking, or you have  
17 to treat it as if it is a leak. Generally,  
18 what happens is that if you -- well, under  
19 the regs, you don't have to declare a  
20 suspected release if within the reporting and  
21 investigation period you find a specific  
22 malfunction, correct the malfunction, and

1 then additional testing does not show a  
2 release.

3           So if you knew that there was a  
4 malfunction, for instance, if you pumped gas  
5 during the test and could point to that and  
6 say, "Oh, gee, that's probably the reason,"  
7 you then have to run the test without pumping  
8 gas and get a passing result; if not, then  
9 you have to declare, or investigate.

10           In general, there are false  
11 positives because people do stupid things  
12 like pumping gas during a test. If you  
13 cannot correct that, in general what EPA and  
14 the states require is what is called a  
15 "tightness test." The tank is pressurized  
16 and any pressure decay during the period of  
17 the test is analyzed to see if it is leaking.

18           There is no evidence that Euclid  
19 did that in response to any fails. In fact,  
20 at the beginning of the case, the EPA had  
21 planned to charge Euclid with failing to  
22 investigate failed results.

1           Because EPA's inspectors and the  
2 state inspectors by themselves went to these  
3 facilities and found failed tests in the test  
4 history. Euclid had been asked to provide  
5 records, but did not provide even those.

6           EPA, after meeting with Euclid,  
7 decided that that was not the proper  
8 violation because Euclid didn't know whether  
9 it had passes, fails, or invalids at all. It  
10 had no idea what the results, if any, were on  
11 any of those tests.

12           So we concluded that, "Well, you  
13 can't be required to report a suspected  
14 release if you have no idea that it happened.  
15 But if you don't have any idea whether it  
16 happened, you haven't been doing any release  
17 detection at all.

18           JUDGE STEIN: But can you -- I'm  
19 having difficulty finding where in the  
20 regulations you are looking to to find the  
21 requirement to have passing results?

22           When I look at 280.43, it describes

1 methods of release detection, and under (d)  
2 it talks about automatic tank gauging,  
3 but -- it talks about being able to detect a  
4 leak rate and to be done in combination with  
5 some other method. But where is the  
6 specificity in the regs that you are  
7 suggesting is there?

8 MR. FIELDS: Well, under 280.41, it  
9 says you must monitor the tanks every 30 days  
10 to determine if they are leaking, and you are  
11 not monitoring if you are getting results  
12 that don't tell you if it's leaking or not.  
13 Some human being has to see or hear or be  
14 told of some results saying "Is this leaking  
15 or not."

16 If you get an invalid result, you  
17 don't know one way or another, so you cannot  
18 be said to have monitored that tank. All can  
19 be said is that you've got the unit on the  
20 wall, you've got probes in the tank, but  
21 you're not monitoring.

22 Certainly, if someone designed a

1 machine that ran tests but had no readout at  
2 all, that would no be monitoring. Even  
3 though the machine knows whether it is  
4 leaking or not, no one else does.

5 JUDGE STEIN: Is there a definition  
6 of monitoring in the tank regulations?

7 MR. FIELDS: No, I don't believe  
8 so. I believe it is a common sense  
9 interpretation that you are not monitoring if  
10 you don't know whether or not it is leaking.

11 JUDGE STEIN: That monitoring to  
12 determine it is leaking is a specific  
13 requirement for ATG, or is a more general  
14 requirement?

15 MR. FIELDS: No, that is in 280.41,  
16 all petroleum USTs must have some sort of  
17 monitoring. In 280.43, it gives several  
18 options as to how you monitor. But in each  
19 instance, you have to have some system that  
20 can detect a leak within 30 days so that you  
21 can monitor to find whether or not that tank  
22 is leaking.

1           JUDGE REICH: Does ATG store only  
2 passing results?

3           MR. FIELDS: I believe the ATG will  
4 store the last test, be it passing or invalid  
5 or fail, and in addition it will store the  
6 last 12 months of passing results. Now, I  
7 say the "last 12 months," the testimony is  
8 clear that if there is no passing result in a  
9 month, it will store prior months.

10          JUDGE REICH: Other than the last  
11 test, if there are no previous tests stored,  
12 can you tell whether there was a failed test  
13 or a not a valid test?

