IN RE EUCLID OF VIRGINIA, INC.

RCRA (9006) Appeal 06-05 & 06-06[1]

FINAL DECISION

Decided March 11, 2008

Syllabus

Respondent, Euclid of Virginia Inc. ("Euclid"), appeals an Initial Decision issued by Administrative Law Judge Carl C. Charneski (the "ALJ") finding Euclid liable for violations of Subtitle IX of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act ("RCRA"); the federal Underground Storage Tank ("UST") regulations; and the UST regulations of the District of Columbia ("D.C."), the State of Maryland, and the Commonwealth of Virginia.

The ALJ found that Complainant, Region 3 (the "Region") of the U.S. Environmental Protection Agency ("EPA"), met its burden of proving that sixty-nine of the seventy-four violations occurred as alleged in the complaint and amended complaint, and he assessed a civil penalty of $3,085,293. The ALJ found Euclid liable for violations of the following federal and state UST regulatory requirements: (1) tank release detection; (2) line release detection; (3) corrosion protection; (4) overfill protection; (5) spill prevention; and (6) financial responsibility.

Euclid argued on appeal that the Region failed to comply with the requirement to notify the states where the alleged violations occurred in accordance with section 9006 of RCRA, and, accordingly, the complaint was invalid and the ALJ lacked subject matter jurisdiction to entertain the case. Euclid raised numerous arguments on appeal and challenged nearly all of the liability findings in the Initial Decision as well as the penalty assessment. The Region filed a cross-appeal challenging the ALJ's decision finding Euclid not liable for the violations alleged in count 47 and finding Euclid liable for only a portion of the period of alleged violation in counts 54 and 57.

Held: The Environmental Appeals Board ("Board") affirms the Initial Decision in part, vacates the Initial Decision in part, and assesses a total penalty of $3,164,555. The Board's holdings with respect to Euclid's and the Region's main arguments are summarized below.

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[1] This case was originally docketed as RCRA (3008) Appeal Nos. 06-05 & 06-06. However, because this is a civil penalty proceeding arising under section 9006 of RCRA, not section 3008, the docket number has been changed to more accurately reflect the nature of the case.

I. *Euclid's Appeal*

A. *The Notice Requirement*

Section 9006 of RCRA requires that, for violations in states with an EPA-approved UST program, EPA notify the state in which the violation occurred before filing an action. The Board upholds the ALJ's determination that, under the facts of this case, the Region satisfied the notice requirement in section 9006. The record shows that the states were actively involved in the process that led to the filing of the complaint and supported the Region's prosecutorial efforts. Although the record does not show the precise date on which the Region notified the states, the record clearly supports the inference that the Region notified them, prior to the filing of the complaint, that the Region was going to initiate enforcement action.

B. *Challenges to Liability Determinations*

1. *The Record Retention Arguments*

- The Board rejects Euclid's arguments that, for most of the tank release detection, line leak detection, and corrosion protection charges, the Region's evidence consisted solely of proof that Euclid lacked documents showing that it had conducted required testing and/or monitoring. The ALJ's findings of liability are supported by far more than a lack of documents; the ALJ's liability findings are adequately supported by facts and inferences in the record. Moreover, the Region met its burden of proof for each of the violations.

- The Board rejects Euclid's suggestion that it cannot be held liable for violations beyond the one-year record retention period established in 40 C.F.R. § 280.45(b). Euclid cannot use this provision to avoid potential liability for violations that may have occurred during the full five-year period allowed under the applicable statute of limitations.

2. *The Tank Release Detection Charges*

- The Board upholds the ALJ's findings that Euclid failed to provide adequate monthly methods by which to detect releases from its USTs. With respect to Euclid's reliance on inventory control in 40 C.F.R. § 280.43, the Board finds that:

    - The ALJ did not err in concluding that Euclid could not rely on inventory control for the entire period of alleged violation, except for the limited facilities and tanks identified by the ALJ. The regulations clearly provide that inventory control could only be used for a limited time period. Because the period allowing for use of this method generally had elapsed, Euclid had the burden of showing that any of its tanks fell under the ten-year grace period

for new or upgraded tanks. Euclid failed to provide any evidence in this regard.

- The ALJ did not err in concluding that inventory control must be conducted on a tank-by-tank basis rather than on a facility-wide basis.

- With respect to Euclid's reliance on automatic tank gauging ("ATG") as a method of tank release detection, the Board finds that:

  - The ALJ did not err in concluding that Euclid either was not conducting ATG monitoring or was conducting inadequate ATG monitoring. Euclid did not provide any evidence sufficient to rebut the Region's prima facie showing.

- With respect to Euclid's other arguments addressing tank release detection liability:

  - The Board rejects Euclid's argument that it used inventory control with the acquiescence of the D.C. Department of Health ("DOH"). Euclid provided no evidence that D.C. DOH allows this practice and, in any event, any decision by D.C. DOH to forebear from enforcement where inventory control was being used would not bind EPA since EPA has independent discretionary authority to initiate action.

  - Euclid's argument that under Virginia law one is not bound by one's admissions is of no relevance here. Under the rules governing this proceeding, a fact admitted by answer is a fact not in issue. Therefore, Euclid is bound by the admissions in its answer to the complaint that the tanks involved in count 10 were subject to the tank release detection regulations during the period of alleged violation.

3. *The Line Release Detection Charges*

- The Board upholds the ALJ's determination that Euclid did not conduct tests of its automatic line leak detectors and line tightness on an annual basis. Taken as a whole, the evidence in the record and the inferences drawn from such evidence establish a prima facie case that Euclid did not perform line tightness and line leak detector testing on an annual basis. Euclid did not present any evidence to rebut the Region's prima facie case.

- The Board upholds the ALJ's determination that Euclid did not meet its regulatory obligations by performing interstitial monitoring. The Region provided ample evidence showing that in some facilities Euclid did not intend to rely upon interstitial monitoring, and, in others, its interstitial monitoring systems

were so inadequate that they could not be relied upon. Euclid's argument that it hired contractors to maintain and test its equipment is irrelevant to the question of liability because RCRA is a strict liability statute.

- The Board rejects Euclid's challenges to the inferences the ALJ drew from the omission of line release detection methods in the UST notification forms. The totality of the evidence confirms the inferences drawn from the omissions in the UST notification forms.

4. *The Corrosion Protection Charges*

- The Board rejects Euclid's challenges to the credibility of the Region's expert witness. Euclid provided no compelling reasons why the Board should depart from the ALJ's credibility determination.

- The Board rejects Euclid's argument that Maryland allows coating and wrapping of metal piping components in contact with the ground as an approved method of isolating metal components from the ground, thereby avoiding the need for cathodic protection. Euclid did not provide any legal authority to support this assertion and failed to show that this is an allowable practice in Maryland.

5. *The Overfill Protection Charges & The Spill Prevention Charge*

The Board rejects Euclid's suggestion that it cannot be held liable for the overfill protection and spill prevention charges because the devices it relied on for tank overfill protection were installed by state-certified contractors and that someone else caused the conditions in which the Region's inspector found Euclid's spill prevention equipment. A party may not avoid RCRA liability by blaming a third party.

6. *The Financial Responsibility Charges*

The Board upholds the ALJ's rejection of Euclid's "net worth" defense and finds no clear error in the ALJ's determination that Euclid's self-insurance claim lacked formal guarantees. Euclid's method of financial responsibility is a combination of self-insurance and guarantee. Accordingly, Euclid's failure to comply with the regulatory requirements for obtaining guarantees is fatal. Euclid also failed to meet important self-insurance procedural requirements that help ensure that the assets of a self-insuring entity are timely available in the case of a release.

C. *Challenges to Penalty Assessment*

The Board rejects Euclid's challenges to the penalty assessment and finds no clear error in the ALJ's assessment of the penalty except as it relates to the

issues raised in the cross-appeal. The ALJ provided a reasonable explanation of how the assessed penalty relates to the applicable penalty criteria, and the Region reasonably applied the applicable penalty policy in calculating the proposed penalty amount.

II. *The Region's Cross-Appeal*

Because Euclid's approach to inventory control as employed at all its facilities during the entire period of alleged violation was flawed, the Board vacates the ALJ's ruling with respect to count 47 and the part of the ruling with respect to counts 54 and 57 in which the ALJ declines to find Euclid liable for violations of the federal UST regulations. Instead, the Board rules in the Region's favor on these counts and assesses a total penalty of $3,164,555.

Before Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Anna L. Wolgast.

Opinion of the Board by Judge Stein:

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I. *BACKGROUND*

A. *Nature of Case*

This is an appeal from an Initial Decision issued by Administrative Law Judge Carl C. Charneski (the "ALJ") finding Respondent, Euclid of Virginia, Inc. ("Euclid"), liable for violations of Subtitle IX of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act ("RCRA"), codified at 42 U.S.C. §§ 6991-6991i; the federal Underground Storage Tank ("UST") regulations (found at 40 C.F.R. pt. 280); and the UST regulations of the District of Columbia ("D.C.") (codified at D.C. Mun. Regs. tit. 20, §§ 5500-6715), Maryland (Md. Code Regs. 26.10.02-.11), and Virginia (9 Va. Admin. Code §§ 25-580, -590).[2] This case involves twenty-three facilities, owned and/or operated by Euclid, in D.C., Maryland, and Virginia, where Euclid sells gasoline and diesel fuel.

The complaint, filed by Region 3 ("Complainant" or the "Region") of the U.S. Environmental Protection Agency ("EPA" or "Agency"), charged Euclid with seventy-four counts of violations.[3] The ALJ found that Complainant met its burden of proving that sixty-nine of the violations occurred as alleged, in whole or in part, in the complaint and amended complaint, and assessed a civil penalty of $3,085,293 for these violations. The complaint alleges, and the ALJ found Euclid liable for, violations to the following sets of federal and state UST regulatory requirements: (1) the tank release detection requirements; (2) the line release detection requirements; (3) the corrosion protection requirements; (4) the overfill

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[2] As noted above, this case involves the federal UST regulations, as well as the state UST regulations of D.C., Maryland and Virginia. The Environmental Protection Agency ("EPA" or "Agency") approves state UST regulations pursuant to section 9004(b)(1) of RCRA, 42 U.S.C. § 6991c(b)(1). Once approved, state UST regulations operate in lieu of the federal UST regulations. 42 U.S.C. § 6991c(d)(2). Approved state regulations are federally enforceable. *See id.* § 6991e.

EPA granted final authorization to administer state UST programs to Maryland, Virginia and D.C. on June 30, 1992, October 28, 1998, and May 4, 1998, respectively. Some of the events in this case occurred while the federal regulations were applicable, and some occurred after the state UST regulations took effect.

[3] The amended complaint, filed on November 25, 2003, alleged seventy-four counts of violations; three of the counts were eventually withdrawn and one of them was dismissed. *See* Complainant's Initial Post Hearing Brief at 2; First Amended Complaint ("Amend. Compl."). Accordingly, the Initial Decision addresses seventy of the original seventy-four counts.

protection requirements; (5) the spill prevention requirements; and (6) the financial responsibility requirements.[4]

Dissatisfied with the Initial Decision, Euclid filed an appeal challenging nearly all of the liability findings, as well as the penalty assessment in the Initial Decision, and requested that a lower penalty be assessed. *See* Brief for Respondent before the Environmental Appeal's Board (hereinafter referred to as "Respondent's Appellate Brief"). Complainant, also dissatisfied with certain aspects of the Initial Decision, filed a cross-appeal challenging the ALJ's decision to find Euclid not liable for the violations alleged in count 47 and to find Euclid liable for only a portion of the period of alleged violations in counts 54 and 57. *See* Complainant's Brief on Cross Appeal and Brief in Opposition to Respondent's Appeal (hereinafter referred to as "Complainant's Cross-Appeal & Response").

On September 18, 2007, the Environmental Appeals Board ("Board") held oral argument in this case focusing on certain aspects of Euclid's appeal. *See* EAB Oral Argument Transcript ("EAB Tr.") (Sept. 18, 2007).[5]

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[4] Codified at 40 C.F.R. pt. 280; D.C. Mun. Regs. tit. 20, §§ 5500-6715; Md. Code Regs. 26.10.02- .11; 9 Va. Admin. Code §§ 25-580, -590.

[5] On September 10, 2007, a few days before the Board held oral argument in this case, Euclid filed a motion with the Board to reopen the proceedings below for the purpose of receiving newly discovered evidence. *See* Motion to Reopen the Proceedings Below for the Purpose of Receiving Newly-Discovered Evidence ("Mot. to Reopen"). The Region opposed Euclid's request by motion filed on September 21, 2007. *See* Response to Motion to Reopen ("Resp. to Mot. to Reopen").

The Board, however, cannot entertain Euclid's motion. As the Region points out, Euclid's motion is filed in the wrong forum. Pursuant to 40 C.F.R. § 22.28(a), a motion to reopen a hearing, like the one Euclid filed, "must be made to the Presiding Officer and filed with the Regional Hearing Clerk," not the Environmental Appeals Board. In addition, "[a] motion to reopen a hearing * * * must be filed no later than 20 days after service of the initial decision." 40 C.F.R. § 22.28(a). The Initial Decision in this case was served on November 14, 2006. While the allegedly "newly-discovered" evidence postdates the twenty-day deadline, the relief requested – reopening of the hearing for the consideration of this evidence – is outside of our authority. *See* 40 C.F.R. § 22.16(c) ("The Environmental Appeals Board shall rule as provided in § 22.29(c) and on all motions filed or made after an appeal of the initial decision is filed, *except as provided pursuant to § 22.28*.") (emphasis added).

Even if we were to interpret Euclid's motion as a request for this Board to take official notice of this evidence, we would agree with the Region that the content of the allegedly newly discovered evidence – a *Washington Post* article and a Statement of Basis promulgated by EPA with respect to the clean up of a petroleum release that occurred at an unrelated site ("the Chillum Site") – is not new, and has no relevance to the case at hand. The Region explains that the release from the Chillum Site has been the subject of extensive news coverage for years and the factual information contained in the Statement of Basis has been available for public review since at least 2002. *See* Resp. to Mot. to Reopen at 2. Euclid seeks to use this "new" evidence to argue that there is no justification for classifying the violations in this case as having a "major impact." *See* Mot. to Reopen at 3-4. While we discuss the penalty assessment in detail in Part II.C. below, it is a well-settled principle that penalty inquiries are inherently fact-specific and circumstance-dependent. *See, e.g., In re Capozzi*, 11 E.A.D. 10, 28

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For the reasons set forth below, the Board affirms the Initial Decision in part, vacates the Initial Decision in part, and assesses a total penalty of $3,164,555.

Our decision begins with a brief discussion of the statutory and regulatory background of the UST program (Part I.B, *infra*), followed by a summary of the Board's standard of review (Part I.C). It continues with a discussion of Euclid's appeal (Part II), followed by our analysis of Complainant's cross-appeal (Part III). Because of the number of facilities involved and the large number of defenses Euclid raised, our analysis is lengthy, in an effort to give full consideration to the issues raised on appeal.

B. *Statutory and Regulatory Background*

In 1976, Congress enacted RCRA to better regulate the large and ever-increasing volume of solid and hazardous waste generated by individuals, municipalities, and businesses in the United States. RCRA restructured an existing statute, the Solid Waste Disposal Act of 1965, as amended in 1970, to eliminate the purported "last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes." H.R. Rep. No. 94-1491, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6239. In 1984, Congress amended RCRA to close loopholes it had identified, in that instance to address, among other things, accidental releases from USTs containing petroleum or other regulated substances. *See* Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, tit. VI, § 601(a), 98 Stat. 3221, 3277-87 (1984) (codified as amended at RCRA §§ 9001-9010, 42 U.S.C. §§ 6991-6991i). As so amended, RCRA directed the EPA to promulgate release detection, prevention, and correction regulations for USTs, with the goal of protecting human health and the environment. RCRA § 9003, 42 U.S.C. § 6991b. EPA promulgated regulations on November 8, 1985, and September 23, 1988, which, as amended, are in effect today. *See* Notification Requirements for Owners of Underground Storage Tanks, 50 Fed. Reg. 46,602 (Nov. 8, 1985); Underground Storage Tanks – Technical Requirements, 53 Fed. Reg. 37,082 (Sept. 23, 1988) (codified as amended at 40 C.F.R. pt. 280).

Under the UST program created by Congress and implemented by EPA, owners of UST systems must, among other things: (1) implement spill and overfill control procedures; (2) provide for corrosion protection; (3) monitor tanks

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(continued)
(EAB 2003); *In re Titan Wheel Corp., of Iowa*, 10 E.A.D. 526, 533 n.14 (EAB 2002) ("Penalty assessments are fact-specific and calculated on a case-by-case basis."), *aff'd*, 291 F. Supp. 2d 899 (S.D. Iowa 2003), *aff'd*, 113 Fed. Appx. 734 (8th Cir. 2004); *In re Newell Recycling Co.*, 8 E.A.D. 598, 642 (EAB 1999), *aff'd*, 23l F.3d 204 (5th Cir. 2000). We, therefore, do not find the information Euclid now offers relevant to the penalty assessment in this case.

and underground piping for releases; (4) maintain records of release detection systems; (5) report accidental releases; (6) take corrective action in response to any such releases; (7) comply with requirements for appropriate temporary and permanent closure of USTs to prevent future releases; and (8) maintain evidence of financial responsibility for taking corrective action and compensating third parties in the event of accidental releases from USTs. RCRA §§ 9003(c)-(d), 42 U.S.C. §§ 6991b(c)-(d); 40 C.F.R. §§ 280.30-.230. "New" UST systems, whose installation commenced or will commence after December 22, 1988, must incorporate protective technologies at the time of installation, while "existing" UST systems, whose installation commenced on or before December 22, 1988, were required to have been upgraded by December 22, 1998, to incorporate all technological precautions needed to prevent, detect, and correct accidental releases of regulated substances, or, if not upgraded, permanently closed. RCRA §§ 9003(e)-(h), 42 U.S.C. §§ 6991b(e)-(h); 40 C.F.R. §§ 280.12, .20-.21. Violations of RCRA UST program provisions are subject to civil penalties of up to $11,000 (originally $10,000 but now increased to $11,000 due to inflation)[6] per tank for the notification requirements promulgated pursuant to RCRA section 9002 and per day of violation for the other requirements promulgated pursuant to RCRA section 9003. RCRA § 9006(d), 42 U.S.C. § 6991e(d).

The UST regulations are part of a comprehensive regulatory program for USTs implementing Subtitle IX of RCRA, RCRA §§ 9001-9010, 42 U.S.C. §§ 6991-6991i. The UST regulations, authorized by RCRA § 9003, 42 U.S.C. § 6991b,[7] and promulgated in 1988, are designed to prevent, detect, and clean up releases from USTs containing petroleum and other regulated substances. In describing this comprehensive regulatory program, the preamble to the UST regulations emphasized that of the nation's then-700,000 UST systems, "10 to 30 percent" had "leaked or [were] presently leaking," constituting an "important threat to the nation's groundwater resources." 53 Fed. Reg. at 37,097. Furthermore, the preamble to the UST regulations identified USTs lacking adequate protective features as a leading cause of tank failure contributing to this threat. *See id*. at 37,101.

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[6] The statutory maximum penalties have been increased by 10%, to $11,000, in accordance with EPA regulations promulgated pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990) (codified at 28 U.S.C. § 2461 note), amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001(s), 110 Stat. 1321, 1321-373 (1996). *See* 40 C.F.R. pt. 19 (EPA's inflation-adjusted maximum penalties); Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7121 (Feb. 13, 2004); 61 Fed. Reg. 69,360 (Dec. 31, 1996). These two penalty-related Congressional acts direct EPA (and other federal agencies) to adjust maximum civil penalties on a periodic basis to reflect inflation.

[7] RCRA § 9003(a) directs the Administrator to "promulgate release detection, prevention, and correction regulations applicable to all owners and operators of underground storage tanks, as may be necessary to protect human health and the environment." 42 U.S.C. § 6991b(a).

C. *Standard of Board Review*

1. *Scope of Review*

The Board reviews an administrative law judge's factual and legal conclusions on a *de novo* basis. 40 C.F.R. § 22.30(f) (the Board shall "adopt, modify, or set aside" the ALJ's findings of fact and conclusions of law or exercise of discretion); *see* Administrative Procedure Act § 8(b), 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers [that] it would have in making the initial decision except as it may limit the issues on notice or by rule."). Nonetheless, the Board has stated on numerous occasions that it will generally give deference to a presiding officer's findings of fact based upon the testimony of witnesses because the presiding officer has the opportunity to observe witnesses and evaluate their credibility. *See, e.g.*, *In re City of Salisbury*, 10 E.A.D. 263, 276 (EAB 2002)*; In re Tifa Ltd.*, 9 E.A.D. 145, 151 n.8 (EAB 2000); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998); *In re Echevarria*, 5 E.A.D. 626, 639 (EAB 1994); *In re Port of Oakland*, 4 E.A.D. 170, 193 n.59 (EAB 1992).

2. *Burden of Proof*

The complainant has the burdens of presentation and persuasion to prove that "the violation occurred as set forth in the complaint and that the relief sought is appropriate." 40 C.F.R. § 22.24(a); *In re Vico Constr. Corp.*, 12 E.A.D. 298, 313 (EAB 2005); *In re LVI Envtl. Servs., Inc.*, 10 E.A.D. 99, 101 (EAB 2001). This prima facie showing of a violation is established upon the Region's production of "evidence of sufficient quality and quantity on each of the [] elements such that, if not rebutted, the trier of fact would 'infer the fact at issue and rule in [complainant's] favor.'" *Salisbury*, 10 E.A.D. at 283 (quoting Black's Law Dictionary 1209 (7th ed. 1999)); *see United States v. RGM Corp.*, 222 F. Supp. 2d 780, 786 (E.D. Va. 2002); *United States v. Lambert*, 915 F. Supp. 797, 802 (S.D.W. Va. 1996). Once the Region establishes its prima facie case, "the respondent must come forward with evidence to support any defenses it has that will rebut the allegations in the complaint." *Salisbury*, 10 E.A.D. at 289; *see* 40 C.F.R. § 22.24(a); *In re Richner*, 10 E.A.D. 617, 620 (EAB 2002). One who asserts an affirmative defense bears the burdens of presentation and persuasion. 40 C.F.R. § 22.24(a). *See In re Adams*, 13 E.A.D. 310, 321 (EAB 2007); *In re Friedman*, 11 E.A.D. 302, 315 (EAB 2004), *aff'd*, No. 2:04-CV-517-WBS-DAD (E.D. Ca. Feb. 25, 2005), *aff'd*, No. 05-15664, 2007 WL 528073 (9th Cir. Feb. 15, 2007).

In carrying the burden of proof, the parties are subject to a "preponderance of the evidence" standard. 40 C.F.R. § 22.24(b). The phrase "preponderance of the evidence" means "the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather

than the other." Black's Law Dictionary 1201 (7th ed. 1999); *see also In re Bullen Cos., Inc.*, 9 E.A.D. 620, 632 (EAB 2001). On several occasions the Board has noted that the preponderance of the evidence standard means that a fact finder should believe that his factual conclusion is more likely than not. *See*, *e.g.*, *Ocean State Asbestos Removal*, 7 E.A.D. at 530; *Echevarria*, 5 E.A.D. at 638; *In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355, 363 n.20 (EAB 1994) (preponderance of the evidence means that a fact is more probably true than untrue).

With these considerations as background, we now proceed to analyze the issues on appeal.

II. *RESPONDENT'S APPEAL*

Euclid raises nine main arguments on appeal. Most of the arguments relate to the ALJ's liability and penalty determinations, except for one of the issues that is procedural in nature. For discussion purposes we have grouped Respondent's arguments in the following three categories: (1) challenges associated with the notice requirement; (2) challenges to the liability determinations; and (3) challenges to the penalty assessment.

Euclid first claims that the Region failed to demonstrate that it had complied with section 9006 of RCRA by giving notice before filing this action to each of the states in whose jurisdictions the violations at issue in this case occurred. In Euclid's view, notice under section 9006 is a jurisdictional requirement, and because the Region failed to provide the required notice, the ALJ lacked subject matter jurisdiction over this case. We elaborate on this issue in Part II.A below.

Euclid then proceeds to challenge most of the liability determinations.[8] The main challenge in Euclid's appeal is to the weight the ALJ gave to Complainant's evidence. In particular, Euclid argues that the Region's only evidence of liability was Euclid's failure to retain records showing that certain tests were performed. In addition, Euclid challenges the testimony of Complainant's expert witnesses, and claims, *inter alia*, that most of the violations were caused by state-certified contractors, not Euclid. While Euclid seems to challenge most of the liability determinations, the challenges, for the most part, deal with the same issues: burden of proof, shifting of the burden, and witness credibility. Euclid also raises issues of regulatory interpretation challenging the ALJ's reading of the release detection provision on reporting and recordkeeping, found at 40 C.F.R. § 280.45, and the Tank Release Detection requirements. We analyze these issues in Part II.B below.

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[8] Several of Euclid's arguments are, at best, unclear, and its appellate brief does not make a clear distinction between liability and penalty arguments. We, nonetheless, have decided to broadly read Euclid's arguments as covering both penalty and liability challenges.

Finally, Euclid challenges the ALJ's penalty assessment. Specifically, Euclid questions the classification of the violations in the penalty matrix of the UST Penalty Policy, arguing that the violations should not have been classified as major or moderate/major. Euclid also claims that the ALJ imposed penalties in excess of that proposed by the Region without record support or without providing an explanation. We analyze Euclid's challenges to the penalty assessment in Part II.C below.[9]

We now begin a detailed analysis of Respondent's appeal.

A. *The Notice Requirement*

Section 9006 of RCRA requires that, prior to issuing an order or commencing a civil action against a violator in a state with an EPA-approved UST program, the Administrator of the EPA notify the state in which the violation occurred. Specifically, section 9006(a)(2) provides:

> In the case of a violation of any requirement of [Subchapter IX] where such violation occurs in a State with a program approved under section 6991c of this title, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.

RCRA § 9006(a)(2), 42 U.S.C. § 6991e(a)(2).

The three jurisdictions involved in this case – Maryland, Virginia and D.C. – have EPA-approved UST programs. Euclid generally argues that the Region failed to comply with the notice requirement in section 9006, and, thus, the complaint was not valid and the ALJ was without subject matter jurisdiction to entertain this case. Respondent's Appellate Brief at 13. Euclid cites to a U.S. Supreme Court case, *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), for the proposition that this requirement is jurisdictional.

[9] As previously noted, the Region has also challenged certain aspects of the ALJ's decision. The Region's cross-appeal is discussed in Part III below.

1. *The ALJ's Decision, Euclid's Challenges, and the Region's Response*

The ALJ dismissed this argument on the basis that the Region and "the States acted in concert in preparing for, and in bringing the enforcement action."[10] Initial Decision ("Init. Dec.") at 7. The ALJ found that the "facts in this case support EPA's position that there effectively was 'notification' [in this case] and that the complaint should not be dismissed." *Id.*

Euclid challenges this determination by arguing that "[i]t is not sufficient * * * that the ALJ infer from what he believes to be the conduct of the investigation * * * that the states 'must have known' that the EPA intended to file the instant case." Respondent's Appellate Brief at 13. According to Euclid, the Region had to "affirmatively and explicitly notify the states some time prior to the filing of the Complaint," and in the trial of the action it had to "plead and prove that it provided notice." *Id.* at 11. In its appeal, Euclid further claims that the record in this case "is devoid of any indication that any particular notice was given, the content of the alleged notice, whether the alleged notice was oral or written, the date of the alleged notice, or anything else pertaining to the alleged notice." *Id.* at 10-11. While at some point in its appeal Euclid seemed to argue that notification under section 9006(a)(2) must be written,[11] it later abandoned this position. At oral argument, Euclid conceded that the statute does not require written notice and that oral notice suffices under section 9006. EAB Tr. at 6. Euclid, however, maintained its claim that notice was inadequate in this case because, in its view, the record does not explicitly show that the Region notified the states prior to the filing of the complaint. *Id.* at 15-18.