14          MR. FIELDS: I believe it varies  
15 from ATG to ATG. I believe some ATGs will  
16 store several failed tests and others will  
17 not. In other instances, I mean, the ATGs,  
18 most of the particular brand here, the  
19 Veeder-Root ones, when it runs a test, it  
20 will kick a test a tape out. It will print  
21 out a tape, and it will drop on the floor.

22                   At one facility, I believe Jackie

1 Rian of MDE found a bunch of these on the  
2 floor or in the office and asked the people  
3 at the facility, "What are these?"

4 And they said, "I don't know, it  
5 just came out of the machine."

6 And she found several failed  
7 results on these tapes. But I don't think as  
8 a rule that the machine will store fails. I  
9 believe it will store up to three alarms.  
10 And generally if you get a fail, the machine  
11 will, internally at least, give off an alarm.  
12 The evidence was very clear at all of  
13 Euclid's facilities any alarms that happened  
14 were being ignored.

15 But once again, if Euclid is asked,  
16 "Show us your records, show us what you're  
17 doing," they said, "We don't know." In fact,  
18 when Euclid did it, they said, "Well,  
19 everything is probably at the facility."

20 But the people at the facilities  
21 said "No, all we use these for is just to get  
22 inventory. Euclid must have it."

1           Well, whether the machines were  
2    doing anything or not, no one was actually  
3    looking at the results.  When EPA in many  
4    instances tried to pull up past results, it  
5    was very clear that no test had ever been  
6    done.

7           JUDGE WOLGAST:  As to the facility  
8    that you say became equipped with CSLD and  
9    then performed valid results, as you said,  
10   what was indicated by those results?  Were  
11   they passing?  Failing?

12           MR. FIELDS:  Yes.  If you have a  
13    CSLD result, it will specifically say: "CSLD  
14    Test Result," and then "pass," or "fail."  By  
15    the time that happened, EPA had actually  
16    worked very closely with a contractor who  
17    Euclid eventually hired.

18           EPA actually worked well with them.  
19    He knew what had to be done.  He just didn't  
20    have authorization to go out and do it early  
21    on, but he was keeping very close records.  
22    Each month he would be out there and he would

1 collect the actual tape and it would say  
2 "test performed/test passed."

3 JUDGE WOLGAST: And they had  
4 passing results at the time?

5 MR. FIELDS: They had passing  
6 results. Mr. DeCaro is correct that EPA has  
7 not identified any specific leak from these  
8 tanks, but I think that that goes only to the  
9 question of did the corrective action rules  
10 kick in.

11 Euclid in fact was going blind on  
12 this in that they did not have any idea if  
13 tanks were leaking or not, and the  
14 regulations are designed to be ready so that  
15 when a tank leaks it can be dealt with.

16 Inventory control had been used in  
17 some method prior to EPA's regs coming in,  
18 and at that point EPA calculated  
19 approximately 300,000 underground tanks had  
20 been leaking in 87.

21 So it is not clear that any given  
22 tank will leak at any particular time, but

1 the environment can be very seriously harmed  
2 if a tank release is not found. And so  
3 Euclid was very blithely ignoring very  
4 important prophylactic rules.

5 JUDGE STEIN: Am I correct in  
6 understanding that in order to use ATG, it  
7 must be used in conjunction with inventory  
8 control or tank tightness testing, or am I  
9 incorrect in that understanding?

10 MR. FIELDS: Well, in the  
11 regulation, it says that in addition to doing  
12 ATG, you have to use inventory control or  
13 some equivalent message in addition. In some  
14 states, particularly in Maryland and in D.C.,  
15 they very clearly require inventory control  
16 to be done at every facility.

17 As I understand it, the Office of  
18 Underground Storage Tanks has been a little  
19 unclear about if EPA requires inventory  
20 control to be there in addition to an ATG.

21 From our standpoint, we are not  
22 arguing that. In other words, if the had a

1 valid ATG result for the purposes of our case  
2 here, EPA considered that to be a passing  
3 test for that month.