The Region does not contend that it provided written notice to the states; it claims instead that the statutory duty of providing notice to the states was fully satisfied in this case because the states involved in this action were completely aware of EPA's intention to bring an enforcement action, and also participated in

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[10] According to the Region, Euclid raised its lack of notice argument for the first time on the opening day of the hearing before the ALJ. In its response to Respondent's appeal, the Region explains that this argument "was not raised in Respondent's Answer to the Initial Complaint, in its Answer to the First Amended Complaint or in any of Respondent's Pre-Hearing Exchanges or pre-hearing filings." Complainant's Cross-Appeal & Response at 49. Indeed, at oral argument Euclid admitted that this was true. EAB Tr. at 5.

The Region adds, however, that there is no need to resolve the question of whether Respondent waived this defense by waiting until the hearing to raise the issue, because the evidence is clear that the requirements of section 9006(a)(2) were fulfilled. Complainant's Cross-Appeal & Response at 49.

[11] *See* Respondent's Appellate Brief at 12-13 (citing *Harmon Indus. v. Browner*, 191 F.3d 894 (8th Cir. 1999), *reh'g and reh'g en banc denied* (8th Cir. 2000), for the proposition that EPA must provide written notice to the states).

the prosecution of the case. *See* Complainant's Cross-Appeal & Response at 49-54. The Region elaborates as follows:

> It is hard to imagine a case where the state notification was as comprehensive and timely as the notifications to the three states in this case. The multi-facility enforcement action in this case was the result of close cooperation between EPA, Maryland, Virginia and the District of Columbia. After initial inspections showed apparent noncompliance, EPA and the three states first held a formal meeting with regard to Euclid in the spring of 2001, and it was agreed at this meeting that EPA would be the focal point or "clearing house" for information, while the states and EPA would each conduct further inspections of Euclid's facilities. After a number of additional state and EPA inspections showed serious violations, a second meeting was held in 2001 during which it was jointly decided by EPA and the three states that EPA would take the lead in an enforcement action against Euclid.
>
> During the second multi-agency meeting, EPA and the states discussed what was anticipated to be a "large enforcement action" of a magnitude beyond the scope of the states' enforcement experience. * * * Subsequent to the second meeting, the ongoing status of EPA's proposed enforcement action was discussed with all states during monthly conference calls.

Id. at 50-51 (internal citations omitted). The Region contends: "Once EPA and the states agreed that EPA would take the lead on an enforcement action, there can be no question but that the statutory duty of providing notice was fulfilled." *Id*. at 53.

2. *Analysis*

It is undisputed that if EPA wants to initiate action against a violator of the UST regulations in a state with an EPA-approved program, EPA must notify the state prior to initiating action. Euclid claims that the Region failed to show that written, or any form of, notification was provided in this case, while the Region argues that the states' active participation throughout the investigative stages leading to the filing of the complaint shows that the states were aware of the filing of the complaint and this sufficiently satisfies the notice requirement. The ALJ agreed with the Region.

The following three questions potentially arise in connection with these claims: (1) whether the statute requires written notification, or whether

non-written notification suffices; (2) if non-written notification suffices, whether adequate notice was given in this case; and (3) if notice in this case was insufficient, whether the notice requirement is jurisdictional. Because Euclid conceded at oral argument that oral notice suffices under the statute, we need not reach, the first question.[12] Therefore, in our analysis below we focus on the second question; based on our findings we will then decide whether the last question needs to be addressed.

As noted, Euclid disagrees that appropriate notice was provided in this case. Euclid apparently believes that, in order to establish that the Region complied with the notice requirement in section 9006(a)(2), the Region must do something more than plead in its complaint that it gave notice to the states. Euclid argues that it is not enough for an ALJ to infer from the investigation that the states knew that the Region intended to commence legal action; the Region had to provide proof at trial that notice had been given. *See* Respondent's Appellate Brief at 13 (citing *Hazardous Waste Treatment Council v. U.S. Envtl. Prot. Agency*, 886 F.2d 355 (D.C. Cir. 1989), for the proposition that "EPA must affirmatively prove by sufficient evidence that it notified the states."). Euclid also apparently believes that oral notice would only be appropriate when the state requests that EPA commence the enforcement action. *Id.* at 12-13 (citing *In re Brenntag Great Lakes LLC*, Docket No. RCRA-05-2002-0001 (ALJ Dec. 19, 2002) (Order on Cross-Motion for Accelerated Decision)). Finally, Euclid argues that one of the purposes of the notice provision is to protect the alleged violator. *Id*. at 12.

We begin our analysis by examining the legislative history of the notice provision. While Congress has not spoken directly to the issue of form, Congress,

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[12] While we need not address the first question, we nonetheless note that section 9006(a)(2) and its legislative history are silent with respect to the form notice must take and the content of such notice. This strongly suggests that Congress did not intend to limit the form of the notice. *See* H.R. Rep. No. 98-198, pt. 1 (1983), *as reprinted in* 1984 U.S.C.C.A.N 5576 (section 9006(a)(2)); *see also United States v. Envtl. Waste Control, Inc*., 710 F.Supp. 1172, 1190-91 (N.D. Ind. 1989) (noting with respect to the RCRA citizen suit provision, section 7002(b), that "[a]s to the sufficiency of the notice, the reported cases consistently have found that sufficient notice was given if the requisite parties had 'notice-in-fact' of the alleged violations."); *United States v. Chevron*, 380 F. Supp. 2d 1104, 1110 (N.D. Cal. 2005) (noting that because section 113 of the Clean Air Act ("CAA") is silent with respect to the form that notice must take, "[r]ather than formal written notice, actual notice of violations is sufficient"); *United States v. BP Exploration & Oil Co.*, 167 F. Supp. 2d 1045, 1051 (N.D. Ind. 2001) (noting that the "CAA does not even specify the form which the notice must take" and holding that under section 113(a) "rather than formal written notice, actual notice of violations is sufficient."). We also note that Euclid's reliance on *Harmon Industries v. Browner*, 191 F.3d 894 (8th Cir. 1999), for the proposition that notice must be in the written form is unpersuasive. The issue of form of notice was not before the *Harmon* court and there is nothing to suggest that the court actually focused on the distinction between written and oral notice. The *Harmon* court dealt with a very distinct and different issue – the permissibility of overfiling – and its expressions about form of notice go beyond the specific matter brought before the court.

nonetheless, has addressed the purpose of requiring EPA to provide notice to the states prior to commencing an enforcement action. In Congress's words:

> This legislation permits the states to take the lead in the enforcement of the hazardous wastes laws. However, there is enough flexibility in the act to permit the Administrator, in situations where a state is not implementing a hazardous waste program, to actually implement and enforce the hazardous waste program against violators in a state that does not meet the federal minimum requirements. Although the Administrator is required to give notice of violations of this title to the states with authorized state hazardous waste programs the Administrator is not prohibited from acting in those cases where the state fails to act, or from withdrawing approval of the state hazardous waste plan and implementing the federal hazardous waste program pursuant to title III of this act.

See H.R. Rep. No. 94-1491, pt. 1, at 31 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6938, 6269 (section 3008(a)(2)).[13] This legislative history reveals that the purpose of the notice requirement is to give deference to authorized states to pursue enforcement of hazardous waste laws by giving states notice prior to the initiation of a federal action, and to promote a relationship of federal/state comity or "partnership" in which EPA shows "deference" to the state as the primary enforcer of an EPA-authorized RCRA program. *In re Landfill, Inc.*, 3 E.A.D. 461, 464 n.5 (CJO 1990); *see In re Gordon Redd Lumber Co.*, 5 E.A.D. 301, 312 (1994); *id*. at 312 n.14 ("[T]he legislative history [of section 3008(2)(2)] underscores the need for state and federal cooperation in implementing hazardous waste laws.") (quoting *United States v. Conservation Chem. Co. of Ill.*, 660 F. Supp. 1236, 1245 (N.D. Ind. 1987)). Nothing in this history, however, suggests that notice is intended to protect the alleged violator, as Euclid propounds.

Significantly, neither Maryland, Virginia, nor D.C. has claimed a lack of adequate notice. To the contrary, the record here shows that the states in this case

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[13] Even though these excerpts come from the legislative history of a different RCRA provision – section 3008(a)(2) – they form the basis for the promulgation of section 9006(a)(2). Specifically, section 9006(a)(2), which was promulgated in 1984, was modeled after section 3008(a)(2), the notice requirement of RCRA subchapter III originally promulgated in 1976. Section 3008(a)(2) provides in pertinent part: "In the case of a violation of any requirement of this subchapter where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 6926 of this title, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section." RCRA § 3008(a)(2), 42 U.S.C. § 6928(a)(2). With the exception of the references to each particular RCRA program, sections 9006(a)(2) and 3008(a)(2) are basically identical.

were actively involved in the entire process that led to the filing of this complaint and that they supported EPA's prosecutorial efforts.[14] While the record does not expressly indicate the precise date on which notice of commencement of action was provided, the record clearly supports the inference that the states both knew and were notified prior to the filing of the complaint that the EPA was going to initiate enforcement action.[15]

As the Region and the ALJ point out, the states and the Region held various meetings prior to the filing of the complaint where they agreed that EPA would serve as the "clearing house" for information during the investigative stages of this case,[16] and eventually, that EPA would take the lead in any enforcement action.[17] This was a joint decision by the states and EPA.[18] Thereafter, the parties held monthly meetings where, according to the record, the question of if and when EPA was going to file an actual enforcement action was discussed.[19]

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[14] Indeed, the record here, which consists of the testimony of EPA and state enforcement officials during the January 12, 2004, to February 5, 2004, hearing before the ALJ, shows that the states and EPA conducted joint and independent inspections of Euclid's facilities in an effort to determine the extent of Euclid's non-compliance. *See* ALJ Hearing Transcript Volume 4 ("TR-4") at 4-5 (Jan. 15, 2004) (testimony of Mary Owen – Region 3's Underground Storage Tank Team Leader for Enforcement). The states also participated in the case after the filing of the complaint. *See*, *e.g.*, TR-1 at 190-191, 242, 244-45 (Jan. 12, 2004) (testimony of Katherine Willis – Petroleum Facility Inspector Senior at the Virginia Department of Environmental Quality ("VDEQ")); TR-2 at 21, 40-41 (Jan. 13, 2004) (testimony of Jackie Lynn Ryan – Environmental Compliance Specialist at the Maryland Department of the Environment ("MDE")); TR-2 at 199-201, TR-3 at 10, 27, 104 (Jan. 14, 2004) (testimony of J. Kofi Berko, Jr. – Advisory Environmental Specialist at D.C.'s Department of Health ("D.C. DOH")).

[15] *See*, *e.g.*, TR-3 at 5-7, 103-05 (Jan. 14, 2004) (testimony of J. Kofi Berko, Jr., explaining that D.C. DOH decided not to take action against Euclid after having issued a directive letter to Euclid during the summer of 2001 identifying various violations because "at that time [sometime in 2001] a decision was made that EPA was pursuing an enforcement action."); TR-2 at 40-41, 80 (Jan. 13, 2004) (testimony of Jackie Lynn Ryan of MDE, explaining that she was directed not to initiate any enforcement action in this case because EPA was the lead).

[16] *See* TR-3 at 195 (Jan. 14, 2004) (Mary Owen's testimony).

[17] *See* TR-4 at 9 (Jan. 15, 2004) (Mary Owen's testimony).

[18] *Id*. at 9-10 (explaining that states and EPA agreed that it would be better to address all the violations in one enforcement action as opposed to each state taking separate actions; also explaining that states were concerned about the use of their limited resources in a case of this magnitude).

[19] Indeed, Ms. Owen testified that the question of if and when EPA was going to file an enforcement action was discussed during these monthly meetings. TR-4 at 9 (Jan. 15, 2004). Euclid does not challenge the testimony of Ms. Owen and has given us no reason to question the veracity of her testimony. We, therefore, will not depart from our general practice of giving deference to a presiding officer's findings of fact based upon the testimony of witnesses. *See generally Salisbury*, 10 E.A.D. at 276; *In re Tifa Ltd.*, 9 E.A.D. 145, 151 n.8 (EAB 2000); *Ocean State Asbestos Removal*, 7 E.A.D. at 530.

In the face of this record, we find it difficult to conclude that the states did not know that EPA was going to file this action or that the states did not receive adequate notice. In our view, the Region did not simply plead compliance with the notice requirement, as Euclid suggests, but rather proved through testimony that such notice was given.[20] We, therefore, find no clear error in the ALJ's decision that notice in this case was adequate. To rule otherwise would lead to an absurd result, particularly in this case, where clearly a federal and state partnership was forged, as intended by Congress, for the common goal of implementing and enforcing RCRA.[21]

Because the record before us clearly shows that the states received adequate notice, we need not determine whether section 9006(a)(2) is a jurisdictional requirement.

B. *Challenges to Liability Determinations*

Euclid makes a number of challenges to each of the ALJ's liability determinations. A common denominator to several challenges is Euclid's argument that the Region cannot rely on Euclid's lack of records to prove that the violations

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[20] We note, however, that litigation of this issue could have been avoided if Region 3 had simply, prior to initiating action, notified each of the states involved in this action in writing. Indeed, in the wake of this litigation, Region 3 has adopted such a practice. *See* EAB Tr. at 49. Prior to this case, counsel for the Region explained, Region 3 did not have a set policy in this respect. *Id.*

[21] As to the cases Euclid cites, none of them stands for the proposition cited, and, in fact, one of these cases seems to support the Region's position that formal notice is not required under section 9006(a)(2). For instance, *Hazardous Waste Treatment Council v. U.S. Envtl. Prot. Agency*, 886 F.2d 335 (D.C. Cir. 1989), cited for the proposition that EPA must affirmatively prove by sufficient evidence that it notified the states, does not address the issue of notice to states. This case only stands for the general proposition that the burden of demonstrating that a violation occurred rests with the Agency. As the Region points out, it is hard to see how notice to a state could be deemed to be an element of a violation. *See* Complainant's Cross-Appeal & Response at 52. The other case Euclid cites, *Brenntag*, not only does not stand for the proposition Euclid sets forth (e.g., that actual notice is only appropriate when the state requests that EPA commence the enforcement action), it lends support to the Region's case here. Even though the notice requirement was not at issue in *Brenntag*, in a footnote the ALJ stated as follows:

> As a final matter regarding jurisdiction, RCRA instructs EPA to "give notice" to a state before issuing an order or commencing a civil action, when the state still has a Federally-authorized program in place. RCRA § 3008(a)(2), 42 U.S.C. § 6928(a)(2). In the case at bar, requiring EPA to give some sort of official notice to the state would be a pointless exercise, as it was the state who asked EPA to enforce the case. Obviously, state authorities already knew that EPA would be bringing the enforcement action in their state.

Brenntag, Docket No. RCRA-05-2002-0001, at 6 n.4 (internal citation omitted). *Brenntag*, therefore, provides no support for Euclid's position.

occurred as alleged. Because this is a defense Euclid raises with respect to the tank release detection, the line leak detection, and the corrosion protection charges, we begin our discussion below by examining Euclid's record retention arguments. We then continue our analysis by examining Euclid's arguments about its compliance with the tank release detection, line leak detection, corrosion protection, overfill protection, spill prevention, and financial responsibility requirements, in that order.

1. *Overview of Euclid's Record Retention Arguments*

Euclid seems to make two related, yet distinct, arguments about the lack of record retention in this case. First, Euclid contends that the Region did not meet its burden of proving a prima facie case of violations. According to Euclid, for most of the tank release detection, line leak detection, and corrosion protection charges, the only evidence the Region presented to prove its case was a lack of documents showing that Euclid had conducted required testing and/or monitoring.[22] *See* Respondent's Appellate Brief at 22-26, 44-46, 49, 52, 55. In Euclid's view, the failure to produce records documenting such testing and monitoring does not mean that Euclid was not conducting the required testing or monitoring, and, therefore, the Region cannot use lack of records as proof of violations. *Id*. at 30. The second argument Euclid seems to make with regard to the lack of record retention and its implications for this case is that, if anything, it can only be held liable for one year of violations. Euclid cites to 40 C.F.R. § 280.45(b) for the proposition that it had no obligation to retain records for more than one year[23] and, therefore, Euclid argues that it cannot be held liable for violations beyond this record retention period. *See id*. at 23. To further support its position, Euclid cites to various state cases, which, in Euclid's view, stand for the proposition that an entity cannot be held liable for an alleged violation if a defense against that violation would require the entity to produce records which the entity is not required to retain. *Id.* at 23-24 (citing *In re Balt. Gas & Elec. Co.*, 76 Md. PSC 181 (1985), 1985 Md. PSC LEXIS 54; *C&P Tel. Co. v. Comptroller* (citation not pro-

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[22] As explained in more detail below, the complaint charges Euclid with, among other things, failure to conduct or adequately conduct certain testing and/or monitoring. Therefore, the issue here is not non-compliance with record retention requirements, but rather what inferences about non-compliance with other requirements can be drawn from lack of records.

[23] Section 280.45(b) provides as follows:

> The results of any sampling, testing, or monitoring must be maintained for at least 1 year, or for another reasonable period of time determined by the implementing agency, except that the results of tank tightness testing conducted in accordance with § 280.43(c) must be retained until the next test is conducted.

40 C.F.R. § 280.45(b).

vided); *Comptroller v. DIGI-Data Corp.*, 562 A.2d 1259 (Md. 1989); *Bly v. Tri-Cont'l Indus.*, 663 A.2d 1232, 1236 (D.C. App. 1995)); *see also id.* at 24 (citing *Murphy v. McGraw Hill Cos.*, No. 4:02-CV-40136, 2003 WL 21788979 (S.D. Iowa Jul. 30, 2003) and *Wolfe v. Va. Birth-Related Neurological Injury Comp. Program*, 580 S.E. 2d 467 (Va. Ct. App. 2003) for the proposition that "a lack of records was not sufficient evidence to hold a recordkeeping party liable for matters for which the records would have exonerated the party").

The first argument Euclid raises requires that we determine whether the findings of liability are supported by facts and inferences in the record. In doing so, we will examine whether the Region adequately met its burden of proof in establishing a prima facie case for each of the underlying violations. We also will examine whether Euclid put forward sufficient evidence to rebut the Region's case in the event that the Region met its initial burden of proof. Rather than addressing Euclid's first argument in this section, we analyze the argument later in the sections specifically dealing with the tank release detection, line leak detection, and corrosion protection violations.

We do address Euclid's second argument in this section (i.e., that Euclid can only be held liable for one year of violations). The ALJ viewed this argument as an attempt by Euclid to shield itself from the tank release detection charges and rejected such attempt, concluding that: "[N]othing prevented Euclid from maintaining any tank release detection records for five-years, * * * to cover the five-year statute of limitations period applicable to the tank release detection charges." Init. Dec. at 14. In response to Euclid's argument about section 280.45(b), the Region concedes that "[a] limited mandatory record retention period [like the one set forth in § 280.45(b)] may affect the inferences which can be drawn from a regulated party's lack of records." Complainant's Cross-Appeal and Response at 114. However, the Region reasons, "there is no justification for completely cutting off inquiry into potential violations which are within the statute of limitations." *Id*. The Region adds that Euclid is essentially arguing that "the record retention periods in the UST regulations act as a *de facto* one-year statute of limitations, trumping the five-year statute of limitations which otherwise would apply." *Id*.

We agree with the ALJ and the Region that to read section 280.45(b) to limit the statute of limitations as Euclid in essence proposes would lead to an undesirable and anomalous result, that is, to truncate the applicable five-year statute of limitations to only one year for UST violations.[24] Euclid has provided no

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[24] While RCRA does not contain a statute of limitations, courts have held that in cases involving civil fines or penalties under RCRA, the general federal statute of limitations set forth at 28 U.S.C. § 2462 is applicable. *See In re Mayes*, 12 E.A.D 54, 63 (EAB 2005), *aff'd*, No. 3:05-CV-478 (E.D. Tenn. Jan. 4, 2008). Section 2462 provides:

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support for this proposition,[25] and we have found nothing in RCRA or the regulatory history of section 280.45 that would lend support to this interpretation.[26] Therefore, we decline to impart such sweeping breath into section 285.45 and reject Euclid's arguments to the extent that Euclid raises them to avoid any inquiry into potential violations that may have occurred during the five-year period allowed under the applicable statute of limitations.

2. *The Tank Release Detection Charges*

a. *Overview of Counts*

The complaint charged Euclid with sixteen violations of the tank release detection regulations found at 40 C.F.R. §§ 280.40-.45, and their state counter-

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(continued)

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. § 2462.

[25] The cases Euclid cites either are not on point or have no relevance to the issue at hand. In the former category are *Comptroller v. DIGI-Data Corp*., 562 A.2d 1259 (Md. 1989), *In re Baltimore Gas & Electric Company*, 76 Md. P.S.C. 181 (1985), 1985 Md. PSC LEXIS 54 ("*BG&E*"), *Murphy v. McGraw Hill Cos.*, No. 4:02-CV-40136, 2003 WL 21788979 (S.D. Iowa Jul. 30, 2003) and *Wolfe v. Virginia Birth-Related Neurological Injury Compensation Program*, 580 S.E. 2d 467 (Va. Ct. App. 2003). In *DIGI-Data Corp*, the statute of limitation itself was reduced from six to four years. That change led the court to conclude that the taxpayer in that case could safely discard records older than four years if the Comptroller did not take the required action within the new four-year period. *See DIGI-Data Corp*, 562 A.2d at 1269-70. In the instant case, the five-year statute of limitation has not been changed. In *BG&E*, the court held that the lack of records in that particular case did not make it impossible for the Baltimore Gas & Electric Company to meet its burden of demonstrating that certain procedures were followed. *BG&E*, 1985 Md. LEXIS 54, at *8-9. For their part, *Murphy* and *Wolfe* are, respectively, discrimination and medical malpractice cases that merely hold that discrimination or malpractice conduct cannot necessarily be inferred from the destruction of personnel records or medical records. *See Murphy*, 2003 WL 2178897, at *9-10; *Wolfe*, 580 S.E. 2d at 476. In the latter category belongs *Bly v. Tri-Continental Industries*, 663 A.2d 1232 (D.C. App. 1995). This case does not appear to have anything to do with the proposition for which it was cited. This is a tort case addressing the applicability of the "alternative" and "market share" theories of liability. If there is indeed any connection with the issue at hand, that connection is not self-evident, and Euclid's mere citation of the case without any analysis does nothing to make that connection evident.

[26] *See* Underground Storage Tanks; Technical Requirements, 53 Fed. Reg. 37,082, 37,167-68 (Sept. 23, 1988) (Final Rule); 52 Fed. Reg. 12,662, 12,747 (April 17, 1987) (Proposed Rule). To the contrary, the regulatory history reveals that the retention period in section 280.45(b) was intended to help inspectors in determining whether UST owners/operators were complying with the release detection requirements, not as a liability shield. *See* 52 Fed. Reg. at 12,747.

parts.[27] *See* First Amended Complaint ("Amend. Compl.") at 6-8, 16-18, 24-26, 31-33, 44-45, 60-61, 69-70, 76-77, 82-83, 88-89, 93-94, 99-100, 103-104, 113-114, 127-128. The charges involve gasoline, diesel and used-oil USTs located at fifteen of Euclid's facilities.[28] There are two to four USTs at each of Euclid's facilities for a total of fifty-two tanks involved in these counts. Init. Dec. at 12-13. The fifteen facilities are located as follows: nine in Maryland, four in D.C., and two in Virginia. Respondent's Appellate Brief at 22.

According to the complaint, Euclid failed to provide adequate monthly methods by which to detect releases from the USTs at these facilities. Init. Dec. at 5. Each count has its own period of alleged violation. For most of the counts, this period extends from September 1997 to April or November 2003.

b. *Methods of Tank Release Detection Allowed Under the Regulations*

The UST regulations require owners and operators of new and existing UST systems, as defined in the regulations, *see* 40 C.F.R. § 280.12, to monitor tanks for release detection so as to detect a release from any portion of the tank or the connected underground piping that routinely contains product. 40 C.F.R. § 280.40(a)(1). In addition, owners and operators of petroleum UST systems, like Euclid, are to conduct such monitoring on a monthly basis using one of the methods listed in section 280.43(d) through (h). These methods are: (1) automatic tank gauging ("ATG"); (2) vapor monitoring; (3) groundwater monitoring; (4) interstitial monitoring; and (5) other methods, or combination of methods, provided that they are in compliance with section 280.43(h). 40 C.F.R. §§ 280.43, .41(a).

There are, however, some exceptions to this mandate, which allow the use of two other methods of tank release detection for monthly monitoring that differ from the methods listed in section 280.43(d) through (h). *See* 40 C.F.R. § 280.41(a)(1)-(3). Relevant to this appeal is the exception in 40 C.F.R. § 280.41(a)(1), which provides:

> UST systems that meet the performance standards in § 280.20 [new USTs] or § 280.21 [upgraded USTs], and the monthly inventory control requirements in § 280.43 (a) or (b), may use tank tightness testing (conducted in accordance with § 280.43(c)) at least every 5 years until

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[27] D.C. Mun. Regs. tit. 20, § 6000 *et seq.*; Md. Code Regs. 26.10.05.01 *et seq.*; 9 Va. Admin. Code § 25-580-130 *et seq.*

[28] Counts 1, 6, 9, 10, 15, 22, 30, 35, 39, 43, 47, 50, 54, 57, 62, and 70 are the ones related to tank release detection.

> December 22, 1998, or until 10 years after the tank is installed or upgraded under § 280.21(b), whichever is later.

40 C.F.R. § 280.41(a)(1). This exception allows, as an interim measure, the use of inventory control combined with tank tightness testing. While recognizing concerns about the reliability of this combined method, the method nonetheless was allowed to respond to practical program implementation concerns about transitioning a large universe of USTs to more reliable methods.[29]

The regulatory history of the UST regulations explains this exception as follows:

> Tanks that meet the standards for new or upgraded tanks are required either (1) to conduct tank tests every 5 years

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[29] Inventory control was the principal method of leak detection for UST systems when technical UST regulations were first promulgated in 1988. *See* 53 Fed. Reg. at 37,150; *see also* 52 Fed. Reg. 12,662. However, concerned about the reliability of this method, but aware that other methods were not available on a large scale for the vast UST universe, the Agency decided to allow the regulated community to continue the use of inventory control, only as an interim measure, and only if supplemented with tank tightness testing for leak verification. 52 Fed. Reg. at 12,669-12,677. The preamble of the proposed rule explains as follows:

> Traditionally, the principal method of leak detection used at UST systems has been manual product inventory control, sometimes supplemented with a tank tightness test to verify suspected releases. Manual inventory reconciliation, however, has been a controversial method of release detection, principally because of human error or negligence in properly measuring, recording and reconciling the measurements with records of receipts and dispersals. A recent EPA study revealed that only about 20 percent of the surveyed retail service stations kept adequate inventory records (Underground Motor Fuel Storage Tanks: A National Survey, May 1986).
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> * * *
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> The Agency is concerned with the reliability of manual inventory controls and believes that tank testing cannot realistically be used for a majority of existing UST systems more frequently than once every 3 to 5 years. Thus, EPA believes that, even with the combined use of these methods, releases from existing UST systems can go undetected. Therefore, EPA is proposing to prohibit the use of infrequent tank testing combined with inventory controls as a method of release detection for new or upgraded UST systems. Frequent tank testing with inventory controls will be allowed. *Thus, infrequent tank testing and frequent inventory reconciliation is proposed only as an interim measure that responds to the practical problems of program implementation resulting from the attempt to establish release detection at a very large number of existing UST systems within a short timeframe.*

Id. (emphasis added).

> combined with monthly inventory controls for a 10-year period following the date of installation or upgrade or until 1998, whichever is later, or (2) to conduct monthly monitoring. [B]y the end of the 10-year period, these USTs must be using an approved monthly monitoring method.

53 Fed. Reg. at 37,148. Under the federal, Maryland, and Virginia UST regulations, inventory control combined with tank tightness testing could only be used until December 22, 1998, or for ten years after the tank is installed or upgraded under section 280.21(b), whichever is later.[30] For tanks in D.C., owners or operators of petroleum UST systems could rely on this combined method only until May 4, 1998. Before the May 1998 cut-off date, D.C. did not have a federally-approved UST program; thus, the federal regulations applied to facilities located in D.C. The D.C. UST regulations began operating in lieu of the federal UST regulations on May 4, 1998, and under the D.C. UST regulations, this combined method was no longer available at that time. Therefore, in D.C., owners or operators of petroleum UST systems can only use one of the methods listed in D.C. Mun. Regs. tit. 20, §§ 6008-6012.[31]

c. *Euclid's Tank Release Detection Methods*

As noted earlier, Complainant charged Euclid with failure to provide adequate methods by which to detect tank releases. Euclid, however, claims that its methods were adequate. In particular, Euclid claims to have conducted inventory control combined with tank tightness testing (collectively referred to by the parties and the ALJ, and for consistency in this decision, as "inventory control") in all the gasoline and diesel USTs involved in the tank release detection counts.[32] Init. Dec. at 12-13. Euclid also claims to have used ATG for all these USTs,[33]except for most of the tanks involved in Count 35, for which Euclid claims to have uti-

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[30] *See* 40 C.F.R. § 280.41(a)(1); Md. Code Regs. 26.10.05.02; 9 Va. Admin. Code § 25-580-140.1.

[31] *See* D.C. Mun. Regs. tit. 20, §§ 6000, 6003.3, .4.

[32] *See* Parties' First Set of Stipulations ¶¶ 16, 30, 37, 46, 53, 56, 60, 70, 79, 88, 98, 108, 116, 124, 132, and 155.

[33] *See id*. At oral argument, counsel for the Region explained that ATG is basically a computer that can be used for many purposes. Essentially, counsel explained, "it's a machine that tells you how much gasoline is in the tank at that moment. It will take a tank level and it will convert that to gallons and it will tell you at that moment" how much product is in the tank. EAB Tr. at 63-64. Similarly, during the hearing before the ALJ, Katherine Willis, a Petroleum Facility Senior Inspector with the Virginia Department of Environmental Quality, described ATG as "a computer that ties into magnetic probes that are installed inside the tank, there are floats on the probes that will measure the liquid level of the product and also any water level." TR-1 at 115 (Jan. 12, 2004).

lized "interstitial monitoring." *See id.* As to the used-oil tanks, Euclid claims to have employed "manual tank gauging."[34] *Id*.

d. *The ALJ's Liability Findings and Euclid's Challenges*

As noted above, Euclid claims to have used various methods of tank release detection to comply with its monthly monitoring obligations. The ALJ, however, found deficiencies in the manner in which Euclid employed these methods and found Euclid liable for failure to provide adequate monthly methods by which to detect releases from its USTs. *See* Init. Dec. at 15-21.

In his Initial Decision, the ALJ first addressed the problems with the inventory control methodology Euclid employed. The ALJ found that Euclid was not entitled to rely solely on this method throughout the entire period of alleged violations to satisfy its tank release detection obligations.[35] *Id*. at 15-20. In addition, the ALJ found that the inventory control method Euclid employed did not comply with the regulations. *Id*. at 18-19. With respect to the other methods of tank release detection Euclid claims to have employed – ATG and manual tank gauging – the ALJ found, among other things, no records showing that these methods either were used for leak detection or were ever performed. *See id*. at 20-21.

Euclid challenges these determinations. Its main disagreement is with the ALJ's conclusions about inventory control. Euclid also questions the weight the ALJ gave to Euclid's own stipulations and the evidence the Region presented. With respect to the use of other methods of tank release detection, Euclid's main contention is that the lack of records is not sufficient to prove a violation.

We elaborate on each of these challenges below.

e. *Use of Inventory Control*

The ALJ first found that, given the temporary nature of the inventory control option, most of Euclid's tanks did not qualify for inventory control as a method of tank release detection, except at most for a small portion of the period of the alleged violation. Init. Dec. at 16. The ALJ explained that only the tanks in

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[34] Euclid claims to have relied on manual tank gauging as a method of release detection for the following tanks: Tank RI-4 (count 1); Tank 61-4 (count 39); Tank HY-3 (count 43); Tank BW-4 (count 50); Tank GT-4 (count 54); and Tank FR-4 (count 70). Parties' First Set of Stipulations ¶¶ 21, 92, 100, 119, 127, 157.

[35] As noted earlier, the period of alleged violations for most counts in this case begins in September 1997 and extends to April/November 2003. For most of the counts, the cut-off deadline for using inventory control had elapsed and the period of alleged violations extend beyond that cut-off deadline.

two facilities in Maryland (counts 22 and 47) and two tanks in one facility in Virginia (count 9) qualified for inventory control during the entire period of alleged violation.[36] *Id*. at 16 n.18, 39. The ALJ further explained that for most of the tanks at issue, the inventory control method was available only for a small portion of the alleged period of violation; specifically from September 1997 to December 22, 1998, in the Maryland and Virginia facilities, and from September 1997 to May 4, 1998 in the D.C. facilities.

Following these observations, the ALJ described the flaws in the methodology Euclid employed in conducting inventory control. The ALJ found three main problems with the type of "inventory control" Euclid conducted. First, the ALJ noted that Euclid's approach – conducting inventory control on a facility-wide basis – was inconsistent with the regulations. The regulations, the ALJ explained, require that inventory control be performed on a tank-by-tank basis. Init. Dec. at 18. The plain reading of 40 C.F.R. § 280.43(a) and the related state regulations, the ALJ reasoned, establish "that inventory control measurements are to be made on each individual tank, and not on a facility-wide basis." *Id.* at 18. Specifically, the ALJ concluded:

> [Section 280.43(a)(1)] speaks in terms of determining inventory control one individual tank at a time, and not an inventory control method that collectively takes into account all of the USTs at a particular facility. This plain reading of the regulation is consistent with its purpose of utilizing inventory control to identify petroleum releases from an Underground Storage Tank, as opposed to identifying a petroleum release at a facility that contains several USTs.

Id. at 19.

The ALJ also clarified that while the combining of inventory figures from multiple tanks is sanctioned by EPA (referring to EPA's guidance pamphlet on inventory control),[37] this exception is only appropriate when the tanks are manifolded together or connected to blending dispensers and share a common inventory of fuel. *Id*. 19 n.23. Based on this observation and his conclusion that inventory control must be performed on a tank-by-tank basis, the ALJ rejected Euclid's inventory control defense in those facilities where Euclid combined different grades of gasoline and different petroleum products in its inventory and where the

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[36] Apparently, the ten-year period allowed under section 280.41(a)(1) had not expired for these tanks. *See* Complainant's Initial Post Hearing Brief at 48.

[37] *See* Complainant's Exhibit ("Ex.") Y-18 (Doing Inventory Control Right for Tank Underground Storage Tanks (Nov. 1993)).

record did not show that the exception applied.[38]

Second, the ALJ concluded that "Euclid's inventory control reconciliation * * * does not follow the methodology of the regulations" because "the UST regulations require that inventory measurements be recorded each operating day." *Id.* (citing 40 C.F.R. § 280.43(a)(1); D.C. Mun. Regs. tit. 20, § 6005; Md. Code Regs. 26.10.05.02; 9 Va. Admin Code § 25-580-160.1.a). Lastly, the ALJ noted that Euclid also had failed to provide tank tightness test results, stating that:

> Even for those tanks where inventory control is an acceptable method of release detection, this method must be combined with tank tightness testing conducted at least every five years for tanks meeting the upgrade performance standards, and every year for all other tanks. * * * [W]ith respect to the individual tank release counts, for the most part, respondent failed to provide the requisite tank tightness testing results.

Id. at 20 n.24 (internal citations omitted).

Euclid disagrees with all these findings. Euclid claims that all the tanks at issue in Maryland and Virginia "qualify for inventory control." Respondent's Appellate Brief at 23. Notably, Euclid does not elaborate on this point.[39] As for the tanks in D.C., Euclid concedes that inventory control did not apply to these tanks, at least after the D.C. UST regulations took effect, but argues that it used this method in lieu of ATG with the acquiescence of the D.C. Department of Health ("D.C. DOH").[40] *Id.* at 30-31, 34.

Euclid's main objection, however, is to the ALJ's determination that inventory control must be conducted on a tank-by-tank basis. In Euclid's view, the regulations do not require tank-by-tank monitoring. Euclid argues that the ALJ erred

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[38] *See, e.g.*, Init. Dec. at 22 (rejecting Euclid's inventory control defense for count 1 because "Euclid used a combined inventory for * * * [its tanks], despite the fact that the tanks separately stored regular grade, plus grade, and super grade gasoline"); *id.* at 34 (stating that "despite the fact that there were four gasoline tanks connected through manifolding and blending there was a separate tank diesel. Euclid's use of a combined inventory for all of the USTs [in count 35] could not, therefore, satisfy the inventory control requirements"); *see also id.* at 24, 30, 31-32 (rejecting Euclid's combined product inventory method for counts 6, 15 and 22).

[39] As previously explained, this method was available in Maryland and Virginia only until December 22, 1998, and for ten years for new or upgraded tanks. Euclid, however, does not explain whether the tanks in these facilities are new or upgraded tanks subject to the ten-year grace period, or whether its claim that the Maryland and Virginia tanks "qualify for inventory control" is with respect to the entire period of alleged violation or just a portion of it.

[40] We elaborate on this argument in Part II.B.2.g.(i) below.

in relying on EPA's policy documents. According to Euclid, tank-by-tank monitoring is only mentioned in EPA's guidance,[41] and because policy documents are not regulatory requirements and the regulations do not prohibit inventory on a facility-wide basis, the ALJ erred in faulting Euclid for utilizing a facility-based approach. Euclid adds that the Region did not show that conducting inventory reconciliation on a facility-wide basis is less likely to detect a leak than conducting the test tank-by-tank. *See id.* at 26-28. In sum, Euclid claims that its facility-based approach complies with the regulations.

We reject Euclid's arguments. First, the ALJ did not err in concluding that Euclid could not rely on this method for the entire period of alleged violation, except for the limited facilities and tanks identified by the ALJ. The regulations clearly provide that monthly monitoring is to be conducted using one of the methods listed in section 280.43(d) through (h), and that the combination of inventory control with tank tightness testing could only be used for a limited time period. Because the period allowing for use of this method generally had elapsed, the burden of showing that any of its tanks fell under the ten-year grace period for new or upgraded tanks fell upon Euclid. *See In re Adams*, 13 E.A.D. 310, 321 (EAB 2007) ("One who asserts an affirmative defense bears the burdens of producing evidence as to the defense and demonstrating, by a preponderance of the evidence, that the defense applies."). Euclid, however, has not presented any evidence in this respect, and in any event the regulatory deadline for the use of this method has elapsed.

Second, the ALJ did not err in concluding that inventory control must be conducted on a tank-by-tank basis. Contrary to Euclid's arguments, in concluding that the regulations require tank-by-tank monitoring, the ALJ did not solely rely on EPA's guidance pamphlet. The ALJ arrived at this conclusion after reviewing the applicable regulations, specifically section 280.43(a), and after considering the regulatory purpose of the UST regulations. Our review of this section, the overall structure of the regulatory scheme, and the applicable regulatory history confirm the ALJ's conclusion.

It is clear from section 280.43(a), which prescribes the manner in which inventory control is to be conducted, that in promulgating the UST regulations, the Agency intended for product inventory control to be performed on a tank-by-tank basis. This section provides as follows:

Inventory control. Product inventory control (or another test of equivalent performance) must be conducted monthly to detect a release of at least 1.0 percent of flow-through plus 130 gallons on a monthly basis in the following manner:

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[41] Euclid refers to EPA's guidance pamphlet on inventory control. *See supra* note 37 and accompanying text.

> (1) Inventory volume measurements for regulated substance inputs, withdrawals, and the amount still remaining in *the tank* are recorded each operating day;
>
> (2) The equipment used is capable of measuring the level of product over the full range of *the tank's height* to the nearest one-eighth of an inch;
>
> (3) The regulated substance inputs are reconciled with delivery receipts by measurement of *the tank inventory volume before and after delivery*;
>
> (4) Deliveries are made through a drop tube that extends to within one foot *of the tank bottom*;
>
> (5) Product dispensing is metered and recorded within the local standards for meter calibration or an accuracy of 6 cubic inches for every 5 gallons of product withdrawn; and
>
> (6) The measurement of any water level in the bottom *of the tank* is made to the nearest one-eighth of an inch at least once a month.

40 C.F.R. § 280.43(a) (emphasis added). Notably, this section utilizes the term "tank," defined in the regulations as "a stationary device designed to contain an accumulation of regulated substances[,]" and not the term "underground storage tank," defined in the regulations as "any one or combination of tanks * * * that is used to contain an accumulation of regulated substances." 40 C.F.R. § 280.12. The Agency clearly made a deliberate choice of distinguishing these two terms. In the preamble of the Proposed Rule, for example, the Agency clarified that "[t]he use of the word 'tank' pertains to only the storage tank vessel itself." 52 Fed. Reg. at 12,663. The consistent use of the singular form of the term tank, thus, leaves no room for ambiguity or confusion.

Moreover, as explained below, the choice between using the term tank and UST is not insignificant in terms of regulatory impact. Not only does section 280.43(a) uniformly refer to "tank" and "the tank" in the singular form, but a different reading would simply render some of the requirements in this section inoperable, if one were to move away from the assumption that the requirements should be applied to one tank at a time (e.g., "deliveries are made through a drop tube that extends to within one foot *of the tank bottom*," 40 C.F.R. § 280.43(a)(4); and "the measurement of any water level in the bottom *of the tank* is made to the nearest one-eighth of an inch at least once a month," *id*. § 280.43(a)(6)).

That the Agency intended inventory control, for the purpose of tank release detection, to be conducted on a tank-by-tank basis is also demonstrated by the requirement that inventory control be accompanied by tank tightness testing. It is clear from section 280.43(c), which sets the standard for tank tightness testing, that this test is to be conducted on each individual tank:

> Tank tightness testing (or another test of equivalent performance) must be capable of detecting a 0.1 gallon per hour leak rate *from any portion of the tank* that routinely contains product while accounting for the effects of thermal expansion or contraction of the product, vapor pockets, *tank deformation*, evaporation or condensation, and the location of the water table.

Id. § 280.43(c) (emphasis added).

Clearly, the monitoring of each tank for releases is one of the centerpieces of the UST regulatory scheme. A reading of the regulations as a whole confirms this conclusion. For instance, immediately following the procedures for inventory control, the regulations lay out procedures for "Manual Tank Gauging," another method of tank release detection under section 280.43. *Id.* § 280.43(b)-(b)(5). Not only do these procedures continue the use of the word "tank" in the singular, they also suggest different monitoring standards for different tanks, based on the tank's particular capacity. *See id*. § 280.43(b)(4).

Furthermore, a facility-wide approach to inventory control would run counter to one of the main goals of the UST regulations: to avoid not only large scale leaks, but small ones, by maximizing accurate measurements and minimizing human error. *See* 52 Fed. Reg. at 12,669 (explaining problems with traditional way of conducting inventory control and detailing reasons why this method should only be utilized on a temporary basis to allow for the development of more advanced release detection methods and devices); *id*. at 12,676 (explaining that "a continuous monitor or a frequently sampled method is more likely to detect releases when they are still small and more easily corrected"); *see also* 40 C.F.R. § 280.43(a) (requiring that inventory control be conducted monthly to detect a release of at least 1% of flow-through plus 130 gallons); Md. Code Regs. 26.10.05.04B(1) (a more stringent provision than its federal counterpart, which requires that inventory control be conducted monthly to detect a release of at least one-half of 1% of the metered quantity).[42]

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[42] It is not difficult, even for a lay person, to realize that the aggregation of data magnifies the potential for mistakes in data entry, and even where data are accurately recorded, that aggregation makes it less likely that small problems in individual tanks can be detected. Indeed, the Region explained in its Initial Post Hearing Brief how a facility-wide approach can easily mask small leaks.
Continued

While we base our decision on our interpretation of the applicable regulations, we do note, as Euclid acknowledges, that the Agency's pamphlet on inventory control, a guidance document created by the Agency to assist the regulated community in complying with the UST requirements, clearly conveys the message that to meet leak detection requirements, inventory control needs to be performed on a tank-by-tank basis. *See* Doing Inventory Control Right for Tank Underground Storage Tanks (November 1993) – Complainant's Ex. Y-18. Even if Euclid read the regulations differently, the Agency's guidance clearly identifies the standard it expected the regulated community to satisfy. Confronted with this information, a reasonable party would have sought clarification from the regulating agency about the propriety of its facility-wide approach. The fact that the record before us does not show that Euclid sought clarification from any of the states or the EPA with respect to its interpretation[43] calls into question Euclid's contention that it was using inventory control to meet its regulatory obligations, and instead lends support to the Region's contention that Euclid's inventory control was being used for other purposes than tank release detection.[44] In any event, by failing to seek regulatory guidance, Euclid assumed a risk. *See In re Howmet Corp.*, 13 E.A.D. 272 (EAB 2007) (holding that by failing to seek regulatory guidance in a circumstance in which the regulated entity should have known that it was pursuing a highly risky course of conduct, the regulated entity assumed the consequences associated with its actions); *In re Friedman*, 11 E.A.D. 302, 324 (EAB 2004) (explaining that the courts and this Board have noted that a member of the regulated community, when confused by a regulatory text and confronted by a choice between alternative courses of action, assumes a calculated risk by failing to inquire about the meaning of the regulations at issue).

(continued)
See Complainant's Initial Post Hearing Brief at 49-62. The Region further explained the flaws in Euclid's methodology and demonstrated how Euclid's approach is susceptible to covering small leaks. *See id.* at 51-53.

[43] At oral argument, the Board asked Euclid's counsel whether there was evidence in the record that its client asked any of the state agencies or EPA about the propriety of its facility-wide approach. EAB Tr. at 29-31. Euclid's counsel responded that there was no evidence in the record. However, Euclid's counsel tried to argue that the fact that none of the states ever corrected Euclid on its practice, despite having been inspected by some of the states prior to this action, was somehow evidence that Euclid had sought clarification. *See id*. Euclid makes a similar argument in its appellate brief with respect to the use of inventory control at the facilities located in D.C. *See infra* Part II.B.2.g.(i). As explained in more detail below, *infra* Part II.B.2.g.(i), we are not persuaded by any of these arguments.

[44] During oral argument, counsel for the Region explained that "inventory control is a method used by gas stations to do things other than release detection. One of the key issues is just being able to predict when to send deliveries of gasoline. It is also used for economic accounting on cash flow between lessees and lessors." EAB Tr. at 57. The Region claimed that "the fact that a system of some sort of inventory control is in place does not mean that that system was intended for and actually used to comply with EPA's regulations." *Id*.

In light of the above, we do not find clear error in the ALJ's determination that, under the tank release detection regulations, inventory control must be conducted on a tank-by-tank basis. Because Euclid does not claim that it conducted inventory control on a tank-by-tank basis at any of its facilities,[45] this admission is fatal to its successful reliance on this method to show that it had met, during a portion of the alleged periods of violations,[46] its tank release detection obligations.[47]

Because Euclid also claims to have used other methods of tank release detection, we now examine whether the Region met its burden of showing that Euclid's use of these other methods did not satisfy regulatory standards.

f. *Other Methods of Tank Release Detection Euclid Relies Upon*

Euclid also claims to have used some of the methods of tank release detection specified in 40 C.F.R. § 280.43(d)-(h), specifically in-tank testing using an ATG system, and manual tank gauging, to satisfy its regulatory obligation of monitoring tanks for releases every thirty days. Specifically, Euclid claims to have used manual tank gauging for all used-oil tanks,[48] and ATG for almost all the gasoline and diesel tanks involved in the tank release detection counts,[49] for at least part of the period of alleged violation.

After considering Euclid's stipulations and the evidence the Region presented, the ALJ ruled against Euclid. *See* Init. Dec. at 21-47. In particular, the ALJ observed that for most of the counts where Euclid claimed to have used ATG as a tank release detection method, Euclid did not have "passing" results until after

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[45] Indeed, on appeal Euclid defends the use of its facility-wide approach, which it claims to have used since prior to 1997. *See* Respondent's Appellate Brief at 22 (defending use of facility-based approach to inventory control and implying that methodology has been the same since prior to 1997). *See also* discussion *infra* Part III.C.

[46] As noted earlier in this decision, the applicable regulations only allowed the use of this method on a temporary basis, and as the ALJ concluded, Euclid could only rely on this method for a limited portion of the alleged periods of violations.

[47] Because of our conclusion that Euclid's facility-wide approach to inventory control does not satisfy regulatory requirements, we need not entertain Euclid's challenges to the other flaws the ALJ identified with respect to Euclid's methodology (i.e., failure to record inventory measurements each operating day) and the conclusion that Euclid failed to demonstrate that it had conducted tank tightness tests on a regular basis.

[48] *See supra* note 34; *see also* Parties' First Set of Stipulations ¶¶ 21, 92, 100, 119, 127, 157.

[49] This excludes some of the tanks involved in count 35 where Euclid claims to have used interstitial monitoring instead. Parties' First Set of Stipulations ¶ 79; *see also* Parties' First Set of Stipulations ¶¶ 16, 30, 37, 46, 56, 70, 80, 87, 88, 98, 108, 116, 124, 132, 144, 155.

the alleged period of violation. Indeed, Euclid stipulated, for most of the tank release detection counts, that it had no records of passing "in-test" or "in-tank" results.[50] *See, e.g.*, Parties' First Set of Stipulations at ¶¶ 17, 18, 31, 38, 47, 57, 71, 81, 89, 90, 99, 107, 117, 125, 134, 146, 156. The ALJ found that the lack of passing ATG results, along with some of the other stipulations and other evidence the Region presented, sufficiently supported the inference that Euclid either was not conducting ATG monitoring or was conducting inadequate ATG monitoring at the facilities involved in counts 1, 6, 30, 39, 43, 50, 57, and 62. *See* Init. Dec. at 22, 25, 33, 36, 38, 40-41, 44, 45. For the remaining counts (i.e., 9, 15, 22, 35, 47, 54, and 70), the ALJ found the lack of passing results to be sufficient evidence to sustain the liability findings. *See id*. at 27, 30, 32, 35, 39, 43, 47. The ALJ rejected Euclid's defenses regarding the use of ATG stating:

> To the extent that Euclid submits that a non-passing ATG test result[51] satisfies the applicable UST leak detection regulations, that position is contrary to the UST regulatory scheme and the requirements that there be such leak detection monitoring in the first place. In addition, such a position defies common sense. Also the fact that no tests were generated as a result of a leak * * * and the fact that there were no leaks in the tanks or lines has no bearing on the issue as to whether Euclid complied with its clear regulatory obligation to test for product releases.

Init. Dec. at 21.

Euclid disagrees with the ALJ and challenges his liability findings, arguing that the lack of records is not sufficient to establish a violation, and that, contrary to what the ALJ concluded, the regulations do not require passing ATG results. *See* Respondent's Appellate Brief at 32-33. The only requirement, according to Euclid, is that failing or inconclusive results be investigated and resolved. *Id.* Euclid claims that, in this case, the Region did not prove that Euclid failed to investigate any of the non-passing results (i.e., failing, inconclusive, or invalid results);

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[50] "In tank" or "in-test" ATG testing, the Region explains:

> [I]nvolves the measurement of changes, if any, in the level of product in a tank over a period of time during which no product is added to or dispensed from the tank. After adjusting for temperature and pressure changes during the test period, the ATG then calculates a rate of change in the tank product level and compares this rate to the 0.2 gallon per hour regulatory standard.

Complainant's Cross-Appeal & Response at 109.

[51] The parties use the term "non-passing" ATG test result to encompass "invalid," "failing" and "inconclusive" results.

that to the contrary, the record shows that such results were always investigated. *Id.* at 33. Euclid adds that the reasons for the lack of passing results were varied, but none were due to a leak in a tank. In addition, Euclid argues that the ALJ gave excessive consideration to the Joint Stipulations. *Id.* at 30.[52]

As to the use of manual tank gauging, the ALJ did not find records showing that Euclid had actually conducted the tests and concluded that, for some of the counts, this was sufficient to sustain the Region's prima facie case. Euclid seems to challenge these findings arguing that it was not required to retain records after a year. *See generally id.* at 34, 41.

In our view, as noted *supra*, the real issue here is not whether Euclid was required to keep records for more than a year. The Region has not charged Euclid with failing to keep records. Rather, the Region has charged Euclid with failure to adequately monitor its tanks for releases. Therefore, the question is whether the Region met its burden of showing that Euclid failed to monitor its tanks for releases every thirty days with its ATG equipment, in accordance with 40 C.F.R. § 280.43(d),[53] or by using manual tank gauging, in accordance with 40 C.F.R. § 280.43(b). Our analysis follows.

(i) *Euclid's Reliance on ATG*

The Region does not contend that Euclid did not have ATG in place; rather the Region contends that Euclid used ATG for purposes other than tank release monitoring, and that any ATG testing for tank release detection was inadequately performed. Complainant's Initial Post Hearing Brief at 37-45 (general arguments), 64-89 (count-by-count arguments).

The record before us supports the Region's contentions. The record shows by a preponderance of the evidence that it is more likely than not that Euclid was

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[52] In addition to these general arguments, Euclid also makes a few count-specific arguments. For instance, with respect to count 6, Euclid argues that Complainant did not offer any proof that there were any ATG alarms during the period at issue or that the alarms did not receive the appropriate response, and adds "that the only evidence offered was that on the day of an inspection, the operator did not seem conversant with the operation of the ATG system." Respondent's Appellate Brief at 38. With respect to count 9, Euclid argues that the "only evidence related to this Count was testimony of a Virginia inspector who visited the site and was unable to obtain records at that visit for tank leak detection." *Id*. at 38; *see also id*. at 40 (claiming that for count 39 the only evidence Complainant introduced consisted of the hearsay testimony of the facility manager that he did not use ATG; similar argument for count 43), *id*. at 41 (claiming that for count 62 the only evidence produced was that Euclid delayed installing an ATG for one year and eleven months and lack of records).

[53] Specifically, section 280.43(d) requires that "equipment for automatic tank gauging that tests for the loss of product and conducts inventory control must detect a 0.2 gallon per hour leak rate from any portion of the tank that routinely contains product." 40 C.F.R. § 280.43(d).

not conducting ATG monitoring, and even if it was conducting ATG monitoring, such monitoring was not adequately done.

First, testimony from Euclid's own representatives calls into question Euclid's allegations that it was using its ATG equipment to monitor tanks for releases. Euclid's General Manager, Mr. Leon Buckner, testified, under direct examination conducted by Mr. Koo Yuen, Euclid's President and Chief Operating Officer ("COO"), that the ATG equipment did not work properly in its leak detection mode and that the results were unreliable, *see* TR-10 at 202-03 (Jan. 27, 2004); yet, Euclid claims that it was using this equipment, albeit unreliable, to satisfy its regulatory obligation of conducting monthly monitoring. Mr. Buckner also testified that Euclid had problems with the ATG systems, *id*. at 204, and that the ATGs had too many false results.[54] *Id*. at 203. It strike us as incongruous that Euclid claims to rely on a method that Euclid's own witness described as unreliable.

According to Mr. Yuen and Mr. Buckner, the best monthly detection method is "the traditional pen in hand system, like Mr. Yuen's final analysis and his inventory control system." *Id.* at 205. With this method, Mr. Buckner added, you do not need any "fancy equipment." *Id.* These statements provide support for the Region's claim that Euclid was not conducting ATG for tank release detection. Rather, if anything, Euclid was conducting inventory control, a method that could only be used temporarily and that, as conducted by Euclid, did not satisfy regulatory requirements.