4 JUDGE STEIN: I want to ask to ask  
5 you the same question I asked Euclid's  
6 counsel, which is, am I correct in  
7 understanding that there are seven counts  
8 that depend on this ATG issue? Are you in a  
9 position to answer that question?

10 MR. FIELDS: I'm not really sure.  
11 I mean, I think that our evidence showed that  
12 in every instance in which tank release  
13 detection was claimed as a violation, there  
14 was an ATG eventually installed at that  
15 facility but that there were no results until  
16 sometime in late 2003, just prior to the  
17 hearing. So I really don't --

18 JUDGE STEIN: You don't know how  
19 many counts were release detection?

20 MR. FIELDS: I believe it was 15,  
21 but that's just off the top of my head.

22 JUDGE STEIN: I believe your co-,

1 not your co-counsel, but Mr. DeCaro may have  
2 the answer.

3 MR. DeCARO: I counted up 13, and  
4 I'm going to give this to Mr. Fields.

5 JUDGE STEIN: Okay.

6 MR. FIELDS: Well, Your Honor, as I  
7 understand, in the stipulations, Euclid  
8 raised ATG testing as a possible defense at  
9 every facility in which an ATG was present,  
10 so I'm not quite sure I understand.

11 But I do believe that at least as  
12 of the hearing Euclid's own general manager  
13 was testifying that he had never seen a valid  
14 passing result from any of these ATGs, and he  
15 didn't care because they were doing their own  
16 method of inventory control and that was good  
17 enough for them.

18 JUDGE STEIN: Okay.

19 JUDGE WOLGAST: Could you speak to  
20 Euclid's argument that as to tank-release  
21 detection and line-release detection, that  
22 the Region's prima facie case is in essence a

1 lack of records?

2 MR. FIELDS: I think -- certainly  
3 for tank-release detection, the primary thing  
4 in the prima facie case is a lack of records,  
5 but it's a lack of records that goes back  
6 forever.

7 In other words, if within the  
8 entire period of keeping records for all the  
9 tanks, both in D.C. and in Maryland, and of  
10 course D.C. has a three-year period and  
11 Maryland has only a single year and  
12 essentially Euclid had no passing results in  
13 that entire period, the ALJ then properly  
14 inferred that if they weren't doing anything  
15 for three years at any tank, they probably  
16 were not doing anything back to five years.

17 At that point, I believe EPA has  
18 established a prima facie case, that the  
19 evidence speaks for itself. Euclid is  
20 welcome to come in and explain that they were  
21 actually doing something just before the  
22 cutoff period but that's kind of a -- that's

1 an argument that's kind of hard to believe.  
2 And Euclid did not make any attempt to do  
3 that. In fact, they testified that they had  
4 never gotten a proper ATG result.

5 Now, on line-release detection, it  
6 is a little bit different. I can actually  
7 turn to my notes on that here. The  
8 line-release detection counts, some of the  
9 evidence shows that when EPA did ask for  
10 annual tightness testing results and annual  
11 line-leak detector results, for some  
12 facilities, Euclid had at that time test  
13 results; for some facilities, it did not.

14 In almost every instance, the test  
15 result was greater than a year old, and so it  
16 was clearly in violation. There was a  
17 combination of inferences that led EPA and  
18 the judge in the case below to conclude that  
19 the only line-tightness test, and line-leak  
20 detector test performed by Euclid are the  
21 ones in which Euclid retained the records.

22 First of all, in the extensive

1 meetings in April 2002, Euclid told the EPA  
2 that the boxes of records it was bringing in  
3 was everything that they had, and they had no  
4 reason to believe that anything had been  
5 removed from those records and also told EPA  
6 that there was no record destruction policy,  
7 that they couldn't understand why anything  
8 would not be there.

9           In addition, in those records,  
10 there were tightness tests going back to  
11 1995, but again very sporadic. It was not on  
12 any kind of annual basis; it was not for  
13 every facility; and there were other  
14 maintenance records going back to the  
15 mid-1980s.

16           In addition, it was very clear  
17 based on a number of pieces of evidence that  
18 Euclid did not have a formal annual testing  
19 program, that tests were being done  
20 sporadically. And, again, Mr. Buckner could  
21 only testify that from time to time he would  
22 order a test.