The same testimony also shows that Euclid was using ATG for purposes other than tank release detection. Notably, Mr. Buckner testified, in response to questions from Mr. Yuen, that ATG was used for the convenience of measuring product inventory levels. *See id.* at 203 (responding "yes" to Mr. Yuen's question as to whether ATG was used for the "convenience of detecting water in the tank and not having to go out in the cold weather and open up the tank gauge and stick it with the [measuring stick] and find out what the inventory is.") (Jan. 27, 2004). Indeed, a number of the facility attendants and managers who EPA and state inspectors interviewed stated that they only used ATG to obtain inventory readings and appeared to be unaware of the monthly monitoring requirement under the tank release detection regulations and the use of ATG for tank release detection.[55] *See* Init. Dec. at 25, TR-2 at 168, 170-171 (Jan. 13, 2004) (count 6); Init. Dec. at

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[54] Mr. Buckner also explained that Euclid did not keep records of failing or invalid tests because such results were meaningless. *See* TR-10 at 200 (Jan. 27, 2004).

[55] Significantly, while Euclid seems to challenge some of these observations by state and EPA inspectors, *see supra* note 52, Euclid has put forward no evidence to rebut the testimony of these inspectors, and we have no reason to doubt the veracity of their statements or to question the weight the ALJ gave to their observations.

36, TR-4 at 145-46 (Jan. 15, 2004) (count 39); Init. Dec. at 38, TR-4 at 163 (Jan. 15, 2004) (count 43); Init. Dec. at 41, TR-4 at 186-187 (Jan. 15, 2004) (count 50); Init. Dec. at 46, TR-5 at 17 (Jan. 16, 2004) (count 62); TR-4 at 133 (Jan. 15, 2004) (count 30).

In addition, other evidence in the record supports the Region's contention that Euclid was not properly conducting ATG testing. *See* Complainant's Initial Post Hearing Brief at 30-41. The record shows that at some facilities Euclid had installed ATG, but had not programmed those ATGs to conduct in-tank testing. *Id*. at 39; Parties' First Set of Stipulations ¶ 18 (count 1), ¶ 89 (count 39); TR-2 at 60-61, 131 (Jan. 13, 2004) (count 39); TR-3 at 156 (Jan. 14, 2004) (with respect to D.C. counts); TR-4 at 133-34 (Jan. 15, 2004) (count 30). At other facilities, the record shows that Euclid could not get passing results because the stations "had no 'idle time' in which to run the test, or because the stations operated 24 hours per day, seven days a week."[56] Complainant's Initial Post Hearing Brief at 40; TR-2 at 47-48 (Jan. 13, 2004), TR-4 at 91 (Jan. 15, 2004), TR-14 at 156 (Feb. 4, 2004); Parties' First Set of Stipulations ¶ 19 (count 1), ¶ 72 (count 30), ¶ 82 (count 35), ¶ 91 (count 39), ¶ 118 (count 50), ¶ 126 (count 54), ¶ 135 (count 57). Further, at some facilities, where Euclid seemed to have used ATGs to conduct the required testing, non-passing results were obtained for reasons such as low product levels, product level increases or excessive temperature changes during the tests. Complainant's Cross-Appeal & Response at 110; TR-9 at 153-154 (Jan. 23, 2004); TR-4 at 101 (Jan. 15, 2004); TR-14 at 155-156 (Feb. 4, 2004).

In light of this record, it was not unreasonable for the ALJ to conclude that Euclid's lack of passing results more likely than not reflected that Euclid was not adequately conducting tank release detection monitoring or was conducting no such monitoring at all.[57] While failing (non-passing) or invalid results could be evidence that tests are being conducted,[58] the existence of failing or invalid results does not necessarily translate into adequate monitoring. In this regard, the Region explains that the regulations treat a failed result as a potential release,

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[56] The Region's witnesses explained, and Euclid did not contest, that in order to run a routine in-tank test the system must have some down time because a valid ATG test cannot be performed at a facility that operates twenty four hours, every day of the year. *See, e.g*., TR-4 at 91 (Jan. 15, 2004) (testimony of Ms. Owen) ; TR-2 at 47-48 (Jan. 13, 2004) (testimony of Ms. Ryan).

[57] We, therefore, do not think that the ALJ gave excessive consideration to the joint stipulations.

[58] Recall that Euclid claims not to have passing results because most of its ATGs only provided failing or invalid results. Euclid, however, did not have a policy of keeping these results. *See supra* note 54.

see 40 C.F.R. § 280.50(c),[59] and that an invalid result does not establish whether a release had occurred. *See* Complainant's Cross-Appeal & Response at 118. If a release is suspected, then the owner and operator of the facility must investigate to ensure that the failing result was not due to a leak. *See* 40 C.F.R. § 280.50(c). At some point, if tests were being properly conducted, Euclid should have obtained passing results because it would have done the necessary investigation to determine whether the failing result was due to a leak or a faulty test. Euclid purports to explain the lack of passing results by arguing, among other things, that non-passing results were always verified for leaks with its inventory control method.[60] *See* Respondent's Appellate Brief at 33. The problem with this argument is that Euclid's method of conducting inventory control was also flawed. In addition, the fact that no leaks were detected or that state and EPA inspectors did not find any leaks has no bearing on the issue of whether adequate monitoring was conducted.

In sum, it is not true, as Euclid represents, that the only evidence the Region provided to make its case about the lack of and/or inadequate ATG monitoring was the absence of records showing that Euclid indeed conducted the required testing. Additional evidence in the form of Euclid's testimony emphasizing its reliance on inventory control and the unreliability of its ATGs, Euclid's stipulations, and the evidence at most of the facilities showing that Euclid's ATGs were not programmed to conduct the required monitoring or that if any ATG monitoring was being conducted it was simply inadequate, constituted prima facie evidence to demonstrate that Euclid was not effectively conducting tank release monitoring with its ATG equipment and, therefore, failed to provide an adequate method by

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[59] Section 280.50(c) requires owners and operators of UST systems to report to the implementing agency the following condition:

> Monitoring results from a release detection method required under § 280.41 and § 280.42 that indicate a release may have occurred unless:
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> (1) The monitoring device is found to be defective, and is immediately repaired, recalibrated or replaced, and additional monitoring does not confirm the initial result; or
>
> (2) In the case of inventory control, a second month of data does not confirm the initial result.

40 C.F.R. § 280.50(c).

[60] Euclid also explains the lack of passing results by arguing that the technology was bad and that "the ATG equipment and methodology had not evolved to the point where it was consistently providing reliable test results." *See* Respondent's Appellate Brief at 33. As the Region notes, the regulations "afford tank owners a number of choices in terms of the methods and equipment * * * [they can use] to comply with the regulations. * * * It is the responsibility of the UST owner/operator to choose methods of compliance appropriate to the specific conditions and type of operations present." Complainant's Cross-Appeal & Response at 113. We, therefore, find Euclid's "bad technology" argument without merit.

which to detect tank releases. Euclid did not provide any evidence sufficient to rebut this prima facie showing. We, therefore, have no reason to disturb any of the ALJ's findings with respect to Euclid's use of ATGs for monthly tank release monitoring.

(ii) *Euclid's Reliance on Manual Tank Gauging*

As noted above, Euclid claims to have monitored the following tanks using weekly manual tank gauging in accordance with 40 C.F.R. § 280.43(b), D.C. Mun. Regs. tit. 20, § 6006, or Md. Code Regs. 26.10.05.04C: Tank RI-4 (count 1), Tank 61-4 (count 39), Tank HY-3 (count 43), Tank BW-4 (count 50), Tank GT-4 (count 54), and Tank FR-4 (count 70). Parties' First Set of Stipulations ¶¶ 21, 92, 100, 119, 127, 157. As with ATG, Euclid stipulated that it had no documentation of manual tank gauging for these tanks. *Id*. ¶¶ 22, 93, 101, 120, 128, 158.

Based on the lack of records showing that monitoring was conducted, and with respect to some counts other evidence, the ALJ found Euclid liable for failure to monitor these tanks.[61] Among the other evidence, the ALJ considered: (1) testimony from Complainant's witness, Ms. Mary Owen, who testified that Mr. Ted Beck, Euclid's compliance contractor,[62] had informed her that release detection was not conducted on certain tanks;[63] (2) admissions from Mr. Leon Buckner, Euclid's General Manager, during an EPA inspection at the facility involved in count 1, to the effect that no tank release detection was being performed on Tank RI-4;[64] and (3) testimony from Maryland Department of the Environment's ("MDE's") Inspector, Jackie Lynn Ryan, that Euclid did not produce records for the tanks involved in count 39 during a June 2001 inspection.[65]

Euclid's sole contention with respect to these findings seems to be that the lack of records cannot be used to determine liability, especially because, according to Euclid, it was not required to retain records after a year. *See generally*, Respondent's Appellate Brief at 34, 41.

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[61] *See* Init. Dec. at 22-23, 36-37, 38-39, 41, 43.

[62] Mr. Beck is the President and owner of Independent Petroleum Services, Inc., which services and install USTs, including testing the tanks and lines. Mr. Beck was accepted as an expert in the areas of tank release detection, line release detection, tank overfill, and spill prevention. *See* Init. Dec. at 38 n.33.

[63] Specifically, she testified that release detection was not conducted on tanks: RI-4 (count 1), HY-3 (count 43), and GT-4 (count 54). *See* Init. Dec. at 23 (citing TR-4 at 75), 38-39 (citing TR-4 at 163), 43 (citing TR-4 at 189).

[64] *See* Init. Dec. at 22-23 (count 1).

[65] *See* Init. Dec. at 36-37 (count 39).

We reject Euclid's arguments. While, under other circumstances, the lack of records by itself may not be sufficient to establish a violation, in the case at hand, the lack of records and the totality of the circumstances do support the ALJ's finding that the violations in this case did occur. Euclid's pattern of non-compliance with respect to other methods of tank release detection and even with respect to manual tank gauging,[66] strongly support the inference that the lack of records shows that more likely than not Euclid was not monitoring all of its used-oil tanks with manual tank gauging as it claimed. It is hard to believe that, if Euclid were indeed conducting weekly tank gauging in these six facilities, it could not produce even a single record or testimony of a credible witness showing that weekly manual tank gauging was conducted in at least one of the facilities. Not only did Euclid not produce records, it produced no other evidence, documentary or otherwise, to rebut the inferences reasonably drawn by the ALJ from the record as a whole.

g. *Other Arguments Addressing Tank Release Detection Liability*

In addition to the arguments discussed above, Euclid makes a few other arguments challenging the ALJ's liability findings with respect to the tank release detection charges. We examine each of those arguments below.

(i) *Use of Inventory Control Approved by D.C. DOH*

Euclid appears to argue that it should not be found liable for the tank release detection charges involving facilities in D.C. (i.e., counts 1, 35, 54, 57).[67] Its reasoning is that it used inventory control in its D.C. facilities in lieu of ATG with the acquiescence of D.C. DOH.[68] Respondent's Appellate Brief at 32, 34, and 37. According to Euclid, D.C. DOH's practice is "to permit or at least tolerate inven-

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[66] The ALJ was persuaded by Ms. Owen's testimony that no manual tank gauging was being conducted in at least two facilities. Euclid has not challenged this testimony, and we have no reason to question it. In addition, Mr. Ted Beck, Euclid's witness, admitted during EPA's April 2003inspection that the used-oil tank involved in count 1 had no equipment to conduct tank release detection. TR-3 at 12 (Jan. 14, 2004) (testimony of Mr. Kofi Berko). Likewise, Euclid has not challenge this testimony.

[67] While it is unclear whether Euclid raises these arguments to support its claim that it should not be held liable for the alleged violations, or to support its request for a lower penalty, we will nonetheless analyze these arguments in both contexts.

[68] As noted earlier in this decision, the D.C. UST regulations took effect on May 4, 1998. Under these regulations, inventory control was not available to Euclid's D.C. facilities after May 4, 1998. Therefore, Euclid was required to use one of the methods listed in D.C. Mun. Regs. tit. 20, §§ 6008-6012 (e.g., ATG, vapor monitoring, groundwater monitoring, or interstitial monitoring). Euclid, however, claims to have used inventory control as a method of tank release detection for the D.C. facilities after May 4, 1998. Euclid also claims to have used ATG (but not until sometime after the May 1998 deadline) for counts 1, 54 and 57, and interstitial monitoring for count 35.

tory control to be used for tanks which are less than 10 years old." *Id*. at 32. Therefore, Euclid argues, it is entitled to rely on D.C. DOH's interpretation of its regulations and practice. *Id.* In addition, Euclid adds, because its inventory control never showed inventory loss, such method should have been accepted. *See id*. at 38 (for count 6), 40 (for count 30).

These arguments must fail. Euclid has provided no evidence that D.C. DOH allows this practice. The sole evidence Euclid presents to support its arguments is the testimony of Mr. J. Kofi Berko, Jr., Advisory Environmental Specialist at D.C. DOH, who testified during the hearing in this case. *See id.* at 31. However, the excerpts from Mr. Berko's testimony establish only that, at the time of the filing of the complaint, manual tank gauging was not allowed in D.C. for tanks more than ten years old. *See id*.; *see also* TR-2 at 221-222 (Jan. 13, 2004). Euclid further suggests that D.C. DOH implicitly approved Euclid's use of inventory control after the phase-out deadline because D.C. DOH never cited Euclid for tank release detection violations during inspections D.C. DOH conducted between May 4, 1998, and the inspections involved in this case. Respondent's Appellate Brief at 37.

Even assuming hypothetically that D.C. DOH did not, or chose not to, cite Euclid for violations of the tank release detection program after May 4, 1998, this fact nonetheless provides no basis for concluding that D.C. DOH approved Euclid's use of inventory control, much less that D.C. DOH approved the manner in which Euclid conducted such method. An agency decision regarding whether to enforce falls within the realm of discretionary authority. A decision to enforce involves consideration of numerous factors including resources and priorities; thus, agencies are not expected to pursue each and every potential violation.[69] In light of the complicated balance of factors that come into play in deciding whether to initiate action against a violator, a decision not to act against a specific type of violation provides no indication that the regulating authority approves the violative conduct. Moreover, the fact D.C. DOH may have chosen not to pursue

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[69] As the Supreme Court has stated:

> [A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing.

Heckler v. Chaney, 470 U.S. 821, 831 (1985).

action against tank release detection violations does not provide a reason for the EPA not to exercise its discretionary authority to initiate action itself.

Euclid concedes that the inventory control method it claims to have used in the D.C. facilities was not permissible after May 4, 1998. *See* Respondent's Appellate Brief at 34. Beyond its unsupported allegations, Euclid did not demonstrate that D.C. DOH indeed affirmatively sanctioned Euclid's use of inventory control after the May 1998 deadline. Therefore, Euclid's concession that it relied on inventory control for tank release detection after the May 1998 deadline supports the ALJ's findings of violations.

(ii) *Arguments Related to Count 10*

On appeal, Euclid claims that the ALJ erred in his findings regarding the out-of-service tanks involved in count 10. Respondent's Appellate Brief at 29. Count 10 involves Tanks 29-3 and 29-4 located at 13793 Spotswood Trail, Ruckersville, Virginia. The complaint alleged that Euclid failed to provide adequate monthly methods by which to detect releases from these tanks between September 30, 1997, and March 1, 1999. *See* Amend. Compl. at ¶ 91. Euclid stipulated to have only used inventory control as a method of tank release detection for these tanks, and also admitted that the tanks involved in count 10 were not "empty" as that term is defined in section 280.70(a). Specifically, Euclid admitted paragraph 90 of the amended complaint, which states: "From at least September 30, 1997, to at least March 1, 1999, Tanks 29-3 and 29-4 at the Spotswood Trail Facility routinely contained greater than 1 inch of regulated substances, and thus were not 'empty' as defined in 40 C.F.R. § 280.70(a) and 9 VAC 25-580-310.1."[70] *See* Parties' First Set of Stipulations ¶ 39; Euclid's Answer to the Amended Complaint ¶ 90; Amend. Compl. at ¶ 90. At trial, however, Euclid argued that there can be no violation for these tanks because they were pumped out, or emptied, in 1997 and removed and disposed of in early April 1999. The ALJ rejected Euclid's arguments based on Euclid's answer to the amended complaint, concluding that Euclid was bound by its own admission. The ALJ also noted that even if Euclid were allowed to argue that the tanks were empty, Euclid's exhibits did not show that the tanks were empty, while Complainant's exhibits did demonstrate that the tanks in question contained significant levels of product until they were removed from the ground in April 1999. Init. Dec. at 28-29.

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[70] Under the applicable regulations, release detection is required unless, *inter alia*, the UST system contains a *de minimis* concentration of regulated substance, or is "empty," as defined in 40 C.F.R. § 280.70(a). *See* 40 C.F.R. § 280.10(b)(5). A tank is considered "empty" if all materials have been removed so that no more than 2.5 centimeters (one inch) of residue, or 0.3 percent by weight of the total capacity remains in the system. *Id.* § 280.70(a).

On appeal, Euclid reiterates its position that the tanks were emptied five years prior to the filing of the complaint and therefore were not subject to monitoring requirements. Respondent's Appellate Brief at 29. Euclid adds that under Virginia law, Euclid is not bound by its admissions and can therefore change its position. *See id*. at 39 (citing *Transilift Equip., Ltd. v. Cunningham*, 360 S.E. 2d 183 (Va. 1987)). Further, Euclid claims that Complainant never proved the tanks had more than one inch of regulated substances, and that it rebutted Complainant's allegations at trial by providing actual volume reports showing that there was no more than a small amount of residue in the tank.[71] *Id*.

We are not persuaded by Euclid's arguments. First, it is a well-settled principle that "[s]tatements in pleadings that acknowledge the truth of some matter alleged by an opposing party are judicial admissions binding on the party making them." *Ahghazali v. Sec'y of Health & Human Servs.*, 867 F.2d 921, 927 (6th Cir. 1989); *see also*, *Giannone v. U.S. Steel Corp.*, 238 F.2d 544, 547 (3d Cir. 1956) (stating that judicial admissions, which include admissions in pleadings and stipulations, do not have to be proven in litigation); *Hill v. Fed. Trade Comm'n*, 124 F.2d 104, 106 (5th Cir. 1941) ("Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them. A fact admitted by answer is no longer a fact in issue."); *Cf. Adventis, Inc. v. Consol. Prop. Holdings, Inc.*, Nos. 04-1405, 04-1411, 2005 WL 481621, at *4 (4th Cir. March 2, 2005) (stating, in the context of Rule 36, that the court was bound by the parties' admissions); *State Farm Mutual Auto. Ins. Co. v. Worthington*, 405 F.2d 683, 686 (8th Cir. 1968) (stating that judicial admissions are conclusive upon their maker). *See also In re Chippewa Hazardous Waste Remediation*, 12 E.A.D 346, 357 (2005) (finding respondent to be bound by admissions made in answer to the complaint); *In re J. V. Peters & Co.*, 3 E.A.D. 280, 292 (CJO 1990) (explaining that it is appropriate for the ALJ to rely on a party's admission in its answer to establish liability), *aff'd*, 1:97-CV-1355 (N.D. Ohio Jan. 14, 1999), *aff'd in part and rev'd in part*, 221 F.3d 1336 (3d Cir. 2000); *cf. In re City of Salisbury*, 10 E.A.D. 263, 285 (EAB 2002) (holding that Region could rely on respondent's admissions in its discharge monitoring reports to establish a prima facie case of liability).

Second, Euclid's reliance on Virginia case law for the proposition that a party's admission is not binding is misplaced. The rules governing this proceeding are the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "CROP"), codified at 40 C.F.R. pt. 22, not state procedural law. While it is appropriate for Administrative Law Judges and the EAB to consult the Federal Rules of Civil Procedure and Federal Rules of Evidence for guidance, these rules are not

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[71] Euclid, however, has not pointed to any place in the record that provides evidence of these reports.

binding upon administrative agencies. *See In Re Wego Chem. & Mineral Corp*., 4 E.A.D. 513, 524 n.10 (EAB 1993); *In re House Analysis & Assoc*., 4 E.A.D. 501, 507 n.26 (EAB 1993). Likewise, state procedural rules are not applicable here.

Since a fact admitted by answer is no longer a fact in issue, and Euclid never sought to amend its answer to the complaint under 40 C.F.R. § 22.15(e),[72] Euclid's admission ended the debate as to whether Tanks 29-3 and 29-4 were subject to the tank release detection regulations during the period of alleged violation. Therefore, because these tanks are subject to regulation and Euclid stipulated to only have used inventory control as a method of tank release detection in these tanks, the ALJ did not err in finding Euclid liable for the violations alleged in the amended complaint with respect to these tanks.

2. *The Line Release Detection Charges*

a. *Overview of Counts*

The complaint charged Euclid with twenty-four violations of the line release detection regulations found in 40 C.F.R. §§ 280.40-.45, and their state counterparts.[73] *See* Amend. Compl. at 8-10, 12-13, 18-20, 26-28, 33-34, 40-42, 45-51, 54-57, 61-62, 71, 77-78, 83-85, 89-90, 94-96, 100-101, 105-106, 114-115, 120-121, 123-124, 128-129. The charges involve USTs in twenty-three different facilities: fourteen located in Maryland, seven in D.C., and two in Virginia.[74] *See* Respondent's Appellate Brief at 42.

Complainant alleges that Euclid failed to utilize adequate monthly or annual methods for detecting releases from underground pressurized piping associated with its USTs as required by sections 280.40 and 280.41(b)(1)(ii), and that it failed to conduct annual testing of line leak detectors required for the detection of catastrophic piping failure, as required by section 280.44. *See* Init. Dec. at 6, 48, n.42; Complainant's Initial Post Hearing Brief at 87-103.

b. *Line Release and Line Detection Requirements*

The part 280 regulations require owners and operators of all UST systems to provide a method, or combination of methods, to detect releases from any por-

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[72] According to section 22.15(e) "the respondent may amend the answer to the complaint *upon motion granted by the Presiding Officer*." 40 C.F.R. § 22.15(e) (emphasis added).

[73] *See* D.C. Mun. Regs. tit. 20, §§ 6004.2-.3, 6013.2-.4; Md. Code Regs. 26.10.05.02.C(2), .05.B, .05C; 9 Va. Admin. Code § 25-580-140.2.a, 170.1-.3.

[74] Counts: 2, 4, 7, 11-12, 16, 20, 23-25, 27-28, 31, 36, 40, 44, 48, 51, 55, 58, 63, 66, 68, and 71.

tion of the system's underground piping. *See* 40 C.F.R. § 280.40. For petroleum USTs, like the ones Euclid owns and/or operates, the regulations require that pressurized underground piping be monitored for releases with an automatic line leak detector used in accordance with 40 C.F.R. § 280.44(a), and that annual line tightness tests or monthly monitoring be conducted in accordance with 40 C.F.R. § 280.44(b)-(c). *Id.* § 280.41(b)(1)(i)-(ii).

The regulations define automatic line leak detectors as "methods that alert the operator to the presence of a leak by restricting or shutting off the flow of regulated substances through piping or triggering an audible or visual alarm." 40 C.F.R. § 280.44(a). These type of detectors must be tested annually to ensure that they are operable within the required parameters. *See id*. For an annual line tightness test, the regulations require that the tightness test be capable of detecting a leak of 0.1 gallon per hour. *Id*. § 280.44(b). With respect to the monthly monitoring requirement, the regulations allow several methods of compliance. *Id*. §§ 280.41(b)(1)(i)-(ii), .44(c). Specifically, the regulations allow the use of the methods prescribed in 40 C.F.R. § 280.43 (e) through (h) as monthly monitoring. Relevant to the case at hand is the method described in section 280.43(g) – interstitial monitoring – as this and line tightness testing are the methods Euclid claimed to have used in its facilities.[75] *See* Init. Dec. at 49; Parties' First Set of Stipulations ¶¶ 24, 27, 33, 40, 48, 53, 58, 60, 62, 65, 67, 73, 83, 94, 102, 110, 121, 129, 136, 147, 149, 152, and 159.

The Initial Decision refers to the requirements of having automatic line leak detectors and annual testing of line leak detectors as "line leak detection" requirements,[76] and to the requirement of performing an annual line tightness test or monthly monitoring as the "line release detection" requirement. Init. Dec. at 47 n.41, 48 nn.42-43.[77] For consistency, and to avoid confusion, we adopt the same convention in this decision.

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[75] Specifically, Euclid stipulated to have conducted line tightness testing in seven of the twenty-three facilities involved in these counts. Parties' First Set of Stipulations ¶¶ 24, 48, 58, 83, 94, 147, 159. In the remaining sixteen facilities, Euclid claims that it performed line tightness testing and/or interstitial monitoring. *Id*. at ¶¶ 27, 33, 40, 53, 60, 62, 65, 67, 73, 102, 110, 121, 129, 136, 149, and 152.

[76] The case before us only involves Euclid's alleged failure to test the line leak detectors annually. Indeed, Complainant did not charge Euclid with failure to provide line leak detectors, except at one facility, *see* Init. Dec. at 48 n.42; instead, as the ALJ explained,"to the extent that [Complainant] charges line leak detector non-compliance, those charges involve [Euclid's] alleged failure to test the line leak detectors annually." *Id*.

[77] The Region also refers to these requirements respectively as "catastrophic" and "non-catastrophic" line release detection. *See* Complainant's Initial Post Hearing Brief at 87.

c. *The ALJ's Liability Findings and Euclid's Challenges* [78]

The ALJ found Euclid liable for all the "line leak" and "line release" detection violations alleged in the complaint. *See* Init. Dec. at 47-75. The majority of his findings were based on Euclid's stipulations, which, among other things, stipulated that Euclid had "no documentation of line leak detector tests and line tightness tests (including, but not limited to, documentation of payments to a contractor for such tests) having been performed on the underground piping associated with" the tanks involved in the line detection charges except for the dates specified in the stipulations.[79] The ALJ also based his findings, particularly those related to interstitial monitoring, on the testimony of state and EPA inspectors.

Euclid challenges the ALJ's liability findings by raising both general and count-specific arguments, which can be grouped in two categories: (1) arguments pertaining to the lack of records; and (2) arguments pertaining to interstitial monitoring. *See* Respondent's Appellate Brief at 42-48. We address Euclid's arguments below.

d. *The Record Retention Argument*

Here, as with the tank release detection charges, Euclid contends that the lack of records is not sufficient to prove a violation. As noted above, the ALJ based his liability findings with respect to the "line leak detection" charges on the lack of records showing that Euclid consistently conducted annual tests of its automatic line leak detectors. The lack of records was also a main consideration in his findings regarding the "line release detection" violations, particularly for counts 2, 11, 16, 23, 36, 40, 63, and 71, as Euclid claimed to have conducted only line tightness testing to meet its "line release detection" obligations. Euclid raises the same arguments it raised in the context of the tank release detection violations, and basically argues that it cannot be held liable based on the lack of records, especially when the regulations only require retention of documents for one year. *See* Respondent's Appellate Brief at 45-46.

As noted earlier, the real issue here is determining whether the Region met its burden of showing, by a preponderance of the evidence, that Euclid did not conduct tests of its automatic line leak detectors and line tightness on an annual basis.

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[78] As noted earlier, Euclid's appeal is unclear as to whether the arguments it raises are intended as challenges to the liability determinations in the Initial Decision, the penalty assessment, or both. We, nonetheless, will read Euclid's arguments as challenges to both aspects of the Initial Decision, and therefore will entertain, as appropriate, each of Euclid's arguments in both discussions.

[79] *See* Parties' First Set of Stipulations ¶¶ 25, 28, 34, 41, 43, 49, 54, 59, 61, 63, 66, 74, 84, 95, 103, 112, 122, 130, 137, 148, 150, 153, 160.