1           In addition, the state  
2       notifications given before the period of  
3       violation had a box to check off methods of  
4       tank- and line-release detection. And for  
5       most of the notifications, line-release  
6       detection was not listed even for facilities  
7       that at some point or another had had a test.

8           And, finally, in the face of all  
9       this evidence, Judge Charneski followed EPA's  
10      suggestion to draw the inference that Euclid  
11      in fact kept records of the tests that had  
12      been done.

13           And so even if we asked in 2001 for  
14      test results and Euclid had a 1999 test,  
15      Judge Charneski agreed that prior to 1999 by  
16      a preponderance of evidence EPA had proved  
17      that Euclid had not done a test.

18           In the face of this, Euclid could  
19      have called witnesses, either a store  
20      operator or the particular person, Charlie  
21      Pyle, who you could claim did any tightness  
22      test done.

1           They could have called this person  
2 to say, "Well -- you know, I have other  
3 records, or I remember doing a test that is  
4 not included in these records." Euclid did  
5 not call any witness, and so therefore did  
6 not rebut these very strong inferences based  
7 on all of this evidence.

8           Now, in the face of all this, the  
9 judge agreed that based on the credibility  
10 and the testimony, that EPA was correct and  
11 that Euclid in fact did have records of any  
12 tests that was actually done at any time.

13           Now, if I could speak real briefly  
14 to the questions on Count 31, the Frederick  
15 Avenue facility in Baltimore. The evidence  
16 at trial was very clear that there were no  
17 sump sensors and the test boots were tight.

18           You could have made some argument  
19 that you wouldn't have tight test boots if  
20 you didn't have sensors. That argument makes  
21 no sense to me. If you have double-walled  
22 pipes, you always have some boots on them,

1 someone tightened.

2           And if you have tight boots, you're  
3 not going to have a flow of a release into  
4 the sump that's not going to be detected by  
5 sensors. If you don't have sensors, it can  
6 be closed or open, you're still not going to  
7 have any detection.

8           The interesting thing, though, here  
9 is that EPA in its First Amended Complaint  
10 did make a mistake. In the penalty  
11 calculation in the first amended complaint,  
12 we mistakenly believed that that was one of  
13 the facilities that had partial elements of a  
14 sump sensor system and that actually had  
15 sensors.

16           At trial, this mistake was  
17 discovered. The evidence was very clear, and  
18 the evidence was introduced and witnesses  
19 testified that there were not sensors there.  
20 Euclid's technical contractor did not  
21 contradict this.

22           At that point in the post-hearing

1 brief, EPA recalculated the penalty and said  
2 that the break that we gave Euclid for  
3 facilities which had some semblance of a  
4 system is not going to be included for this  
5 facility.

6 Now, in the penalty policy, this  
7 break isn't even in there. EPA gave that  
8 break, but only at the facilities which  
9 actually had some sort of a sump sensor  
10 system.

11 Any other questions?

12 JUDGE STEIN: Thank you.

13 REBUTTAL ARGUMENT OF THEODORE F. DeCARO

14 ON BEHALF OF RESPONDENT

15 MR. DeCARO: May it please the  
16 Court, I guess the sensors and boots go  
17 together. The complaint said there were  
18 sensors. I guess if there were some  
19 testimony at trial that there weren't any  
20 sensors, then I guess there is a variance  
21 between the complaint and the evidence. That  
22 is the only point that could be made there.

1 I don't have anything further to say, unless  
2 you have any questions.

3           Okay. As far as financial  
4 responsibility, I would just like to clarify  
5 that. There are several ways of meeting the  
6 financial responsibility requirements, and  
7 one of them is to have a guarantee. We don't  
8 have a guarantee in this case. We have  
9 actual, what we are claiming, Respondent is  
10 claiming that there is an actual net worth.

11           There is no guarantee, and so I'm  
12 not going to sit here and contend that the  
13 guaranteed requirements were somehow  
14 satisfied, because they weren't -- okay,  
15 there is no documentation of a guarantee.