The Region does not contend that Euclid never conducted these tests; the Region's contention is that Euclid did not conduct these tests on an annual basis, as the regulations require. *See* Complainant's Initial Post Hearing Brief at 94, 102 (explaining that Euclid did have documentation of at least one line tightness test, and one leak detector test at every facility, but such testing was not conducted on an annual basis). The Region's evidence, as the Region itself pointed out, consisted in large part of Euclid's records, and lack thereof. *Id*. at 94. The Region explained that while Euclid did provide records showing that line tightness and leak detector tests were conducted, Euclid's records fail to show that tests were conducted on an annual basis, or even on a systematic basis.[80] The Region explained further that it is unlikely that Euclid might have discarded the records that would make up the gap in the documents Euclid provided, among other things, because: (1) when EPA examined Euclid's files in April 2002, Euclid's files contained records dating as far back as the 1980's, *id*. at 95 (citing Ms. Owen's testimony – TR-4 at 30-31 (Jan. 15, 2004)); (2) at the April 2002 meetings between Euclid and EPA, Mr. Yuen told EPA that Euclid did not have any specific policy for destroying records, and that he did not know of any reason why any records would have been removed from the files, *id*. at 96 (citing Ms. Owen's testimony – TR-4 at 35 and TR-15 at 134 (Feb. 5, 2004));[81] and (3) line tightness test results were available, at the time of the meetings, dating back to at least February 22, 1995, *id*. (citing Parties' First Set of Stipulation ¶ 43). Finally, the Region argues that Euclid did not appear to have a program of annual line tightness testing, *id*. at 96-97, explaining, among other things, that: (1) even after the April 2002 meetings, where EPA emphasized the need for Euclid to produce its records and made it clear that Euclid was potentially facing large penalties for non-compliance, Euclid continued to have gaps of greater than one year between its tightness and leak detector tests; and (2) most of Euclid's state notification forms did not list line tightness testing as a method of line release detection and many listed no method of line release detection whatsoever.[82] *Id*. at 96.

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[80] Indeed, for most of the facilities, the gap in Euclid's records is significantly greater than one year, and there is no discernable pattern to the frequency Euclid conducted such testing. For instance, the records Euclid submitted show that Euclid performed line leak detection and tightness testing on the underground piping system of some of its facilities as follows: (1) count 4 on November 5, 1999, and April 17, 2003; (2) count 11 on June 1, 1999, and May 7, 2003; (3) count 20 on February 19, 2002, and April 2, 2003; (4) count 23 on October 15, 1999, November 26, 2001, and April 14, 2003; (5) count 24 on June 26, 2000, and April 10, 2003; and (6) count 31 on February 23, 2000, and April 28, 2003. Parties' First Set of Stipulations ¶ 28, 41, 54, 59, 61 and 74. The same pattern of inconsistent testing repeats in all the facilities involved in the line leak detection violations. *See*, *e.g*., *id*. ¶¶ 25, 34, 43, 49, 63, 66, 84, 95, 103, 112, 122, 130, 137, 148, 150, 153, 160.

[81] Euclid has not challenged this testimony, and we have no reason to question the credibility of Ms. Owen.

[82] The UST regulations require owners and operators of UST systems to submit a notification form to the state or local agency or department where the UST system is located. *See* 40 C.F.R.

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Euclid does not deny, at least on appeal, any of these observations. Euclid's only contention is that the absence of records does not establish a violation. Yet, we believe that reasonable inferences can be drawn from the presence and absence of records. We agree with the ALJ and the Region that, taken as a whole, the evidence and the inferences drawn from such evidence establish a prima facie case that Euclid did not perform line tightness and line leak detector testing on an annual basis. As the Region noted, it is highly unlikely that Euclid maintained records of the earlier and later tests, yet somehow discarded results for tests that would show that tests were conducted annually.

Having established a prima facie case of violation, the burden shifted to Euclid to come forward with evidence to support any defenses it had to rebut the Region's allegations. Euclid could have rebutted the Region's case by the testimony of any of the persons that allegedly performed these tests. Euclid, however, produced no witnesses to show that Euclid had performed the tests on a regular basis prior to the filing of the complaint.[83] Euclid's failure to carry its burden of proof is, therefore, fatal.

e. *Interstitial Monitoring*

As noted above, Euclid claimed to have conducted interstitial monitoring with sump sensor interstitial monitoring systems, in addition to line tightness tests, to meet its line release detection obligations in sixteen of the twenty-three facilities involved in these counts.[84]

The ALJ, however, was not persuaded that Euclid had meet its regulatory obligations by performing interstitial monitoring. Instead, persuaded by the evidence the Region presented, the ALJ concluded that in some of its facilities Euclid did not intend to rely upon interstitial monitoring, and in others, the intersti-

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§ 280.22. The purpose of this notification form is to assist in locating and evaluating USTs. *Id.* pt. 280, app. I. Among other things, the form requires the regulated entity to identify the methods of release detection used at the UST facility. *Id.*

[83] Euclid seems to believe that it was the Region's obligation, not Euclid's, to contact the contractors that Euclid allegedly used to perform these tests. *See* Respondent's Appellate Brief at 45 (alleging that the Region chose to rely on inferences drawn from missing records rather than contacting Euclid's contractors). As noted above, the Region's prima facie case is based on more than just inferences from missing records, and the burden of producing evidence to support a defense falls on the party who asserts the defense, in this case Euclid.

[84] According to Euclid, it conducted interstitial monitoring and/or line tightness testing in the facilities involved in the following counts: 4, 7, 11, 20, 24, 25, 27, 28, 31, 44, 48, 51, 55, 58, 66, and 68. *See* Parties' First Set of Stipulations ¶¶ 27, 33, 40, 53, 60, 62, 65, 67, 73, 102, 110, 121, 129, 136, 149, and 152.

tial monitoring systems were so inadequate that they could not be relied upon. *See* Init. Dec. at 47-75.

Complainant's evidence consisted of the testimony of state and EPA inspectors who observed and documented the conditions of various sump systems and interviewed facility operators. Complainant also relied on the UST notification Euclid sent to the state agencies, which, according to the Initial Decision, did not list for at least eleven of the facilities interstitial monitoring as a method of release detection.[85]

More specifically, Complainant introduced photographs depicting the condition of various sump systems, showing dirt and rusting on the sump floors and walls. The ALJ found this to be proof of chronic flooding of the sumps.[86] Complainant also introduced the testimony of state and EPA inspectors who observed: (1) liquid in sumps and signs of flooding;[87] (2) missing sensors[88] or sensors inap-

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[85] This, in the ALJ's view, was evidence that Euclid did not intend to rely upon interstitial monitoring to detect piping releases. *See* Init. Dec. at 57, 59-62, 64, 66, 68-69, 70-71. Interstitial monitoring was not listed in the UST notification form of the facilities involved in counts: 20, 24, 25, 27, 28, 31, 44, 48, 51, 55 and 58.

[86] The problem with a flooded sump, as EPA's expert witness, Mr. John Cignatta explained, is that it becomes difficult to detect fuel releases. *See* Complainant's Cross-Appeal & Response at 130 (explaining that "[w]hen a sump is flooded with water, an operable sensor will already be in alarm, and a release of fuel will not cause any change in the status of the alarm. Where sumps show signs of chronic flooding, it is evident that alarms are not heeded on an expeditious basis, if at all, and it is clear that there are repeated and significant periods of time during which the sump sensors system simply will not detect a release because the sensor is already tripped.") (citing TR-7 at 96-97 (Jan. 21, 2004)).

[87] The record shows that Complainant's witnesses observed water and/or fuel in the sumps of at least four of the facilities involved in the line release violations. *See* TR-2 at 24, 32 (count 44), 68-72 (count 20), 75-76 (count 28) (Jan. 13, 2004) (testimony of MDE inspector Jackie Ryan); TR-4 at 124-26 (count 25) (Jan. 15, 2004) (testimony of Mary Owen); TR-7 at 96-98, 101-5 (count 25) (Jan. 21, 2004) (testimony of John Cignatta); TR-9 at 180 (count 20) (Jan. 23, 2004) (testimony of John Cignatta); Complainant's Ex. Y-21 at 1726-27. In addition, Complainant's witnesses testified to having observed flooded sumps, or signs of flooding, such as mud, rust stains, corrosion, and standing water, *inter alia*, in the sumps involved in the following counts: 4, 25, 48, and 51. *See* Init. Dec. at 52, 60, 68, 69.

[88] According to Complainant's witness, the sump pump system involved in count 31 had missing sensors. *See* Init. Dec. at 64 (citing TR-4 at 129-33 (January 15, 2004) (testimony of Mary Owen)). Without sensors, monitoring cannot be conducted. *See* Init. Dec. at 49 (explaining the concept of interstitial monitoring).

propriately located;[89] (3) "tight boots;"[90] and (4) systems in continuous alarm.[91] Complainant's witnesses also interviewed facility operators who allegedly were unaware of any line leak or line release detection being performed at their facilities[92] and did not understand the significance of having a sensor alarm go off.[93]

Euclid does not deny any of these observations, but challenges the inferences drawn from them.[94] Euclid's approach is to justify each individual situation by explaining why some of the sump systems were in the conditions inspectors described, and by arguing that in most of these instances Euclid relied on

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[89] The Region explains that "sensors must be located at or very near the bottom of the sump, otherwise releases may not be detected at all (if the sump is not sealed and liquid thus escapes), or may not be detected until long after the release begins." Complainant's Cross-Appeal & Response at 127 (citing TR-7 at 89, 105-107 (Jan. 21, 2004) (testimony of John Cignatta)); *see also id.* at 129. The ALJ was persuaded by Complainant's evidence that the sensors in the sump systems involved in counts 20, 25 and 28 were inappropriately located (i.e., either too high or lying on the floor out of their bracket). *See* Init. Dec. at 57, 60, 63.

[90] A boot, Euclid explains, "is a rubber fitting around the outer wall of a double-walled piping system." Respondent's Appellate Brief at 42. If the boots are tight, Euclid adds, "this interferes or blocks the ability of the interstitial monitoring systems and/or sump monitoring system to detect a line leak." *Id*. at 42-43. Complainant's witnesses testified to have observed tight boots in the sumps of the facilities involved in counts 31, 58, 66, and 68. Init. Dec. at 64 (citing TR-4 at 129-133 (Jan. 15, 2004)) (testimony of Mary Owen) (count 31); *id*. at 71 (citing TR-5 at 12-13 (Jan. 16, 2004)) (testimony of Mary Owen) (count 58); *id*. at 73 (citing TR-5 at 22-23 (Jan. 16, 2004)) (testimony of Mary Owen) (count 66); *id*. at 74 (citing TR-3 at 72-74 (Jan. 14, 2004)) (testimony of D.C. DOH environmental specialist J. Kofi Berko, Jr.) (count 68); TR-5 at 25 (Jan. 16, 2004)) (testimony of Mary Owen) (count 68).

[91] Complainant argues that a continuous alarm, or alarms being ignored, is a sign that Euclid did not train its facility operators to treat alarms as suspected releases to which the operator must immediately respond. Complainant's Cross-Appeal & Response at 129. Complainant's witnesses claimed to have observed continuous alarms in the facilities involved in counts 44, 48 and 51. *See* Init. Dec. at 67, 68, 69.

[92] For instance, one of Complainant's witnesses (EPA Environmental Protection Specialist George Houghton) testified about his conversation with the operators of the John Mosby Highway facility, the facility involved in count 7, who, in the inspector's view, did not understand the concept of leak detection. Init. Dec. at 53 (citing TR-2 at 170-71 (Jan. 13, 2004)).

[93] For example, Complainant introduced evidence of an inspection at the Baltimore Avenue facility (count 44), which showed a sensor that was "completely submerged and in alarm, and had been in alarm for five and a half months preceding the inspection." Init. Dec. at 67 (citing TR-4 at 149, 154-57 (Jan. 15, 2004) (testimony of Mary Owen) and TR-7 at 109-11, 113-14 (Jan. 21, 2004) (testimony of John Cignatta)); *see also id.* at 69 (explaining that both sumps at the Rhode Island Avenue, Brentwood, Maryland facility (count 51) were flooded, and in alarm, and that the attendants were unaware of them and in any event did not understand the alarm's significance) (citing TR-4 at 182-85 (Jan. 15, 2004) (testimony of Ms. Owen) and TR-7 at 60-62, 66, 138-44 (Jan. 21, 2004) (testimony of John Cignatta)).

[94] However, Euclid does take issue with the observations of Complainant's witnesses with respect to count 31, which we discuss in more detail below. *See infra* Part II.B.3.(f).

state-certified contractors for maintenance and testing of these systems. *See* Respondent's Appellate Brief at 42-48. Euclid claims that it cannot be held liable because it relied on the expertise of state-certified contractors. *Id*. at 43. It blames state-certified contractors for the "tight boots," and also for the water in the sumps. *See id*. at 43 (explaining that boots are tightened when the piping system is installed and later when the system is periodically tested, and that this job is done by state-certified contractors and not Euclid employees); *id*. at 43-44 (explaining that non-certified individuals may not discharge liquid from a sump into the environment and that Euclid has an outside contractor who is notified every time an alarm goes off). Euclid further argues that water in sump systems or diesel is not conclusive evidence. *Id*. at 46-47 (counts 7, 20, 25). In regard to the inspectors' observations about raised sensors, Euclid argues that the regulations do not specify a height for sump sensors, that Complainant did not elicit testimony to the effect that the raised sensors failed to meet other requirements of the regulations, and that in any event, "[r]aising sensors in chronically flooded sumps is a reasonable accommodation to the exigencies of operating this type of system." *Id*. at 44. Likewise, Euclid argues that there is no evidence that a sump sensor must be maintained at the bottom of the sump, adding that "[n]either manufacturer specifications nor regulations are in evidence to sustain this rationale of the Tribunal." *Id*. at 47. With respect to the observations about continuous alarms, Euclid argues that "the testimony of Andre Miller establishes that Respondent had a system in place to investigate and remediate the various problems arising in connection with the service station operation, including alarm conditions." *Id*. at 47 (counts 20, 25). As to Complainant's reliance on Euclid's failure to list interstitial monitoring in the UST notification to the states, Euclid argues that "there are no regulations which provide that the neglect to mention interstitial monitoring on the initial disclosure means that, even if the system exists, you cannot rely on it to meet the requirements of line monitoring." *See id*. at 46, 47. Finally, Euclid claims that it had leak detectors as an alternate to the alarm systems (sump sensors) that "meet the line leak detection requirements even if the sump sensors do not meet these requirements." *Id*.

We are not persuaded by any of Euclid's arguments. That Euclid hired contractors to maintain and test its equipment is irrelevant to the question of liability. As the ALJ correctly stated, "a party may not avoid liability for non-compliance with the UST regulations by hiring a contractor to perform the work required by these regulations." *See* Init. Dec. at 96 n.69. RCRA is a strict liability statute, and, therefore, Euclid cannot escape liability by claiming that it relied on its contractors to perform its regulatory obligations.[95] *See In re Pyramid Chem. Co.*, 11 E.A.D. 657, 677 (2004) (holding that when it comes to strict liability offenses a respondent cannot avoid its responsibility by blaming its contractor); *In re Rybond, Inc.*, 6 E.A.D. 614, 638 (1996) (rejecting argument that respondent

[95] We also address these arguments in the penalty context in Part II.C.5.a.(ii) below.

should not be held liable for the alleged RCRA violations because it was unaware that any hazardous waste was being stored on its property and made good faith efforts to dispose of the hazardous wastes as soon as it was notified of the existence of the storage tanks); *In re Humko Prods.*, 2 E.A.D. 697, 703 (CJO 1988) (holding that RCRA is a strict liability statute and authorizes the imposition of a penalty even if the violation is unintended).

Euclid's other arguments fare no better. We agree with the ALJ that Euclid's claim that the regulations do not specify a height for a sump pump sensor is disingenuous. Init. Dec. at 60. As the ALJ points out, this argument ignores the fact that a sensor can be positioned at such a height that it no longer serves its intended purpose to provide an alarm in the event of a petroleum leak. *Id*. Euclid has provided no evidence to rebut the testimony of Mr. Cignatta, who the ALJ accepted as an expert witness in line release detection, among other areas, and who explained that sensors must be located near the bottom of the sump so that releases may be detected early. *See* TR-7 at 41, 89, 105-07 (Jan. 21, 2004).

Likewise, Euclid's challenges to the inferences the ALJ drew from the omission of line release detection methods in the UST notification form is also of no avail. While, as Euclid suggests, the absence of a mention of a line release detection method in the state UST notification form does not necessarily mean that an omitted method is not being used at the corresponding facility, by the same token, the mere existence of equipment that can be used for monitoring does not mean that such equipment is being used or that monitoring is being conducted. There is ample evidence in the record of this case showing that Euclid did not maintain its sump pump systems in proper working condition and did not respond to them, at least on a prompt basis,[96] all of which support the conclusion that Euclid could not rely on such equipment to meet its monitoring obligations. In the case at hand, the totality of the evidence further confirms the inferences drawn from the omissions in the UST notification forms.

In sum, the evidence presented shows that more likely than not Euclid was not conducting monthly monitoring of its underground piping with its sump sensor systems. The majority of the evidence consists of the testimony of Complain-

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[96] As noted above, Euclid argues that the testimony of Andre Miller established that Euclid had a system in place to take care of problems such as alarm conditions. Euclid, however, does not provide a specific citation to the record for this proposition. We have reviewed Mr. Miller's testimony, *see* TR-11 at 161-97 (Jan. 28, 2004), and found that the only thing his testimony established, with respect to alarm conditions at Euclid's facilities, is that his company, HOSE Maintenance, provided support to Euclid only upon being contacted by Euclid. *See id*. at 160-67. Notably, Mr. Miller testified that in responding to a service call he never asked how long the alarm condition or maintenance issue had been going on, and also that he could not determine the duration of the problem. *Id*. at 177-78. Meanwhile, the Region produced ample evidence, among other things, of the poor condition in which Euclid kept its sump systems and how alarms were constantly ignored.

ant's witnesses, testimony Euclid does not rebut. As we noted earlier in this decision, we normally give deference to a presiding officer's findings of fact that are based upon the credibility of witnesses, and in this case, Euclid has given us no reason to depart from this practice.[97]

f. *Other Count-Specific Arguments*

Euclid makes a number of count-specific arguments, most of which we incorporated in our discussion above. Below is a discussion of other arguments Euclid raises that do not fall into the two categories already discussed.

With respect to count 12, Euclid claims that the tanks at issue were taken out of service in 1997 and removed in April 1999, and, therefore, Euclid had no obligation to keep any records for these tanks as of the date of the filing of the complaint. Respondent's Appellate Brief at 42, 46. In Euclid's own words: "Respondent cannot be charged with maintaining any documentation or evidence of equipment used for line release detection as of the date of filing of this Complaint, and therefore it is not proper to charge Respondent with violating the requirements for line release detection with respect to this tank." *Id.* at 42.

Euclid misses the point. Euclid has not been charged with failure to maintain records, Euclid was charged with failure to conduct required testing and monitoring during the period of September 30, 1997, to March 1, 1999. Euclid stipulated that from September 30, 1997, until the tanks were removed from the ground, it did not perform any method of piping release detection for the underground piping associated with these tanks, other than line tightness testing. Parties' First Set of Stipulations ¶ 42. Euclid also stipulated that it had "no documentation of any line leak detector tests and line tightness tests (including, but not limited to, documentation of payments to a contractor for such tests) having been performed on the underground piping associated with" the tanks involved in count 12 except for the tests performed on February 22, 1995. The ALJ found, based on these stipulations, Euclid's pattern with respect to the other facilities, and the totality of the evidence, that Complainant had proven the violations as charged. *See* Init. Dec. at 55. Euclid could have rebutted the Region's case by presenting other type of evidence, not just records of the tests. Here, as with the other charges, the Region met its burden of proof, and Euclid failed to come forward with evidence to rebut the Region's prima facie case.

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[97] We also reject Euclid's argument that it had leak detectors as an alternative to the sump sensors to "meet the line leak detection requirements even if the sump sensors do not meet these requirements." Respondent's Appellate Brief at 44. Euclid seems to believe that an automatic leak detector can be used as an alternative to monthly monitoring. The regulations, however, are clear that the requirement of having automatic leak detectors is distinct and separate from the requirement of conducting monthly monitoring. 40 C.F.R. § 280.41(b)(1)(i)-(ii).

With respect to count 31, Euclid questions the ALJ's reliance on the observations of the EPA inspectors who visited the Frederick Avenue facility located in Baltimore, Maryland, and the conclusions the ALJ drew based on such testimony. The ALJ found liability based on, among other things, the testimony of Ms. Owen, who testified that none of the sumps had sensors. Based on the same testimony, the ALJ also concluded that "even if there were sensors present, the system would have not worked in any event because the 'boots' used to test the double-wall lines were too tight and thus did not allow for an interstitial space." *Id*. at 64 (citing TR-4 at 129-133).

Euclid's argument on appeal is that "[i]f sump sensors were not present, then there would have been no reason to have tight boots." Respondent's Appellate Brief at 48. The Region objected to this contention at oral argument, explaining as follows: "That argument makes no sense * * * . If you have double-walled pipes, you always have some boots on them * * * ." EAB Tr. at 86.

While Euclid questions Ms. Owen's observations about the tight boots and lack of sensors, Euclid offers no evidence to refute that testimony. Moreover, the ALJ based his liability findings on other factors as well, such as Euclid's failure to list interstitial monitoring as a method of line release detection in the UST notification form sent to MDE, Euclid's stipulations, and the lack of records showing that the required monitoring was conducted. Based on the totality of the circumstances, the ALJ did not err in concluding that the Region met its prima facie case with respect to the charges in count 31, which was unrebutted.

The last count-specific argument that Euclid raises pertains to count 55. Euclid appears to argue that the Region did not prove its case by contending as follows: "Complainant must demonstrate affirmatively that this site does not have interstitial monitors. The Complainant and its experts visited all of the sites continuously over a period of approximately one year. If this site lacked monitors, the Complainant could have simply produced testimony to that effect." Respondent's Appellate Brief at 48. The ALJ based his liability finding with respect to this count on Euclid's stipulations and the UST notification form Euclid sent to D.C. DOH. *See* Init. Dec. at 70.

Here, again, Euclid misses the point. Euclid is not charged with failure to have monitors, but with failure to conduct the required monitoring and required testing. As with the other counts, the totality of the circumstances supports the Region's case.

3. *The Corrosion Protection Charges*

a. *Overview of Counts*

The complaint charged Euclid with twelve violations of the state UST corrosion protection regulations.[98] The charges, counts 8, 13, 14, 17, 18, 32, 37, 41, 45, 52, 59, and 73, involve USTs in ten different facilities: six located in Maryland, two in D.C., and two in Virginia. Respondent's Appellate Brief at 49; Init. Dec. at 78-95.

The complaint alleged that Euclid failed to: (1) provide adequate corrosion protection for underground metal tanks and the associated underground piping (counts: 13, 14, 17, 18, 32, 41, 52, 59);[99] (2) conduct adequate periodic testing and inspection of cathodic protection systems intended to protect underground metal tanks and the associated underground piping (counts: 8, 17, 32, 37, 45, 59);[100] and (3) isolate or protect metal pumps and piping fittings which were in contact with the ground (counts: 37, 41, 73).[101] *See* Init. Dec. at 6, 78-95.

b. *ALJ's Findings and Euclid's Challenges*

The ALJ found Euclid liable for all of the alleged corrosion protection violations. The ALJ based his findings on Euclid's admissions, on the testimony of EPA's expert witnesses, and on documentary evidence.

With respect to the counts alleging inadequate corrosion protection, the ALJ found that: (1) no form of corrosion protection was present in some facilities;[102]

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[98] In particular, the complaint charges Euclid with violations to the D.C. regulations found at D.C. Mun. Regs. tit. 20, §§ 5700.1, 5800.1, 5801.1-.2, 5901.1-.6, & Chapter 61; the Maryland regulations found at Md. Code Regs. 26.10.03.01, .02, .09, .10 & §§ 26.10.04.02; and the Virginia regulations found at 9 Va. Admin. Code §§ 25-580-50.1, -50.2, -60.1, -60.2, -60.3, -90, -90.2, & Part VII.F.

[99] As required by D.C. Mun. Regs. tit. 20, §§ 5701, 5800.1, 5801.1, 5901; Md. Code Regs. 26.10.03.01.B; 9 Va. Admin. Code § 25-580-60.

[100] As required by D.C. Mun. Regs. tit. 20, §§ 5901.1-.6; Md. Code Regs. 26.10.04.02.D(1); 9 Va. Admin. Code § 25-580-90.

[101] As required by D.C. Mun. Regs. tit. 20, § 5901.3; Md. Code Regs. 26.10.04.02.B.

[102] Specifically, the ALJ found no corrosion protection in the facilities involved in counts 13, 14, and 52. *See* Init. Dec. at 79-80 (finding, for counts 13 and 14, that scribbled check marks on notification form Euclid submitted to VDEQ, with the initials "KDG" appearing next to scribbling, established that the tanks and piping associated with these counts had no corrosion protection); TR-1 at 123-125 (Jan. 12, 2004) (testimony of Ms. Willis from VDEQ explaining that initials "KDG" belonged to Mr. Kevin D. Garber, a former VDEQ inspector; also explaining that scribbled check marks made by the VDEQ inspector indicate that the owner had initially reported to VDEQ that the tanks and piping were cathodically protected, but that after verifying with the owner, the inspector crossed out

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(2) that the method used by Euclid in some of its facilities to protect metal piping components in contact with the ground – coating and wrapping – was not an accepted corrosion protection method;[103] and (3) that in facilities where some corrosion protection systems had been provided, such systems had been installed after the regulatory deadline,[104] and/or had not been providing adequate corrosion protection.[105]

With respect to the counts alleging inadequate testing and inspection of cathodic protection systems, the ALJ found that there was no documentation that tests were performed as frequently as the applicable regulations require,[106] and

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the original check marks to show that the systems were in fact not cathodically protected or corrosion protected). *See also* Init. Dec. at 91-93 (noting that Euclid's answer to the complaint admitted the allegations of the complaint with respect to count 52).

[103] Euclid claimed to have "coated" and "wrapped" certain metal piping components in contact with the ground in the facilities involved in counts 18 and 41 as an alternative to corrosion protection. The ALJ found, based on the expert testimony of Mr. Cignatta, Complainant's expert witness, that "coating and wrapping" is not an acceptable method of corrosion protection. *See* Init. Dec. at 83-84 (count 18), 89 (count 41).

[104] For instance, the Federal UST and D.C. UST regulations required corrosion protection for "existing tanks" by December 22, 1998. The tanks involved in count 59 are "existing tanks" as defined under the regulations; however, no corrosion protection was provided until approximately January 3, 2000, when impress current was applied to the tanks. *See* Init. Dec. at 94.

[105] *See* Init. Dec. at 81-82 (finding that tanks were either partially unprotected or almost completely unprotected); *id*. at 87 (finding that the cathodic protection system used in facility involved in count 32 did not provide continuous protection because the current had been turned off for a significant period of time); *id*. at 94 (finding that the impress current system used in facility involved in count 59 was not energized for a significant period of time).

[106] The ALJ found that Euclid had no records proving that testing had been conducted in accordance with the applicable regulations in the facilities involved in counts: 8, 17, 45 and 59. *See* Init. Dec. at 78, 81-82, 89-91, 93-95. With respect to count 8, Euclid stipulated that it had no documentation as to the testing of the cathodic protection systems for the tanks in this Virginia facility, except for testing conducted on September 8, 1996, and February 25, 2002. Parties' First Set of Stipulations ¶ 36. Because under the Virginia regulations, 9 Va. Admin. Code § 25-580-90.2, cathodic systems must be tested every three years, and Euclid had no documentation showing that such testing had been conducted, the ALJ found that Euclid violated this requirement. Init. Dec. at 78. For the Maryland facilities for which Euclid was charged with failure to test and inspect (i.e., counts 17, 32, and 45), Euclid produced testing documentation for one day only for each facility. The Maryland regulations require that cathodic protection systems be inspected by a qualified cathodic protection tester within 6 months of installation and at least every year thereafter. Md. Code Regs. 26.10.04.02.D. The Maryland regulations further require that records of at least the last two years be maintained. *Id*. at 26.10.04.02.G(2). Given the lack of records showing that tests were conducted yearly, the ALJ found Euclid liable. *See* Init. Dec. at 81(count 17), 85-86 (count 32), 89-90 (count 45). Similarly, Euclid had no documentation showing that the required testing had been conducted in the facility involved in count 59. This facility is located in D.C. Under the D.C. regulations, impress current cathodic systems must be inspected every sixty days, and records of at least the last three inspections must be maintained. D.C.
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that the tests results that were provided were inadequate.[107]

Lastly, with respect to the counts alleging failure to isolate or protect metal pump elements and piping fittings that were in contact with the ground, the ALJ found that contact with "pea gravel"[108] equates to contact with the ground; therefore, those facilities with unprotected metal pump elements and piping fittings in contact with pea gravel were in violation.[109]

On appeal, Euclid appears to challenge only the liability findings of nine of the twelve counts involving corrosion protection, and the penalty assessment of all twelve counts. Specifically, Euclid seems to challenge the liability findings for the following counts: 8, 13, 14, 17, 18, 37, 41, 45, and 73.[110] In challenging the

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Mun. Regs. tit. 20, §§ 5901.6, .7(b). Euclid stipulated that it had documentation of cathodic protection testing only for January 3, 2000, and April 28, 2003. Based on Euclid's stipulation, the ALJ found that Euclid had violated the D.C. regulations. Init. Dec. at 94.

[107] In particular, the ALJ found, based on Mr. Cignatta's expert opinion, that the methodology Euclid's contractor, Mr. Denny, used for testing was not in accordance with accepted industry codes of practice as the regulations require. Init. Dec. at 81-82 (count 17), 85-86 (count 32), 90-91 (count 45).

[108] The Region explains that "pea gravel" is material which is used to fill the excavation in which an underground storage tank is placed. Complainant's Cross-Appeal & Response at 133.

[109] This was the finding for the facilities involved in counts 37, 41 and 73.

[110] It is unclear whether Euclid challenges the liability determination with respect to counts 13 and 14. For example, on appeal Euclid does not deny that the tanks and underground metal piping in the facility involved in counts 13 and 14 were subject to regulation and required corrosion protection during the period of alleged violation (i.e., from December 22, 1998, to March 1, 1999) and that Euclid did not provide the required protection. Euclid's arguments on appeal read as follows: "Records regarding this tank system were not retained. It is not appropriate to penalize Respondent for any alleged deficiencies regarding the compliance of this tank system" because the tanks and piping system were removed in April 1999, *see* Respondent's Appellate Brief at 52, and because "Respondent is not responsible for verifying the history of the cathodic protection status of a tank taken out of service in early 1999." *Id*. at 51. Despite this ambiguity, we will, nonetheless, address these arguments as if they were challenges to the liability determination. We, thus, construe Euclid's arguments as an attempt to argue that the Region cannot rely on Euclid's failure to retain records to prove the alleged violations in counts 13 and 14. However, as noted above, *see supra* note 102, the ALJ based his findings of liability with respect to these two counts on the notification form Euclid submitted to the state of Virginia, which, the ALJ concluded, indicated that the tanks and piping at issue in these counts were not cathodically protected. Clearly, Euclid's suggestion that the Region's case is based solely on Euclid's failure to retain records is without merit. In addition, Euclid does not challenge the ALJ's conclusion with respect to the notification form; we, thus, have no reason to second-guess his liability determinations for these two counts.

The arguments Euclid raises with respect to counts 32, 52, and 59 seem to only relate to the penalty assessment. Notably, Euclid does not deny any of the factual findings that led the ALJ to conclude that the facilities involved in counts 32 and 59 had no adequate corrosion protection and that Euclid did not conduct adequate periodic testing and inspection of its cathodic protection system.
Continued

liability findings, Euclid does not question the applicability of the regulations. Rather, Euclid questions the weight the ALJ gave to the evidence Complainant presented, and the ALJ's reading of some of the regulatory requirements.[111] *See* Respondent's Appellate Brief at 49-55.

In its general discussion, Euclid identifies what it believes are the main problems with the evidence the ALJ relied upon. According to Euclid:

> (1) there were significant errors made by Complainant's expert in his report regarding certain aspects of corrosion protection; (2) Complainant did not conclusively demonstrate that "coating and wrapping" is not appropriate corrosion protection for metal fittings and pumps connected to fiberglass tanks and piping; (3) there are differences of opinion among certified corrosion protection testers as to testing methodology, and as to whether a particular system is adequately protected; (4) in instances where the power to the corrosion protection system was shut off, there was no evidence that Respondent had anything to do with turning off the power;[112] and (5) the mere absence

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(continued)
Euclid's contention is that it is "entitled to rely on the test results of certified testers to avoid a penalty of the magnitude imposed." Respondent's Appellate Brief at 53-54 (similar argument with respect to count 59). Euclid takes a similar approach with respect to count 52. Euclid does not deny that the tank at issue in this count lacked cathodic protection; Euclid's argument on appeal is that the imposition of a penalty is inappropriate because Euclid was under the impression that this tank did not require corrosion protection because it was a fiberglass tank. *See id*. at 54. We address these arguments in Part II.C.5.a below.

[111] Specifically, Euclid seems to challenge the ALJ's reading of Maryland requirements as applied in counts 18, 41 and 73. In challenging the liability findings for these counts, Euclid seems to question the ALJ's reading of the regulatory requirements by arguing that the state of Maryland does not require the extent of cathodic protection described by Complainant's expert witness. *Id*. at 52, 53. We discuss this argument in more detail in Part II.B.4.d.

[112] As noted above, for some of the counts (e.g., 32, 59), the ALJ found, among other things, that the corrosion protection system was turned off or de-energized, and therefore was not providing cathodic protection. Init. Dec. at 86, 88, 94. Euclid claims that the:

> "[O]nly reason why the system had been de-energized would have been to permit testing or maintenance on the system. The reason that the tank would not have been connected is that a state-certified contractor either did not connect the tank to the system upon installation, or disconnected it for some other reason. * * * Therefore, Respondent cannot be held strictly liable for the errors of outsiders."

Respondent's Appellate Brief at 51-52. In its discussion of these counts, however, Euclid only seems to question the penalty assessed and not liability. *See supra* note 110. We therefore address these arguments in Part II.C below.

> of production of documents regarding testing records on the record of this case does not conclusively establish that the cathodic protection tests were not performed.[113]

Respondent's Appellate Brief at 49. In essence, Euclid questions the credibility of Complainant's expert witness, Mr. Cignatta,[114] and claims that the lack of records showing that the required tests were conducted is not sufficient to establish the charged violations.

c. *Credibility of Witnesses*

With respect to the credibility of Complainant's expert witness, Euclid argues that Mr. Cignatta's expert report had significant errors. Euclid also argues that there were a number of disagreements between EPA's and Euclid's corrosion experts, but that its expert witness, Mr. Mollica,[115] was more credible. In any event, Euclid argues that it should not be found liable because of a disagreement between experts. Euclid also argues that its other witnesses, Mr. Denny and Mr. Beck, were more credible that Mr. Cignatta.[116] In sum, Euclid claims that its witnesses were more credible than Complainant's expert witness with respect to identifying appropriate corrosion protection for metal piping in contact with "pea

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[113] As with the tank release and line leak detection counts, the ALJ found that Euclid had no records proving that testing had been conducted in accordance with the regulations. This, in conjunction with other findings, led the ALJ to conclude that Euclid committed the violations charged in counts: 8, 17, and 45. *See* Init. Dec. at 78, 81-83, 89-91.

[114] Mr. Cignatta was qualified, based on his educational background and work expertise, as an expert witness in the areas of: tank release detection, line release detection, spill prevention, overfill protection, and corrosion protection. *See* TR-7 at 41 (Jan. 21, 2004); *see also* TR-6 at 170-214 (Jan. 20, 2004)(discussing Mr. Cignatta's qualifications); TR-7 at 7-41 (Jan. 21, 2004).

[115] Mr. Mollica was qualified, based on his work experience, as an expert witness in the general areas of corrosion protection, testing, and installation. TR-11 at 206 (Jan. 28, 2004); *see also id.* at 198-206 (discussing Mr. Mollica's qualifications).

[116] Mr. Denny is a corrosion technician, who conducted some of the tests in dispute in this case. *See* TR-12 at 130-38 (Jan. 29, 2004). Mr. Beck owns the company Independent Petroleum Services, Inc. The company, among other things, "perform[s] service and installation of underground storage tanks, * * * [and] test[s] underground storage tanks." TR-14 at 48-49 (Feb. 4, 2004). Mr. Beck was qualified, on the basis of his work experience, as an expert in the areas of tank release detection, line release detection, tank overfill, and spill prevention. *Id.* at 99. Mr. Beck, however, was not qualified as a corrosion protection expert. *Id.* at 98-105.

gravel,"[117] "coating and wrapping,"[118] and "testing."[119]

We, however, are not persuaded by Euclid's arguments. The ALJ, after observing the testimony of Complainant's and Respondent's experts, found Complainant's expert to be more credible.[120] We have stated on numerous occasions that the Board ordinarily defers to a presiding officer's factual findings where credibility of witnesses is at issue "because the presiding officer had the opportunity to observe the witnesses testify and to evaluate their credibility." *In re Mayes*, 12 E.A.D. 54, 95 n.35 (EAB 2005), *aff'd*, No. 3:05-CV-478 (E.D. Tenn. Jan. 4, 2008); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 552, 530 (EAB 1998); *accord In re Phoenix Constr. Servs., Inc.*, 11 E.A.D. 657 (EAB 2004); *In re City of Salisbury*, 10 E.A.D. 263, 276, 293-96 (EAB 2002). Absent compelling reasons to the contrary, this Board typically will defer to the presiding officer's determinations of credibility. *See In re Mex. Feed & Seed Co., Inc.*, 2 E.A.D. 510, 513 (CJO 1988). In this case, Euclid has provided no compelling reasons as to why we should depart from the ALJ's credibility determination. Euclid argues that Mr. Cignatta's expert report had significant errors, but does not identify those errors on appeal. Simply arguing that one expert witness is more credible than the other does not constitute a compelling reason. We have reviewed Mr. Cignatta's

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[117] According to Euclid, Mr. Cignatta erred in equating the term "in contact with the ground" with being in contact with pea gravel. Respondent's Appellate Brief at 49. As noted above, the complaint charges Euclid with failure to isolate or protect metal pumps and piping fittings that were in contact with the ground. Euclid argues that the metal pumps and piping fittings identified by Complainant in counts 37, 41 and 73 were not in contact with the ground, but instead were in contact with pea gravel. The term "in contact with the ground," Euclid argues, only covers the common use definition of soil, and does not cover pea gravel. *Id*.

[118] Euclid adds that the testimony of its expert witness showed that "the only practical method, and the method universally accepted in the industry" to protect metal pumps and piping fittings that are components of fiberglass systems is coating and/or wrapping and that MDE deems "coating and wrapping" as an appropriate method of corrosion protection. *See* Respondent's Appellate Brief at 50.

[119] With respect to the differences among certified corrosion protection testers as to the appropriate testing methodology and whether a particular system is adequately protected, Euclid argues that the testimony of its witnesses, Mr. Mollica, Mr. Denny, and Mr. Beck, proved that the facilities at stake were cathodically protected and that the discrepancy between the tests conducted by Mr. Cignatta and Mr. Mollica is an "indication that there can be differing results obtained by firms who are both state certified." Respondent's Appellate Brief at 51. Euclid, however, does not provide any record citation to support this argument.

[120] *See, e.g.*, Init. Dec. at 81 (crediting Mr. Cignattas's testimony that the USTs at the facility involved in count 17 were not cathodically protected); *id*. at 84 (holding that "[o]n balance, the more detailed testimony of cathodic protection expert John Cignatta as to the 'coating and wrapping' of pipes and connectors is credited over the testimony of Ted Beck") (count 18); *id*. at 87 (finding, based on Mr. Cignatta's testimony, that Mr. Denny's testing did not comport with accepted industry codes of practice) (count 32); *id*. at 87 n.63 (crediting Mr. Cignatta's testimony over Mr. Mollica's because Mr. Mollica was not qualified as a cathodic protection expert and because he offered no rationale for certain conclusions regarding testing); *id*. at 94-95 (finding that observations by Mr. Cignatta raised serious doubts about Mr. Denny's testing) (count 59); *see also id*. at 90-91 (count 45); 92 (count 73).

testimony and find that he provided cogent, persuasive and credible testimony with respect to corrosion protection,[121] testing,[122] coating and wrapping,[123] and the implications of contact with pea gravel.[124] We, therefore, have no reason to depart from the ALJ's credibility determination.

d. *Euclid's Argument that Maryland Allows "Coating and Wrapping"*

Euclid argues that, in practice, the state of Maryland allows coating and wrapping of metal piping components in contact with the ground as an approved method of isolating metal components from the ground, thereby avoiding the need for cathodic protection; furthermore, Maryland has an Information Fact Sheet supporting this practice. *See* Respondent's Appellate Brief at 50, 52. Euclid cites to testimony of Mr. Beck who, according to Euclid, testified that an MDE inspector approved the coating and wrapping of a line without the need for cathodic protection at a Maryland facility. *Id*. at 50 (citing TR-14 at 113).

We are not persuaded by any of these arguments. Euclid provides no legal authority to support its assertion. The alleged Information Fact Sheet, which Euclid claims it attached to its Appellate Brief, was neither presented in evidence below nor attached to its brief on appeal. At the hearing below, Mr. Cignatta testified that he was aware of a Maryland guidance document regarding coating and wrapping, but clarified that this guidance does not apply to straight steel piping such as the piping at issue in this case. *See* TR-15 at 117-20 (Feb. 5, 2004) (explaining in detail situations where this guidance document may apply). As to Mr. Beck's testimony, that MDE accepts coating and wrapping in practice, the Region argues that such testimony is inconsistent with Ms. Ryan's testimony, the MDE inspector who testified in this case. Indeed, Ms. Ryan testified that "if you coat and wrap something, you still need the cathodic protection." TR-2 at 130-31

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[121] *See, e.g.*, TR-9 at 4-24 (Jan. 23, 2004) (Mr. Cignatta's explanation of corrosion protection principles); TR-9 at 50-51 (Mr. Cignatta's findings concerning facility involved in count 17); TR-9 at 71-85 (Mr. Cignatta's findings at facility involved in count 32); TR-9 116-17 (Mr. Cignatta's findings at facility involved in count 59).

[122] See Mr. Cignatta's evaluation of Mr. Denny's report and testing methodology at TR-9 at 51-52 (Jan. 23, 2004) (count 17), 67-70 (count 32), 102-04 (count 45).

[123] *Compare* Mr. Cignatta's testimony at TR-15 at 118-19 (Feb. 5, 2004) *with* Mr. Beck's testimony at TR-14 at 112 (Feb. 4, 2004). Even though Mr. Beck was not qualified as an expert witness in the area of corrosion protection, he offered his opinion as to what he thought were the appropriate procedures for coating and wrapping piping. Those procedures are not nearly as detailed as the ones Mr. Cignatta described. *Id.*

[124] *See* TR-9 at 31-32, 126 (Jan. 23, 2004); TR-11 at 80-81 (Jan. 28, 2004) (Mr. Cignatta's testimony, explaining that because pea gravel absorbs moisture, over time, the soil chemistry permeates through capillary action to that pea gravel exposing any metal in contact with the gravel to the same corrosive conditions as if it were in contact with native soil).

(Jan. 13, 2004). Because Euclid has not shown that indeed this is an allowable practice in Maryland, we have no reason to disregard the ALJ's findings on this particular issue.

e. *Euclid's Argument About the Lack of Records*

Finally, Euclid's claims that the lack of records is not sufficient to show that the required tests were not conducted is without merit. Here, as with the tank release and line leak detection charges, the totality of the evidence points to the conclusion that, more likely than not, Euclid did not conduct the required testing as often as the applicable regulations require. The missing documents in particular support this inference.[125] Euclid did not present any evidence to rebut the Region's prima facie showing, and, as previously explained in this decision, its failure to do so is fatal.

4. *The Overfill Prevention Charges*

a. *Overview of Counts*

The complaint charged Euclid with ten violations of the UST overfill protection regulations of Maryland and D.C.[126] The counts involve USTs in ten different facilities: nine located in Maryland and one in D.C.[127] Respondent's Appellate Brief at 55; Init. Dec. at 6, 95-105.

The complaint alleged that Euclid failed to provide equipment that meets the applicable regulatory requirements. *See* Amend. Compl. ¶¶ 168, 210, 236, 269, 334, 362, 383, 411, 467, 559; *see also* Init. Dec. at 6, 95-105. Specifically, section 26.10.03.03A(2)(a)-(c) of the Maryland regulations and section 5705.3 of the D.C. regulations require owners and operators of UST systems to, *inter alia*, use overfill prevention equipment that automatically shuts off flow into the tank when the tank is 95% full, or alerts the transfer operator when the tank is 90% full by restricting the flow into the tank or triggering a high level alarm. D.C. Mun. Regs. tit. 20, § 5705.3; Md. Code Regs. 26.10.03.03 A(2)(a)-(c).

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[125] *See supra* note 106.

[126] *See* Amend. Compl. ¶¶ 170, 213, 238, 272, 337, 364, 386, 413, 470, 562. In particular, the complaint charges Euclid with violations of the of D.C. regulations found at D.C. Mun. Regs. tit. 20, § 5705.2 and the Maryland regulations found at Md. Code Regs. 26.10.03.01.D(1)(b); the correct citations, however, should be D.C. Mun. Regs. tit. 20, § 5705.3 and Md. Code Regs. 26.10.03.03 A(2)(a)-(c).

[127] The overfill protection charges involve the following counts: 21, 26, 29, 33, 42, 46, 49, 53, 60, and 74.

b. *ALJ's Findings and Euclid's Challenges*

Euclid stipulated that the tanks involved in the overfill protection charges were equipped with overfill protection in the form of "ball float check valves,"[128] "float activated drop tube overfill valves,"[129] and/or overfill alarms.[130] Based on the testimony of Mr. Cignatta, the ALJ concluded that Euclid's overfill protection equipment was inoperative in at least two of the facilities and improperly installed in the remaining eight.[131] *See* Init. Dec. at 95-105.

On appeal, Euclid does not question the applicability of the regulations, nor does Euclid deny or challenge the observations and testimony of Complainant's expert witness. Euclid's argument is that the devices Euclid relied on for tank overfill protection were installed by certified installers,[132] that such contractors relied on industry practice, and that Maryland regulations sanction the methods Euclid used.

With regard to its contention that the contractors relied on industry practice, Euclid explains that installers followed the installation instructions valve manufacturers supplied, which apparently specified a height that did not meet the regulatory requirements. Respondent's Appellate Brief at 56. Euclid also argues that even Complainant admits "that the problems it identified with [the ball float

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[128] Euclid claimed to have "ball float check valves" for certain tanks, if not all, in the facilities involved in counts 21, 29, 42, 46, 53, 60 and 74. Init. Dec. at 96, 98, 100-04 (citing Respondent's Ex. RX-7 at 9005 and Parties' First Set of Stipulations ¶¶ 69, 97, 107, 123, 142, and 162).

[129] Euclid claimed to have "float activated drop tube overfill valves" for certain tanks, if not all, in the facilities involved in counts 26, 33, 42, 49, 60, and 74. Init. Dec. at 96, 99, 100, 102-04 (citing Respondent's Ex. RX-7 at 9006 and Parties' First Set of Stipulations ¶¶ 78, 97, 114, 141, and 162).

[130] Euclid claimed to have alarms in the facilities involved in counts 29, 33, 42, 46, 49, 53, 60 and 74. Init. Dec. at 98, 99, 100-04 (citing Parties' First Set of Stipulations ¶¶ 69, 78, 97, 107, 114, 123, 141, 142, and 162).

[131] Mr. Cignatta testified to the effect that the overfill devices in Euclid's tanks were not installed at the right height to shut off flow into the tank when the tank is 95% full. Specifically, in Mr. Cignatta's expert opinion, the length of the pipe of each "ball float check valve" in Euclid's tanks failed to extend down to the 95% full by volume mark. *See, e.g.*, TR-8 at 11 (count 21), 32-33 (count 29), 43-49 (count 42), 52-53 (count 46), 59-62 (count 53), 64-65 (count 60), 76-78 (count 74) (Jan. 22, 2004). Mr. Cignatta also was of the opinion that the "float activated drop tube overfill valves" were located at the wrong activation point. *See, e.g.*, TR-8 at 20-21 (count 26), 20, 36-39 (count 33), 56-58 (count 49). In sum, in Complainant's expert witness' opinion, Euclid's overfill devices were set above the regulatory 95% full level.

[132] As with the other charges, the ALJ rejected Euclid's argument about its reliance on certified contractors as a liability defense. In particular the ALJ stated: "It is the holding of this Tribunal that a party may not avoid liability for non-compliance with a UST regulations [*sic*] simply by hiring a contractor to perform the work required by these regulations. In other words, a party cannot 'contract out' its responsibility to comply with the UST regulations." Init. Dec. at 96 n.69.

check] valves resulted from an accepted industry practice which is now being reexamined." *Id*. (citing Complainant's Initial Post Hearing Brief at 221).[133] Euclid then argues that "[w]hile Respondent bears [the] ultimate responsibility for the integrity of its pollution control devices, it is not appropriate to penalize Respondent under the circumstances." *Id.* In addition, it is Euclid's position that "Maryland regulations discuss an alternate method of overfill protection which provides that any method which prevents the delivered fuel from coming into contact with the top of a tank is an acceptable method." *Id*.

c. *Analysis*

Euclid's arguments with respect to these counts seem to challenge the penalty determination, instead of liability. However, because Euclid claims that Maryland regulations allow alternative methods of overfill protection, which would cover the devices in Euclid's facilities, we will entertain Euclid's contention in this section of our decision, as well as in Part II.C below, where we discuss the penalty assessment.

As the ALJ correctly pointed out, and as we stated earlier in this decision, RCRA is a strict liability statute, and, therefore, Euclid cannot escape liability by claiming that it relied on its contractors to perform its regulatory obligations. As to Euclid's contention that Maryland regulations allow other methods of overfill protection, Euclid has provided no legal authority to support this contention.

Because Euclid does not challenge any of the observations of Complainant's expert, and we have no reason to question his credibility, and because the ALJ based his findings on those observations, we see no reason to depart from the ALJ's findings. Furthermore, we are persuaded that the Region met its burden of showing that Euclid's overfill devices did not meet applicable regulatory requirements. Since the Region met its burden, the burden shifted to Euclid to come forward with evidence to support any defenses it had and demonstrate by a preponderance of the evidence that such defenses apply. Euclid failed to do so, and, therefore, it has provided us with no reason to depart from the ALJ liability findings.

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[133] We have reviewed page 221 of Complainant's Initial Post Hearing Brief and found that Respondent misstates Complainant. On pages 221 to 222, Complainant explains how the new trend in the industry is to *lower* the shut-off level so that tanks are never allowed to be filled beyond 90% capacity. *See* Complainant's Initial Post Hearing Brief at 221-22. The record here shows that Respondent's ball floats were set well *above* the 95% regulatory level, and well above the new industry trend. Clearly, the discussion Euclid relied upon neither stands for the proposition cited nor does it support Euclid's case.

5. *The Spill Prevention Charge*

The complaint charged Euclid with one violation of the Maryland UST spill prevention regulations.[134] The Maryland regulations require owners and operators of USTs to use spill prevention equipment to "prevent release of a regulated substance into the environment when the transfer hose is detached from the fill pipe by use of a spill catchment basin." Md. Code Regs. 26.10.03.03A(1). Count 34 charges that "the spill catchment basins for tanks 39-1, 39-2, 39-3 and 39-4 [in the Frederick Avenue facility] were not liquid-tight and would not prevent the release of product into the environment." Amend. Compl. ¶ 275; *see* Init. Dec. at 106.

The ALJ found in favor of Complainant, based on the testimony of Mr. Cignatta. Specifically, Mr. Cignatta testified about the conditions of the spill catchment basins in the tanks at the Frederick Avenue facility, noting that there were gaps in at least tanks 39-2, 39-3 and 39-4 that would not prevent the release of a regulated substance into the environment. *See* TR-7 at 151-53 (Jan. 21, 2004).

Euclid does not question the applicability of the regulations, nor does Euclid deny or challenge any of the observations and testimony of Complainant's expert witness. Rather, Euclid questions the ALJ's liability findings by implying that it was someone else's fault and by characterizing the problem as a maintenance issue. Respondent's Appellate Brief at 57 (arguing that "the most likely cause of the gap between the fill tube and the spill bucket was improper conduct by one of the delivery drivers").

These apparently are the same arguments Euclid raised before the ALJ, who was not persuaded by Euclid and ruled in Complainant's favor, reasoning as follows:

> Euclid's argument, however, lacks record support. It rests purely on speculation that the damage was caused by someone else at some unknown point in time. Still, [R]espondent's attempt to assign the blame to another must fail, in any event, given the unalterable fact that as owner and, or, operator of the Frederick Avenue facility, it is the party responsible under Maryland law to prevent petroleum spills. It is Euclid who is liable for non-compliance in this instance.

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[134] The complaint charges Euclid with violations of the Maryland regulations found at Md. Code Regs. 26.10.03.01.D(1)(a); however, the correct citation should be Md. Code Regs. 26.10.03.03A(1).

Init. Dec. at 106. We agree with the ALJ. As noted earlier, a party may not avoid RCRA liability by blaming a third party. Once again, Euclid has given us no reason to depart from the ALJ's liability findings.

6. *The Financial Responsibility Charges*

a. *Overview of Counts*

The complaint charges Euclid with seven violations of the Federal and the D.C. UST financial responsibility regulations codified at 40 C.F.R. § 280.90-.116 and D.C. Mun. Regs. tit. 20, §§ 6700-6715. The counts, 3, 5, 38, 56, 61, 67, and 69, involve seven facilities located in D.C. Init. Dec. at 107-08; Respondent's Appellate Brief at 57-63. The complaint alleges that Euclid failed to maintain financial mechanisms to ensure the availability of clean up funds in the event of a release of regulated substances from the USTs. Amend. Compl. ¶¶ 27-29, 42-43, 305-306, 431-435, 472-473, 517-518, 531-532.

The applicable financial responsibility regulations require that owners or operators of petroleum USTs, like Euclid, demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs. 40 C.F.R. § 280.93; D.C. Mun. Regs. tit. 20, § 6700.10-.12. An owner or operator may demonstrate financial responsibility using any of the mechanisms or combination of mechanisms set forth in 40 C.F.R. § 280.95-.103 and D.C. Mun. Regs. tit. 20, § 6703-6711, which include: (1) self-insurance; (2) guarantee; (3) insurance and risk retention group coverage; (4) surety bond; (5) letter of credit; and (6) trust fund.

b. *Mechanisms of Financial Responsibility Relied Upon By Euclid*

In its post-hearing brief, Euclid claimed to have satisfied the UST financial responsibility requirements because it had insurance coverage for each of the facilities, and Euclid reasonably believed that this insurance was enough to satisfy the financial responsibility regulations. Init. Dec. at 108-09 (citing Respondent's Post-Hearing Brief at 4-5). Euclid also relied on self-insurance, claiming that it met the "financial net worth test for establishing financial responsibility."[135] *Id*. at

[135] Euclid refers to sections 6703 to 6705 of the D.C. UST regulations, and section 280.95 of the federal UST regulations, which provide that an owner, a guarantor, or both may satisfy the financial responsibility requirements by passing one of the specified financial tests. *See* D.C. Mun. Regs. tit. 20, §§ 6703-6705; 40 C.F.R. § 280.95. On appeal, Euclid seems to claim that it passed both tests identified in section 6703 of the D.C. regulations, although it seems to rely only on one particular test – Test B. *Compare* Respondent's Appellate Brief at 57 *with id.* at 59; *see also* discussion *infra* note 137 (discussing financial self insurance tests).