16           Euclid is saying the gestalt of its  
17 operation has a large enough net worth to  
18 meet the self-insurance requirements. And so  
19 we're not saying that the lack of a guarantee  
20 means they failed the requirements. We're  
21 just saying --

22           JUDGE WOLGAST: I understood that

1 the ALJ as to that point both found that it  
2 lacked formal guarantees but also the  
3 financial resources on which Euclid was  
4 relying went to its affiliates and not to the  
5 company itself.

6 MR. DeCARO: All these -- most of  
7 the financial resources are owned by limited  
8 liability companies under common ownership, I  
9 mean, common ownership to a certain extent, I  
10 guess. The testimony of the Respondent,  
11 Mr. Koo Yuen, is that this is available.  
12 There was nothing agreed about that.

13 I mean, the ALJ wants to look at  
14 the -- I mean, we presented -- we presented  
15 the fact that the limited liability company  
16 memberships are owned by three trusts, three  
17 different trusts.

18 Euclid is a member of some of the  
19 limited liability companies, but Euclid  
20 doesn't own the real estate. However, the  
21 stations where the facilities are located are  
22 very valuable. I think there was plenty of

1 evidence of that. That was what we presented  
2 on that point.

3           The other thing I would like to  
4 point out is in the record, the documents  
5 that Mr. Fields presented regarding the  
6 inventory control used by Euclid are not all  
7 of the documents that Euclid presented.

8           There are daily sheets that roll up  
9 into that sheet that Mr. Fields presented,  
10 which is actually the least attractive, the  
11 least readable of the sheets. So I would ask  
12 the Panel to take a look at the record when  
13 evaluating Euclid's compliance with respect  
14 to inventory control.

15           MR. WOLGAST: Was Mr. Fields  
16 correct that the manner in which Euclid  
17 performed the monthly tallies did not begin  
18 with existing inventory at the beginning of  
19 any given month?

20           MR. DeCARO: Not at the Leon  
21 Buckner level. Leon Buckner is the general  
22 manager of Euclid. He did not -- he gathered

1 data and passed it on to Koo Yuen, who  
2 performed the conforming analysis, and he  
3 testified to it. Mr. Yuen testified as to  
4 that. So that was where even though  
5 Mr. Buckner did not every month perform a  
6 conforming test, the test was being performed  
7 and it would have had --

8 JUDGE WOLGAST: Only by Mr. Yuen,  
9 you're saying?

10 MR. DeCARO: Mr. Yuen, right.

11 JUDGE WOLGAST: How would he do it?

12 MR. DeCARO: Well, he would get  
13 these sheets from Mr. Buckner and he would  
14 take a look at them. He had the inventory  
15 readings from the station and he had the  
16 previous month's inventory reading from his  
17 records and that was put into the record at  
18 the hearing.

19 JUDGE STEIN: Were they done on a  
20 real-time basis, or is there evidence in the  
21 record as to that point?

22 MR. DeCARO: He testified that they

1 were done on a monthly basis. There was  
2 evidence in the record that the CSLD, those  
3 are very, very accurate right now, but there  
4 is evidence in the record that at the time  
5 they were not always so accurate and that's  
6 why the retrofit came later in the process.

7 Then, we're talking about  
8 Count 31 -- I'm sorry, I already addressed  
9 that.

10 Thank you. Thank you very much.

11 JUDGE STEIN: Any further  
12 questions?

13 (No verbal response)

14 JUDGE STEIN: Thank you.

15 MS. DURR: All rise.

16 The hearing stands adjourned.

17 (Whereupon, at approximately  
18 12:08 p.m., the HEARING was  
19 adjourned.)

20 \* \* \* \* \*

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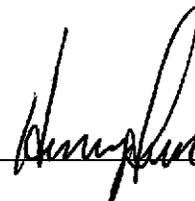
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## CERTIFICATION OF TRANSCRIPT

I certify that the attached transcript of the oral argument in the matter of Euclid of Virginia, before the Environmental Protection Appeals Board, on September 18, 2007, was held as herein appears and that this is the original transcript.

I, the undersigned, do certify that this is a true, accurate and complete transcript prepared from the electronic recording taken by Oveda Hancock of Beta Court Reporting, Inc., on the aforementioned date, and that I have verified the accuracy of the transcript by comparing the typewritten transcript against the electronic recording.

Transcriber/Proofreader:



Date:

9-25-2007