109 (quoting Respondent's Post-Hearing Brief at 4-5). To show that it met the threshold net worth amount required under the financial responsibility regulations, Euclid relied on the assets of all its affiliates, the Patricia Yuen life insurance trust, the Koo Yuen life insurance trust, and the Yuen children's trust. *Id*. at 111. The estimated value of Euclid's assets was supplied by Mr. Yuen, whom Euclid unsuccessfully tried to qualify as a valuation expert before the ALJ. *Id*. at 114 n.80.

c. *ALJ's Findings and Euclid's Challenges*

Upon consideration of Euclid's stipulations and the evidence the Region presented, the ALJ found against Euclid. The ALJ began his analysis by summarizing Euclid's stipulations, in which Euclid admitted that it never filed a certificate of financial responsibility pursuant to D.C. Mun. Regs. tit. 20, §§ 6700.8, 6702.7, that prior to December 11, 2003, its chief financial officer never prepared or signed a letter of assurance pursuant to D.C. Mun. Regs. tit. 20, § 6703.3, and that it has never established a standby trust pursuant to D.C. Mun. Regs. tit. 20, § 6711. Init. Dec. at 111 (citing Parties' First Set of Stipulations ¶¶ 8, 9, 11). Based on these stipulations and Euclid's reliance on the assets of its affiliates and the various family trusts, the ALJ concluded that Euclid relied on a combination of self-insurance and guarantee and that Euclid failed to demonstrate compliance with critical self-insurance and guarantee elements (i.e., that Euclid did not comply with sections 6700.8, 6702.7, 6703.3, 6711). Init. Dec. at 111-115.

The ALJ continued his analysis by explaining why he was unpersuaded by Euclid's arguments about its compliance with the financial responsibility requirements. With respect to Euclid's insurance coverage, the ALJ concluded, based on Euclid's admissions,[136] that Euclid did not have the proper insurance to meet its regulatory financial responsibility obligations during the period of alleged violation. *Id*. at 109. The ALJ further concluded that the fact that Euclid's President may have at one time believed that the company's insurance policy "provided the requisite financial responsibility coverage * * * has no bearing on the underlying issue of liability." *Id*.

The ALJ also rejected, on three different grounds, Euclid's claim that it met the financial net worth test for establishing financial responsibility. *See id*. at 111-114. First, the ALJ concluded that Euclid's self-insurance claim lacked formal guarantees for some of the assets being relied upon. *Id*. at 111-112. The ALJ found particularly troublesome Euclid's reliance on guarantees from multiple guarantors, instead of its own financial resources, and the lack of a formal agree-

[136] According to the ALJ, Euclid admitted that Mr. Yuen was advised by his insurance agent in April 2002 that Euclid's insurance policy did not meet the D.C. financial assurance requirements of D.C. Init. Dec. at 109.

ment exposing the assets of these guarantors to liability arising from the operation of Euclid's USTs. *Id*. Because of Euclid's reliance on these guarantors, the ALJ concluded that Euclid was not only relying on self-insurance but on a combination of self-insurance and guarantee, *id*. at 111, and noted that for an owner to rely on a guarantee, it must have: (1) an explicit guarantee in accordance with D.C. Mun. Regs. tit. 20, § 6706.3; (2) to the regulatory agency, pursuant to Appendix 67-3; (3) to fund an already existing standby trust fund, as required by section 6706.8, all of which Euclid did not have.

Second, the ALJ concluded that Euclid's self-insurance claim lacked independent verification. Init. Dec. at 113. The ALJ explained that in drafting its financial responsibility regulations, the Agency placed the burden of financial verification upon the entity claiming self-insurance. This is reflected in the requirement that self-insuring entities either file annual financial statements with the U.S. Securities and Exchange Commission ("SEC") or report their net worth annually to Dun and Bradstreet and obtain a strength rating of 4A or 5A.[137] *Id*. at 113 (citing D.C. Mun. Regs. tit. 20, § 6704, 40 C.F.R. § 280.95(b), 53 Fed. Reg. 43,322, 43,341 (Oct. 26, 1988)). The ALJ explained further that, the Agency in-

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[137] As noted previously, the regulations prescribe two tests for proving financial self-insurance. D.C. Mun. Regs. tit. 20, § 6703.3 (referred to as Tests A and B); 40 C.F.R. § 280.95 (referred to as Alternatives I and II). These tests are based on year-end financial statements for the latest completed fiscal year and are to be filed annually. D.C. Mun. Regs. tit. 20, § 6703.3; 40 C.F.R. § 280.95(a). Relevant to the case at hand are the requirements in sections 6704.5 (for Test A) and 6705.5 (for Test B). Under Test A:

> [T]he owner/guarantor, annually should do either of the following: (a) File financial statements with the U.S. Securities and Exchange Commission, the Energy Information Administration, or the Rural Electrification Administration; or (b) Report the firm's tangible net worth to Dun and Bradstreet. Dun and Bradstreet must have assigned the firm a financial strength rating of 4A or 5A.

D.C. Mun. Regs. tit. 20, § 6704.5; *see also* 40 C.F.R. § 280.95 (similar requirement for Alternative I). Under Test B:

> [I]f the financial statements are not submitted annually to the U.S. Securities and Exchange Commission, the Energy Information Administration, or the Rural Electrification Administration, the owner/operator/guarantor shall obtain a special report by an independent certified public accountant ("CPA") stating the following: (a) The CPA has compared the data that the letter from the chief financial officer specifies as having been derived from the latest year-end financial statements of the owner/guarantor, with the amounts in the financial statements; and (b) In connection with that comparison, no matters came to the attention of the CPA which caused him or her to believe that the specified data should be adjusted.

D.C. Mun. Regs. tit. 20, § 6705.5; *see also* 40 C.F.R. § 280.95 (similar requirement for Alternative II).

tended the financial alternative test (i.e., Alternative II)[138]to have stricter reporting and certification requirements than those for Alternative I, and that the financial statements submitted under this test be independently audited. *Id.* (citing 53 Fed. Reg. at 43,343).

With respect to the case at hand, the ALJ noted that there is no evidence or representation that Euclid submitted financial statements to the SEC or obtained audited financial statements of any kind. *Id*. Apparently, to show compliance with the financial test for self-insurance (i.e., Test B), Euclid submitted an "accountant's report" consisting of unaudited financial data, termed by Euclid as "compiled financial statements." *See id*. at 113.[139] The ALJ rejected Euclid's "accountant's report" because the submission was based on unaudited data. The ALJ stated as follows:

> To the extent that Euclid claims that 40 C.F.R. [§] 280.95(c)(2) and [D.C. Mun. Regs. tit. 20,] § 6705.2 do not require audited financial statements, that claim is rejected. *See* TR-10 at 26. In that regard, a [compiled] financial statement is considered the lowest level of review of a financial statement. It essentially involves the acceptance at face value of unverified information submitted by the company.

Id. at 113-14.

Finally, the ALJ was not persuaded by the evidence Euclid presented to demonstrate its "net worth," which consisted of Mr. Yuen's valuation of all his real estate. *Id*. at 114-15.

d. *Euclid's Appeal*

On appeal, Euclid does not challenge the ALJ's rejection of Euclid's claim that it had adequate insurance coverage.[140] Respondent's Appellate Brief at 58

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[138] Alternative II is the federal counterpart to Test B of the D.C. UST financial responsibility regulations. *See* discussion *supra* note 137.

[139] Notably, such report was not prepared contemporaneously, despite the requirement that financial statements be filed annually. *See* Respondent's Appellate Brief at 59 (admitting that report was not prepared contemporaneously, but arguing that "with the exception of being late, [the report] fully complies with the applicable requirements").

[140] Instead, Euclid claims that its belief that it had enough insurance mitigates against the imposition of a penalty totaling $124,876, and that, at most, Euclid should only be penalized for the month of April 2002 rather than for the entire period of alleged violations. Respondent's Appellate Brief at 58. We address Euclid's challenges to the penalty assessment in Part II.C below.

(stating that Euclid did not need insurance because it had an alternate financial responsibility mechanism in place). Rather, Euclid focuses on the ALJ's rejection of its "net worth" defense. Euclid reiterates its position that it met the D.C. and federal self-insurance tests. Although not clearly articulated, Euclid seems to argue that it only relied on "self-insurance" and not on a "guarantee" as a mechanism to show compliance with the D.C. UST financial responsibility regulations. *Id.* at 60 (arguing as follows: "The ALJ also rejected the guarantee among the trusts and Euclid for the cost of remediation of Euclid's sites and the closure of the sites, almost out of hand. This guarantee is not a 'financial guarantee' under the regulations, but a commitment to utilize the resources of the trust to pay for any required remediation of the sites."). Euclid also claims that the ALJ erred in requiring audited reports, and in not considering Mr. Yuen a valuation expert. With respect to Mr. Yuen's valuation expertise, Euclid argues that the ALJ erred in crediting Ms. Joan Meyers, Complainant's expert, as casting "considerable doubt" on the net worth figures Mr. Yuen asserted. *Id*. Finally, with respect to the other deficiencies the ALJ identified (i.e., lack of a formal agreement, failure to file a certificate of financial responsibility, and failure to create a letter of assurance and a standby trust), Euclid seems to believe that the self-insurance requirements are mere formalities, unnecessary in this particular case,[141] and that the requirements related to obtaining a guarantee are inapplicable since Euclid is not relying on a guarantee to satisfy the financial responsibility requirements.

e. *Analysis*

In our view, the main issue here is determining whether Euclid's method of financial responsibility is, as the ALJ concluded, a combination of self-insurance and guarantee. We agree with the ALJ.

Euclid's argument that because it is relying on self-insurance it need not comply with the requirements associated with obtaining a guarantee, strikes us as disingenuous. As the Region explains, "Euclid has never submitted financial information to support a self-insurance argument using solely its own assets, but instead has submitted statements purporting to show that its assets, when combined with the assets of a * * * combination of affiliates, are sufficient to support

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[141] Specifically, with respect to the letter of assurance, Euclid argues as follows:

> Respondent does not contend that such a letter was contemporaneously prepared. However, Mr. Yuen testified that all of the required representations for the CEO letter were in effect for each of the years at issue. For Mr. Yuen to write a CEO letter to himself would not have had any significant purpose. The failure of Mr. Yuen to write this letter contemporaneously does not mean that the requirements of the financial assurance regulations were not met.

Respondent's Appellate Brief at 61 (internal citation omitted).

a self insurance claim." Complainant's Cross-Appeal & Response at 148. We agree with the Region that "despite its claim to the contrary, Euclid is clearly relying on guarantees from affiliates instead of its own financial resources," and thus, Euclid's arguments "fall[] apart from the start, because it has never obtained formal guarantees of any kind." *Id.* (emphasis omitted). In order to demonstrate that it met the threshold amounts required under the financial responsibility regulations, Euclid relies on the "guarantee among the trusts and Euclid," to put it in Euclid's own words.[142] Yet, Euclid expects to be exempted from complying with the regulatory requirements of a guarantee by arguing that "[t]his guarantee is not a 'financial guarantee' under the regulations, but a commitment to utilize the resources of the trusts to pay for any required remediation of the sites." Respondent's Appellate Brief at 60; *see also id*. at 57-63 (providing no other basis for the proposition that the guarantees among the trusts and Euclid are not subject to the regulations governing financial guarantee).

RCRA defines the term guarantor as "any person, other than the owner or operator, who provides evidence of financial responsibility for an owner or operator under this subsection." RCRA § 9004(c)(5), 42 U.S.C. § 6991(c)(5). Therefore, to the extent that Euclid relies on its affiliates, the Patricia Yuen life insurance trust, the Koo Yuen life insurance trust, and the Yuen children's trust, to provide evidence of financial responsibility for the company, the affiliates and the trusts are guarantors under the statute. Accordingly, Euclid's failure to comply with the regulatory requirements for obtaining guarantees is fatal.

We, therefore, find no clear error in the ALJ's determination that Euclid's self-insurance claim lacked formal guarantees and, therefore, those alleged guarantees cannot be used to support Euclid's self-insurance claim. In addition, not only did Euclid fail to comply with the requirements for obtaining formal guarantees, but it also failed to meet important self-insurance procedural requirements. Specifically, Euclid failed to file a certificate of financial responsibility pursuant to D.C. Mun. Regs. tit. 20, §§ 6700.8, 6702.7 and failed to have its chief financial officer prepare or signed a letter of assurance pursuant to D.C. Mun. Regs. tit. 20, § 6703.3. These requirements, as the Region rightly points out, help ensure that the assets of a self-insuring entity will be promptly available in the case of a release. *See* Complainant's Cross-Appeal & Response at 142-43. We, thus, reject Euclid's arguments that these are mere unnecessary formalities. Evidently, even Euclid's alleged compliance with the self-insurance regulations is not without problem. In our view, these conclusions sufficiently support the Region's claim that Euclid failed to maintain financial mechanisms to ensure the availability of clean up funds in the event of a release of regulated substances from its D.C.

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[142] Respondent's Appellate Brief at 60 (arguing as follows: "the ALJ also rejected *the guarantee among the trusts* and Euclid for the cost of remediation of Euclid's sites and the closure of the sites, almost out of hand") (emphasis added).

USTs.[143]

C. *Challenges to Penalty Assessment*

Euclid also challenges the penalty the ALJ assessed and requests that the Board impose a lower penalty. In Euclid's view, a more appropriate penalty in this case would be $314,989, instead of the $3,085,293 the ALJ assessed.[144] Respondent's Appellate Brief at 21.

Before examining Euclid's arguments, we first lay out the principles guiding our review of an administrative law judge's penalty determination followed by a brief summary of the applicable statutory penalty criteria and penalty policy. Our analysis continues with a summary of Euclid's arguments and the ALJ's Initial Decision. Finally, because the ALJ, for the most part, adopted the Region's proposed penalty amounts, we also analyze the Region's penalty calculation.

1. *Board's Review of an ALJ's Penalty Determination*

Under the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. pt. 22 (the "CROP"), a presiding officer is responsible for assessing a penalty based on the evidence in the record and the penalty criteria set forth in the relevant statute. *See* 40 C.F.R. § 22.27(b). In particular, the CROP requires presiding officers to "explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria" set forth in the statute. *Id.* In addition, the CROP requires presiding officers to consider any civil penalty guidelines issued by EPA under the statute.[145] *Id*.

In cases where a presiding officer has provided a reasonable explanation for the penalty assessment, and the assessed amount falls within the range of penalties provided in the penalty guidelines or the presiding officer has adequately ex-

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[143] Based on these conclusions, we find it unnecessary to address Euclid's remaining challenges to the Initial Decision (i.e., to the ALJ's determination that Euclid's self-insurance claim lacked independent verification, and to the weight the ALJ afforded to Mr. Yuen's testimony regarding the value of his assets).

[144] Euclid explains its proposed $314,989 figure as follows: $10,000 per site, for a total of $230,000 for the 23 sites, plus $84,989 of avoided costs.

[145] ALJs, however, are not compelled to use penalty policies in calculating penalties. *In re CDT Landfill Corp*., 11 E.A.D. 88, 117 (EAB 2003). Instead an ALJ, "having considered any applicable civil penalty guidelines issued by the Agency, is nonetheless free not to apply them to the case at hand." *Id.* at 118 (citing *In re Capozzi*, 11 E.A.D. 10, 31 (EAB 2003)). Nevertheless, if the ALJ chooses not to apply the penalty policy, the ALJ must explain his/her reasons for departing from the penalty policy. *Id*.

plained any deviations from applicable penalty guidelines, the Board generally will not substitute its judgment for that of the presiding officer absent a showing that the presiding officer committed clear error or an abuse of discretion in assessing the penalty. *In re Mayes*, 12 E.A.D. 54, 95-96 (EAB 2005), *aff'd*, No. 3:05-CV-478 (E.D. Tenn. Jan. 4, 2008); *In re Capozzi*, 11 E.A.D. 10, 32 (EAB 2003); *In re Chem Lab Prods., Inc.*, 10 E.A.D. 711, 725 (EAB 2002); *In re Johnson Pac., Inc.*, 5 E.A.D. 696, 702 (EAB 1995).

2. *The RCRA Penalty Criteria and the Applicable Penalty Policy*

RCRA section 9006(c), 42 U.S.C. § 6991e(c), directs the Agency to apply certain factors in determining penalties for violations of RCRA Subtitle IX – the statutory framework for the national UST program. Specifically, this provision directs the Administrator to:

> [A]ssess a penalty, if any, which the Administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.

RCRA § 9006(c), 42 U.S.C. § 6991e(c). The EPA has developed guidelines for the implementation of these statutory factors. The *U.S. EPA Penalty Guidance for Violations of UST Regulations* has been developed for the calculation of civil penalties against owners/operators of USTs who, like Euclid, are in violation of the UST technical standards and financial responsibility regulations. *See* Office of Solid Waste & Emergency Response, U.S. EPA, *Penalty Guidance for Violations of UST Regulations* (Nov. 14, 1990) ("UST Penalty Policy"). The UST Penalty Policy seeks to ensure that UST civil penalties are assessed in a fair and consistent manner, and that such penalties serve to deter potential violators and assist in achieving compliance. *Id.* at 2. To deter the violator from repeating the violation, and to deter other potential violators from failing to comply, the penalty policy seeks to place the violator in a worse position economically than if the violator had complied on time. *Id.* § 1.3. The policy document achieves deterrence by removing any significant economic benefit that the violator may have gained from non-compliance (referred to as the economic benefit component of the penalty) and by assessing an additional amount, based on the specific violation and circumstances of the case, to penalize the violator for not obeying the law (referred to as the gravity-based component). *Id.*

3. *Euclid's Challenges*

As noted above, Euclid challenges the penalty assessment in this case. Its principal contention is that the ALJ erred in upholding the Region's classification

of the violations as major/major and moderate/major.[146] Respondent's Appellate Brief at 15. According to Euclid, the violations in this case do not merit such classifications because: (1) the record shows no environmental degradation or harm;[147](2) many of the alleged violations were caused by contractors and not by Euclid;[148] (3) the violations were not deliberate;[149] (4) the ALJ failed to consider Euclid's conduct or good faith efforts;[150] (5) the tank release detection counts involve a disagreement between Euclid and EPA regarding the proper method of inventory control and because Euclid had a method of inventory control, the penalty assessed for these counts should not have been that high;[151] (6) federal case law supports lower penalties;[152] (7) the economic benefit of non-compliance Euclid derived was minimal,[153] and (8) the penalties associated with the facilities located in D.C. are too high considering that Euclid was conducting inventory reconciliation with the acquiescence of D.C. DOH.[154] Euclid also argues that in many instances the ALJ imposed a penalty much higher than that requested by the Region, without record support and without providing an explanation in the Initial Decision.[155]

As we explain in more detail below, we find no clear error in the ALJ's penalty assessment. To the contrary, we find that the ALJ met CROP requirements by providing a reasonable explanation of how the assessed penalty relates

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[146] As explained in more detail below, these classifications refer to the gravity levels the UST Penalty Policy utilizes to classify violations. *See infra* Part II.C.5.a.(i).

[147] Euclid argues that its "operations over an extensive period of time show no environmental degradation [and] [t]here were no leaks, no spills, nothing of the kind." *See* Respondent's Appellate Brief at 14.

[148] *Id*. at 14-16. Euclid raises this argument with respect to the line leak detection charges, the corrosion and overfill protection charges, and the spill prevention charges.

[149] *See id*. at 20 (arguing that "in this case, Euclid did not deliberately violate any of the statutes or regulations").

[150] *Id*. at 17, 20-21. In particular, Euclid claims that it had release detection and other controls in place at all relevant times, that it had a policy of monitoring for leaks which it followed and which worked, that it had an ATG system for tank monitoring, that during and after the investigation it engaged in a complete upgrade of its tanks and line release detection systems and methodology, and that it upgraded its other practices to exceed the RCRA requirements. *See id*. at 20-21.

[151] *Id*. at 14.

[152] Euclid cites *United States v. DiPaolo*, 466 F. Supp. 2d 476 (S.D.N.Y. 2006), for the proposition that lower penalties than the ones assessed under EPA penalty guidelines are appropriate in cases where there is no release to the environment. *Id*. at 16-17.

[153] *Id*. at 17.

[154] Euclid makes this argument with respect to counts 1, 35, 54 and 57. In Euclid's view, given D.C.'s lack of enforcement, these violations do not warrant a substantial penalty. *Id.* 35-37.

[155] *Id.* at 16.

to the applicable penalty criteria. In addition, our review shows that the Region reasonably applied the applicable penalty policy in calculating the proposed penalty amounts. We are not persuaded by the arguments Euclid raises on appeal and, therefore, we uphold the ALJ's penalty assessment as reasonable and consistent with the RCRA UST statutory objectives and applicable penalty policy.[156] Our analysis follows.

4. *The ALJ's Penalty Determination*

In the Initial Decision, the ALJ explains in reasonable detail his rationale for the assessment of penalties for each of the counts in this case.[157] In particular, the penalty discussion turns on the seriousness of the violations and on Euclid's degree of negligence. The ALJ found that, for the most part, the violations were serious and that Euclid exhibited a high degree of negligence.

In considering the seriousness of each of the violations, the ALJ factored into his analysis the capacity of the tanks at each facility, the nearby population, and the hazards to health and the environment in the event of a release. The ALJ's penalty assessment was particularly influenced by two expert reports Complainant submitted into evidence, which focused on the hazards that would be presented to human health and the environment in the event of a petroleum release.[158] The reports identify the potential environmental and health hazards (i.e., contamination of soil, groundwater, and air, exposure to vapors, explosion and fire hazards, toxicological issues) peculiar to each of Euclid's facilities based on factors such as population, exposure potential, groundwater usage, and likelihood that a release would contaminate the groundwater. *See* Init. Dec. at 9-11. Both reports use a

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[156] Except for the penalty assessment for counts 47, 54 and 57, which we discuss in more detail in the context of the Region's cross-appeal. *See infra* Part III.

[157] *See* Init. Dec. at 23-24 (count 1); 25-26 (count 6); 27-28 (count 9); 29 (count 10); 31 (count 15); 32 (count 22); 33 (count 30); 35 (count 35); 37 (count 39); 39 (count 43); 41-42 (count 50); 43 (count 54); 44-45 (count 57); 46 (count 62); 47 (count 70); 50-51 (count 2); 52 (count 4); 54 (count 7); 54-55 (count 11); 55 (count 12); 56 (count 16); 57-58 (count 20); 58 (count 23); 59 (count 24); 61 (count 25); 62 (count 27); 63 (count 28); 64 (count 31); 65 (count 36); 66 (count 40); 67 (count 44); 68 (count 48); 69-70 (count 51); 70-71 (count 55); 71-72 (count 58); 72 (count 63); 73 (count 66); 74 (count 68); 75 (count 71); 78 (count 8); 79 (count 13); 80 (count 14); 82 (count 17); 84(count 18); 88 (count 32); 89 (count 41); 91 (count 45); 92 (count 52); 92-93 (count 73); 93 (count 37); 95 (count 59); 96 (count 21); 97-98 (count 26); 98-99 (count29); 99-100 (count 33); 100-01 (count42); 101 (count 46); 102 (count 49); 103 (count 53); 104 (count 60); 105 (count 74); 106 (count 34); 115-16 (counts 3, 5, 38, 56, 61, 67, 69).

Our decision does not elaborate on the ALJ's penalty assessment for each and every count, as we find it unnecessary. We have, nonetheless, reviewed the ALJ's penalty determination for each count and we find no clear error in the ALJ's rationale for imposing the penalties prescribed in the Initial Decision.

[158] *See* Init. Dec. at 8-11 (summarizing the "Hennessy" and the "Rotenberg" expert reports).

scale of "1" to "5," to represent the level of hazard, with "1" representing the least hazardous circumstances and "5" representing the most hazardous ones. Each report assigned each facility a hazard value, which the ALJ weighed in his assessment of the seriousness of the violations.

In assessing Euclid's negligence, the ALJ considered the duration of each of the violations, assessing, as appropriate, smaller and larger penalties based on the length of each violation.[159] The ALJ also factored in Euclid's conduct and history of compliance. In particular, the ALJ found Euclid's failure to comply with the same type of regulatory requirements in several of its facilities (i.e., fifteen facilities charged with tank release detection violations and twenty-three facilities charged with line leak detection violations) and its failure to comply with the different UST programs at all of its twenty-three facilities, as evidence of Euclid's high negligence. *See, e.g.*, Init. Dec. at 23 (concluding, with respect to count 1, that "[R]espondent allowed the same type of violative condition to exist at other facilities involved in this case, thus evidencing an across-the-board lack of compliance with the tank release detection regulations" warranting a high penalty). Likewise, the ALJ found Euclid's history of compliance telling, concluding that it lent support to the penalty amounts Complainant requested. The ALJ explains:

> [A]s pointed out by [C]omplainant, the fact that the government (Federal and State) was concerned with Euclid's overall UST regulation compliance should have come to no surprise to [R]espondent. EPA and the States began their inspection of the Euclid's facilities in 2001. Thereafter, EPA met with [R]espondent in April of 2002, to discuss [R]espondent's UST compliance. This meeting was followed by more EPA inspections. Yet, these activities seemed to have little effect on Euclid's efforts to comply with the UST regulations as the inspection of each facility, for the most part, continued to reveal a pattern of non-compliance.
>
> Accordingly, Euclid's overall record of non-compliance cannot be ignored in the penalty assessment of this case. It is a consideration that is taken into account by this Tribunal in the determination of each penalty. As such, it provides substantial support for the penalty amounts requested by EPA.

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[159] For instance, the ALJ assessed lower penalties than those recommended by the Region in similar counts when the duration of a violation was relatively short (e.g., counts 13, 14) and higher penalties for longer periods of violation (e.g., counts 8, 17).

Id. at 23 n.29.

These explanations by the ALJ strike us as sound and reasonable. The ALJ considered each of the statutory criteria, and we have found no clear error in his analysis.[160]

While the ALJ conducted his own penalty analysis, he, for the most part, adopted the Region's policy-based proposed penalty amounts. We, therefore, move to the next phase in our analysis, that is, determining whether the assessed amounts fall within the range of penalties contemplated in the UST penalty policy – the policy document the Region relied upon.[161]

5. *The Region's Penalty Calculation*

In accordance with the UST Penalty Policy's methodology, the Region's penalty consisted of two basic elements: (1) a gravity-based component;[162] and (2) an economic benefit component.[163] UST Penalty Policy at 5-10. *See* Complainant's Initial Post Hearing Brief at 254-401. We discuss each of these elements below.

a. *Gravity-Based Component*

In determining the gravity-based component, the Region obtained a "matrix value" for each particular violation, which it then adjusted based on "violator-specific" factors, and the applicable "environmental sensitivity" and "days of non-compliance" multipliers. *See* Complainant's Initial Post Hearing Brief at 257-58. Because Euclid's arguments are, in essence, challenges to the first two

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[160] Euclid argues that the penalty assessment did not consider Euclid's good faith efforts to comply, such as having ATGs in its facilities and a policy of monitoring tank inventory in place. *See supra* note 150 and accompanying text. We disagree with Euclid's suggestion that the ALJ erred in not adjusting the penalty downward based on its alleged good faith efforts, and elaborate on this topic in Part II.C.5.a.(ii) below.

[161] In its response to Euclid's appeal, the Region explains that it only deviated from the UST Penalty Policy to reduce the penalty below the penalties recommended in the guidance document. Complainant's Cross-Appeal & Response at 54-55.

[162] The gravity-based component consists of the following four elements: (1) matrix value; (2) violator-specific adjustments to the matrix value; (3) environmental sensitivity multiplier; and (4) days of non-compliance multiplier. UST Penalty Policy §§ 3.1-.4.

[163] The economic benefit component represents the economic advantage that a violator has gained by delaying capital and/or non depreciable costs and by avoiding operational and maintenance costs associated with compliance. UST Penalty Policy § 6.9.

elements of the gravity-based component,[164] our discussion below will only focus on the Region's determination of the matrix value and its consideration of violator-specific factors.[165]

(i) *The Matrix Value*

Matrix values, which are simply dollar amounts, represent the base penalty for a specific violation. Matrix values are based on two criteria: (1) the extent to which a violation deviates from the UST statutory or regulatory requirements ("extent of deviation"); and (2) the likelihood that the violation could or did result in harm to human health or the environment and/or has, or had, an adverse effect on the regulatory program ("actual or potential harm"). These criteria are measured in three gravity levels: major, moderate, and minor. UST Penalty Policy §§ 3.1.1-.2 (defining each of these levels for each criterion). To determine the base penalty for a violation, the Agency has developed a matrix in which the gravity level of the penalty is based on the assigned "extent of deviation" and the "actual or potential harm." *See id*. Ex. 4.

Another way of determining a base penalty amount is using Appendix A of the UST Penalty Policy for certain types of violations. Appendix A contains a number of tables the Agency developed as a guide for determining the appropriate gravity level for specific violations. These tables assign gravity levels to the "extent of deviation" and the "actual or potential harm" based on the type of violation, resulting in a set penalty amount for the violations identified in these tables.

In calculating the penalties in this case, the Region used both the tables in Appendix A and the matrix in Exhibit 4, which basically yielded major deviation/major potential and major deviation/moderate potential violations. Euclid takes issue with these classifications, claiming that the major/major and major/moderate categorizations are erroneous. However, our review of the Region's penalty calculation shows that the Region reasonably applied the UST Penalty Policy. The Region opted for using Appendix A, and when it deemed it appropriate, the Region deviated from the gravity levels prescribed in this Appendix to lower the gravity levels, at which point the Region turned to the matrix in Exhibit

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[164] As noted above, Euclid claims that the ALJ erred in classifying the violations as major/major and moderate/major and in failing to consider good faith efforts.

[165] Euclid does not seem to question the considerations that went into the Region's determination of the environmental sensitivity and days of non-compliance multipliers, and, therefore, we will not elaborate on these particular topics. We have, nonetheless, reviewed the Region's penalty calculations and are satisfied with the manner in which the Region calculated these elements. *See* Complainant's Initial Post Hearing Brief at 270-271 (discussing in general the environmental sensitivity component); *id*. 283-398 (discussing, *inter alia*, the days of non-compliance component for each violation).

4 as guidance for obtaining a base penalty amount. There is no clear error in this approach.

We now take a detailed look at the different types of violations involved in this case to determine whether the amounts the Region assessed fall within the range contemplated in the applicable penalty policy.

(a) *Base Penalty for Tank Release Detection Violations*

The UST Penalty Policy generally considers violations to the tank release detection program as major deviations from the statutory and regulatory requirements, with a major potential for harm. *See* UST Penalty Policy, App. A-Subpt. D. These gravity levels carry a base penalty of $1,650.[166] *Id*. The Region found this to be a reasonable assessment for most of the tank release detection violations identified in Euclid's locations, except for the violations associated with facilities and time periods where an ATG was present. Complainant's Initial Post Hearing Brief at 280-83. In those cases, the Region decided to reduce the "extent of deviation" criterion from major to moderate and keep the "potential for harm" as major, which carries a base penalty of $1,100.[167] *See* Complainant's Initial Post Hearing Brief at 280-315; UST Penalty Policy, Ex. 4.

We see no error in these categorizations. Euclid seems to argue that these violations should have been categorized differently to reflect lower gravity levels. Its rationale for this proposition is that it had release detection and other controls in place at all relevant times, that it had a policy of monitoring for leaks that it followed and that worked, that it had an ATG system for tank monitoring, and that these counts involve a disagreement between Euclid and the EPA regarding the proper method of inventory control. In Euclid's view, the penalty assessed for these counts should have been lower. Euclid also argues that the record shows no harm to the environment.

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[166] The $1,650 amount is the result of the base penalty of $1,500 increased by 10% to reflect inflation. *See supra* note 6.

[167] Once the Region obtained a matrix value for each of the tank release detection violations, it calculated the gravity-based component by adjusting the matrix value based on violator-specific factors, and the applicable environmental sensitivity and days of non-compliance multipliers. The Region recommended a total penalty of $1,357,709 for the sixteen tank release detection violations, which involve a total of fifty-two tanks. This number was the combination of the gravity-based and economic benefit components. The ALJ, however, assessed a total penalty of $1,235, 276 for fifteen of the sixteen tank release detection violations charged by Complainant. *See* Init. Dec. at 21-47.

In six of the sixteen tank release detection counts, the ALJ imposed lower penalties than those recommended by Complainant, based on, among other things, his liability determination and mitigating factors. *See* Init. Dec. at 23 (count 1), 37 (count 39), 40 (count 47), 43 (count 54), 44-45 (count 57), 47 (count 70). Because the Region has challenged the ALJ's liability determination for counts 47, 54 and 57, we review these penalties in Part III below.

None of these arguments convince us that the Region, and consequently the ALJ, clearly erred in categorizing these violations. Under the applicable penalty policy, the failure to provide adequate release detection methods for tank release detection is considered a major deviation with a major potential for harm. As the Region rightly pointed out in its Initial Post Hearing Brief, tank release detection is one of the most important elements of the UST regulations as its purpose is to ensure that regulated substances are not released into the environment in large quantities. Complainant's Initial Post Hearing Brief at 280. Early detection is, thus, pivotal in achieving this goal; inadequate release detection methods, like the ones Euclid employed, jeopardize the achievement of this goal.

We also note that, contrary to what Euclid suggests, the Region did factor in the fact that Euclid had ATG systems in place, even though the record does not show that they were being used for tank release monitoring. While Euclid may have had a system for monitoring its inventory, the record here shows that such method did not comply with the regulatory requirements for tank release monitoring. In addition, even if Euclid's inventory control methodology had met regulatory standards, inventory control was only allowed on a temporary basis. The regulations do not sanction the use of this method past the regulatory deadline. Under the circumstances of this case, where Euclid's inventory monitoring does not rise to the level required under the regulations, reliance on this method after the time prescribed in the regulations is simply no basis to reduce the gravity levels recommended by the penalty policy beyond the reductions the Region generously applied. In sum, Euclid did not persuade the ALJ, nor has Euclid persuaded this Board, that its methods for tank release detection warrant a further reduction in the penalty.

Finally, Euclid's argument about the lack of harm to the environment is also of no avail. It is a well-settled principle that proof of actual harm to the environment need not be proven to assess a substantial penalty. *In re V-1 Oil Co.*, 8 E.A.D. 729, 755 (EAB 2000); *In re Everwood Treatment Co.*, 6 E.A.D. 589, 602-03 (EAB 1996), *aff'd*, No. 96-1159-RV-M (S.D. Ala., Jan. 21, 1998); *accord In re Carroll Oil Co.*, 10 E.A.D. 635, 657 (EAB 2002) ("'[S]eriousness of a violation' is or can be based on *potential* rather than actual harm."). As stated in the UST Penalty Policy, when determining the "actual or potential harm" factor, "it is the potential in each situation that is important, not solely whether harm has actually occurred." UST Penalty Policy § 3.1.2. Therefore, the fact that the record shows no environmental degradation is not a basis for changing the gravity levels either.[168]

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[168] Euclid cites *United States v. DiPaolo*, 466 F. Supp. 2d 476 (S.D.N.Y. 2006), for the proposition that, absent harm to the environment, high penalties are not appropriate. Respondent's Appellate Brief at 16-17. According to Euclid, the *DiPaolo* court held that a penalty of about $9,000 was
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(b) *Base Penalty for the Line Release Detection Violations*

Generally, under the UST Penalty Policy, violations of the line leak detection requirements, such as the ones in this case, are categorized as major deviations with a major potential for harm, carrying a base penalty of $1,650. *See* UST Penalty Policy App. A-Subpt. D. The Region found this to be a reasonable assessment for most of Euclid's locations, except for facilities in which Euclid had in place elements of an interstitial line monitoring system. *See* Complainant's Initial Post Hearing Brief at 315-51. In those cases, the Region decided to reduce the "extent of deviation" criterion from major to moderate and keep the "potential for harm" as major, which carries a base penalty of $1,100.[169] *Id.*; UST Penalty Policy, Ex. 4.

Here, as with the penalty assessment for the tank release detection violations, we see no clear error in the Region's application of the UST Penalty Policy to determine the appropriate base penalty for the line leak detection violations. Line release detection is also a critical element of the UST regulations, as this excerpt from the Region's initial post hearing brief illustrates:

> Underground piping is particularly vulnerable to stress, and thus the requirement for monthly monitoring or an annual line tightness test helps ensure that smaller line failures do not lead over time to the release of large quan-

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(continued)
warranted in that case instead of the $42 million penalty sought by EPA. Euclid also claims that DiPaolo's non-compliance was in many ways more severe than Euclid's.

Euclid's reliance on this case is misplaced for two basic reasons. First, as this Board has stated on numerous occasions, it is inappropriate to compare penalties imposed in different cases. *See, e.g., In re Chem Lab Prods., Inc.*, 10 E.A.D. 711, 728 (EAB 2002) ("There is naturally substantial variability in case-specific fact patterns, making meaningful comparison between cases for penalty assessment purposes impracticable."); *In re Hunt*, 12 E.A.D. 774, 795 (EAB 2006) ("[T]he penalty inquiry is inherently fact-specific such that abstract comparison of dollar figures between cases without considering the unique factual record of cases does not allow for meaningful conclusions about the fairness or proportionality of penalty assessments."). Second, *DiPaolo* does not even speak to the issue at hand. In *DiPaolo*, the federal court ruled that EPA was entitled to the full penalty that had been assessed during the administrative proceeding. *See* 466 F. Supp. 2d at 485. The penalty Euclid refers to in its appellate brief (i.e., the $42 million that the federal court reduced) relates to a penalty EPA sought when *DiPaolo* failed to comply with EPA's compliance order. The case had nothing to do with the determination of a base penalty for the violations that were alleged in the administrative complaint.

[169] Once the Region obtained a matrix value for each of the line release detection violations, it adjusted the number to obtain the gravity-based component. It then derived the total penalty by adding the economic benefit component to the gravity-based component . The ALJ assessed a total penalty of $1,283,798 for the twenty-four violations Complainant charged – the same penalty amount the Region proposed. *See* Init. Dec. at 47-75; Complainant's Initial Post Hearing Brief at 317.

> tities of regulated substances into the environment. In addition, leak detectors (which detect rate or "catastrophic" leaks) provide a crucial function, since pressurized piping is a potential source of rapid large quantity releases. The requirement for annual tests on mechanical line leak detectors is a critical requirement that ensures that the line leak detectors are capable of performing their function. Annual testing is particularly important due to the high rates of failure which have been observed for mechanical line leak detectors.

Complainant's Initial Post Hearing Brief at 315-16 (internal citations omitted). The record in this case shows that Euclid failed to provide adequate monthly or annual methods by which to detect releases from underground pressurized piping associated with its USTs, and that it failed to conduct annual testing of line leak detectors required for the detection of catastrophic piping failure.

In assessing the penalties for the line leak detection violations, the Region reduced the gravity levels from those recommended under the penalty policy. The Region assigned a lower gravity level for those facilities in which Euclid had some elements of interstitial monitoring, despite the fact that at no facility was interstitial monitoring maintained or operated in such a manner as to actually be reliable in detecting releases. We are not persuaded that lower gravity levels than the ones the Region already assigned are appropriate in this case.[170]

(c) *Base Penalty for the Corrosion Protection Violations*

As explained earlier in this decision, the complaint charged Euclid with failure to provide adequate corrosion protection, failure to conduct adequate periodic testing and inspection of cathodic protection systems, and failure to isolate or protect metal pumps and piping fittings that were in contact with the ground. The UST Penalty Policy considers the failure to operate and maintain corrosion protection systems continuously as well as the failure to test cathodic protection systems within six months of installation to be major deviations from the statutory and regulatory program, with a major potential for harm. UST Penalty Policy, App. A-Subpt. C. In addition, the penalty policy considers the failure to test the system every three years (following an initial test of the system within the first six months of installation) as a major deviation, with a moderate potential for harm. *Id*.

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[170] Euclid argues that it relied on state-certified contractors, and, therefore, should not be penalized. We address this argument in Part II.C.5.a.(ii) below.

Corrosion protection is another crucial element of the UST regulations. In its initial post-hearing brief, the Region described the program as "the most important 'preventive' element of the UST regulatory program, [as it is designed] to minimize the risk of release occurring in the first place." Complainant's Initial Post Hearing Brief at 351. In deriving its proposed penalty for these violations, the Region followed the assessments prescribed in Appendix A of the UST Penalty Policy, explaining that these gravity levels are appropriate given the importance of cathodic protection and the risks involved in failing to test. *See id*. at 354. The Region further explained that the penalty calculations for the corrosion protection violations are complicated by the overlap of related violations, in particular the failure to provide cathodic protection and the failure to inspect and test cathodic protection systems. The Region added that because these violations are related, in that one flows from the other, it only assessed a single penalty for periods of time during which these violations overlapped. *Id.* at 353. In those instances, the Region assessed the penalty at the higher of the two applicable levels. With respect to other violations, the Region assessed lower levels based on the specific circumstances of each facility. *Id*. at 354, 355-77.

We find no clear error in the Region's application of the UST Penalty Policy. The Region only deviated from the levels prescribed in the policy document to reduce gravity levels based on the circumstances at each facility.[171] Euclid has given us no justifiable reason to deviate from the gravity levels prescribed in the penalty policy and those the Region selected or to further reduce the penalty below those reductions the Region and the ALJ made.[172]

(d) *Base Penalty for the Overfill Protection Violations*

The complaint charged Euclid with failure to properly install overfill prevention equipment. Under the UST Penalty Policy, installation of inadequate overfill prevention equipment is generally assessed as a major deviation from the regulatory requirement, with a moderate potential for harm. UST Penalty Policy, App. A-Subpt. B. The Region in this case assessed a lower level of deviation (i.e., moderate) for the overfill protection violations because Euclid's facilities had some equipment capable of preventing overfills, had it been installed properly. *See* Complainant's Initial Post Hearing Brief at 377-78; *see also id.* at 378-91. The

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[171] In addition, the ALJ assessed lower penalties than the ones the Region proposed in four of the twelve counts, based on the length of the period of violation and on other mitigating factors. *See* Init. Dec. at 79 (count 13), 80 (count 14), 89 (count 41), 92-93 (count 73). The ALJ assessed a total penalty of $307,102 for the twelve violations, while the Region proposed a $317,877 penalty. *See* Init. Dec. at 78-95; Complainant's Initial Post Hearing Brief at 354. The Region does not appeal any of these determinations.

[172] Euclid argues that it relied on state-certified contractors, and, therefore, should not be penalized. We address this argument in Part II.C.5.a.(ii) below.

Region also assessed lower levels of potential for harm (i.e., minor) in cases where an overfill valve was installed within two inches of the proper level. *Id*. at 377.

As with the other violations, the Region's approach here was to reduce the gravity levels prescribed in the UST Penalty Policy in consideration of the specific circumstances of each facility.[173] *See id.* at 378. We see no clear error in this approach, and Euclid has given us no reason to further reduce the gravity levels for these violations.[174]

(e) *Base Penalty for the Spill Prevention Violation*

The complaint charged Euclid with only one spill prevention violation, alleging that the spill prevention devices in three of Euclid's tanks would not prevent the release of product into the environment. Under the UST Penalty Policy, the failure to install spill prevention equipment, is generally assessed as a major deviation from the regulatory requirements, with a major potential for harm to the environment and the regulatory program, which carries a base penalty of $1,650. UST Penalty Policy, App. A-Subpt. B. The installation of inadequate spill prevention equipment is assessed as a major deviation from the regulatory requirements, with a moderate potential for harm to the environment and the regulatory program, which carries a base penalty of $825. *Id*.

The Region in this case used Appendix A as guidance to assess a penalty for the violation charged in this case. Because the charged violation was different from the violations contemplated in Appendix A, the Region choose different gravity levels than the ones the Appendix proposes. *See* Complainant's Initial Post Hearing Brief at 391-93. The Region assessed both gravity levels for this violation as moderate, explaining that even though the facility had ineffective spill buckets in place, they would have at least contained part of a spill. *Id*. at 392. Under the UST Penalty Policy, a moderate deviation/moderate potential violation carries a base penalty of $550.

Euclid argues that the penalty matrix was improperly utilized here because there is no proof that the gaps identified by Complainant's expert could have resulted in significant releases. Respondent's Appellate Brief at 57. This argument

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[173] The ALJ assessed a total penalty of $129,437 for the ten violations Complainant charged, while the Region proposed a $144,099 penalty. *See* Init. Dec. at 95-105; Complainant's Initial Post Hearing Brief at 378. The ALJ assigned lower penalties in three of the ten counts based, *inter alia*, on the economic benefit component. *See* Init. Dec. at 96 (count 21), 99 (count 29), 101 (count 46). The Region does not appeal any of these determinations.

[174] We address Euclid's contention about its reliance on state-certified contractors in Part II.C.5.a.(ii) below.

is without merit. Here, the Region reduced the gravity levels proposed under the UST Penalty Policy, assigning moderate/moderate gravity levels and not major, as Euclid implies. The matrix value the Region obtained falls within the range of penalties provided under the applicable penalty policy, and Euclid has given us no reason to reduce these gravity levels beyond the reductions the Region applied.[175] Moreover, having defective spill prevention devices hurt the regulatory program, irrespective of the amount, because they could allow releases that are prohibited under the statute.[176]

(f) *Base Penalty for the Financial Responsibility Violations*

Under the UST Penalty Policy, the failure to comply with the financial responsibility requirements is generally assessed as a major deviation from the regulatory requirements, with a moderate potential for harm to the environment and the regulatory program. *See generally* UST Penalty Policy App. A-Subpt. H. The Region found these gravity levels reasonable. *See* Complainant's Initial Post Hearing Brief at 391-398. The base penalty for a major deviation/moderate potential for harm violation is $825. *See* UST Penalty Policy App. A-Subpt. H.

In this case, the Region demonstrated that Euclid failed to maintain financial mechanisms to ensure the availability of clean up funds in the event of a release of regulated substances from the USTs. As the Region points out in its initial post-hearing brief, the purpose of these requirements is to ensure that there are sufficient funds to clean up releases without the expenditure of public funds. Complainant's Initial Post Hearing Brief at 393. Here, as with the other violations, we see no clear error in the Region's application of the UST Penalty Policy to determine the appropriate base penalty for the financial responsibility violations.[177] Euclid has not persuaded us that lower gravity levels are appropriate here.[178]

Because we have found no clear error in the gravity levels assigned by the Region, we now proceed with the next step of our analysis, determining whether the penalty assessment reflects certain violator-specific factors.

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[175] We address Euclid's argument about its reliance on state-certified contractors in Part II.C.5.a.(ii) below.

[176] The ALJ assessed a total penalty of $4,840 – the same penalty amount Complainant proposed. *See* Init. Dec. at 106; Complainant's Initial Post Hearing Brief at 393.

[177] The ALJ assessed a total penalty of $124,870 – the same penalty amount Complainant proposed. *See* Init. Dec. at 115-16; Complainant's Initial Post Hearing Brief at 394.

[178] We address Euclid's claim that its belief that it had enough insurance mitigates against the imposition of a $124,876 penalty in Part II.C.5.a.(ii) below.

(ii) *Violator-Specific Factors*

Once the Region obtained a matrix value for all the violations, it proceeded to adjust that value based on "violator-specific adjustments." The UST Penalty Policy allows enforcement personnel to increase or reduce the matrix value based on information known about the violator including: (1) degree of cooperation or non-cooperation; (2) degree of willfulness or negligence; (3) history of non-compliance; and (4) other unique factors. UST Penalty Policy § 3.2.

The degree of cooperation is concerned with the violator's good faith efforts in response to enforcement actions. *Id*. § 3.2.1. The penalty policy allows upward adjustments of up to 50% and downward adjustment of as much as 25% based on this factor. In this particular case, the Region used as a baseline an upward adjustment of 15%. In its response to Euclid's appeal, the Region provides a detailed description of the joint EPA and state investigations and Euclid's level of cooperation during those stages. Complainant's Cross-Appeal & Response at 57-71.[179] There, the Region explains that it took into consideration Euclid's failures to respond to information requests made by state agencies, Euclid's failure to provide meaningful information and documentation regarding its compliance activities, Euclid's failures to provide promised updates, Euclid's non-cooperation after the filing of the original complaint, and Euclid's failure to cooperate in scheduling inspections. *Id*. at 74. The Region further explains that it made refinements to the 15% increased baseline, by increasing it to as much as 25% or by reducing it based on the specifics of each count. *Id*. at 75.

Our review of the record shows that the Region's upward adjustments for lack of cooperation, which increased the based penalty by 25% in some instances, are within the range allowed under the UST penalty policy and are also well supported. The record stands in stark contrast to Euclid's suggestion that its alleged good faith efforts to comply with the regulations merit a downward adjustment. According to Euclid, it engaged in a complete upgrade of its tanks and line release detection systems and methodology during and after the investigation, and it upgraded its other practices to exceed the RCRA requirements. *See* Respondent's Appellate Brief at 20-21. These unsupported claims by Euclid do not persuade us that a downward adjustment is warranted. As the penalty policy clearly states, it is the violator's burden to demonstrate that it has gone beyond what is required by law to have the matrix value reduced:

> In order to have the matrix value reduced, the owner/operator must demonstrate cooperative behavior by going beyond what is minimally required to comply with requirements that are closely related to the initial harm

[179] *See also* Complainant's Initial Post Hearing Brief at 264-67.

> addressed. For example, an owner/operator may indicate a willingness to establish an environmental auditing program to check compliance at other UST facilities, if appropriate, or may demonstrate efforts to accelerate compliance with other UST regulations for which the phase-in deadline has not yet passed. *Because compliance with the regulation is expected from the regulated community, no downward adjustment may be made if the good faith efforts to comply primarily consist of coming into compliance*. That is, there should be no "reward" for doing now what should have been done in the first place.

UST Penalty Policy § 3.2.1 (emphasis added). Euclid's alleged efforts to upgrade its tanks and line release detection systems during and after the investigation strike us at best as efforts to come into compliance. Moreover, Euclid's assertions that it upgraded its other practices to exceed the RCRA requirements are too vague and, to Euclid's detriment, unsupported.

The second factor, degree of willfulness or negligence, takes into account the owner/operator's culpability and intentions in committing the violation. *Id*. § 3.2.2. One element the penalty policy suggests be considered in the assessment of this factor is how much control the violator had over the events constituting the violation (e.g., whether the violation could have been prevented or was beyond the owner/operator's control, as in the case of a natural disaster). *Id*. As with the first factor, the penalty policy allows upward adjustments of up to 50% and downward adjustment of as much as 25% for a violator's degree of willfulness or negligence.

In this particular case, the Region also used as a baseline an upward adjustment of 15%, which the Region further adjusted both upward (up to 50%) and downward depending on the specifics of each count and each facility. *See* Complainant's Cross-Appeal & Response at 77-78 (explaining situations where Region believed upward and downward adjustments to the 15% increased baseline were warranted). The Region explains that Euclid's negligence is evidenced by its high level of non-compliance despite being warned by EPA and the states that it could face high penalties for its widespread non-compliance. *Id*. at 76. Specifically, the Region explains how, during 2001, EPA and the states conducted numerous inspections of Euclid's facilities and communicated to Euclid the violations discovered, and discussed the regulatory requirements and the high penalties that Euclid potentially faced. *Id*. However, the Region continues, despite all of these communications, Euclid still did not bring its facilities into compliance, as evidenced by the series of inspections EPA conducted in the spring and summer of 2003 that showed "more widespread non-compliance than EPA had previously anticipated." *Id*.

On appeal, Euclid does not deny having been warned by the Region and/or the states of the potential penalties Euclid faced due to the non-compliance discovered during the earlier investigations. Euclid argues, however, that the penalties for the line leak detection charges, the corrosion and overfill protection charges, and the spill prevention charges should have been further reduced because the violations were not deliberate and many were caused by contractors, not Euclid. *See* Respondent's Appellate Brief at 14-16, 50, 56-57. With respect to its financial responsibility obligations, Euclid argues that its belief that it had enough insurance mitigates against the imposition the penalty. *Id*. at 58.

We note first that, as with the previous factor, the Region's adjustments for willfulness and negligence were within the range allowed under the UST penalty policy. The question is whether further adjustments are warranted based on Euclid's allegations. We conclude that further adjustments are not warranted.

The Region has demonstrated that Euclid knew of most of the problems at its facilities, if not before the first investigations in 2001, then at least during the period between 2001 and 2003, but Euclid did not take the required steps to achieve widespread compliance. Against this backdrop, we find Euclid's argument that the violations were not deliberate unconvincing. In addition, contrary to Euclid's suggestions, the Region did consider Euclid's reliance on its contractors to reduce matrix values, although not to the extent Euclid desired, as the Region only applied downward reductions to certain overfill counts. Specifically, the Region applied a downward adjustment of 25% to the matrix value of some of the overfill protection violations, where drop tube overfill valves were installed improperly. The Region explained that "a drop tube overfill valve is supposed to operate by itself, with no need for human intervention, and even a diligent tank owner would not have to maintain such a valve on a frequent basis." Complainant's Cross-Appeal & Response at 87. The Region also explains why the other violations do not merit reductions on the basis that Euclid had relied on certified contractors, *see id*. 85-88, and we are persuaded by the Region's rationale. The majority of the line leak detection, corrosion protection and overfill protection violations in this case resulted from poor maintenance (e.g., interstitial monitoring system, inadequate cathodic protection), or from Euclid's failure to conduct certain tests (e.g., automatic line leak detectors, line tightness testing), perform monthly monitoring and carry out inspections. As noted above, control over the violation is a key factor in determining the level of negligence of a violator. Retaining a third party to take care of these activities does not release the owner/operator of a regulated facility of its obligations and is not, without more, evidence of lack of control. Moreover, Euclid did not provide any evidence that prior to the filing of the complaint, it had a contract in place for the purpose of conducting the required testing, inspections and monitoring, or that it had a contract to ensure that its systems were in ongoing operational and working order. With respect to those violations that resulted from poor installation (e.g., failure to isolate or protect metal pumps and piping fittings which were in contact with the

ground, valves installed upside down, inadequate corrosion protection), Euclid failed to provide any evidence showing that, indeed, state-certified contractors had done the work, evidence the trier of fact would have at least considered had it been presented. As the Region states, "[A] mere claim to have used state-certified contractors falls short of establishing due care in ensuring compliance with regulatory requirements." Complainant's Cross-Appeal & Response at 88. The record here is replete with examples of Euclid's lack of due care. We, therefore, do not agree with Euclid that further adjustments are warranted on the basis that it allegedly relied on state-certified contractors.

We also disagree with Euclid's argument that its belief that it had insurance should serve to mitigate the penalty assessment for the financial responsibility charges. The record here shows that Euclid knew as early as 1994 that its general insurance policy "was not likely compliant with financial responsibility."[180] In addition, in 1997 MDE sued Euclid for failure to meet the financial assurance requirements for USTs in Euclid's Maryland facilities, at which point Euclid obtained an additional insurance policy to specifically provide UST coverage in Maryland. *See* Complainant's Exs. Y-9, Y-10. Based on this history, Euclid should have known, or at least suspected, that its insurance policy for the D.C. facilities was not sufficient.[181] We have reviewed the violator-specific adjustments the Region made to the matrix value of the financial responsibility violations, *see* Complainant's Initial Post Hearing Brief at 393-94, and are satisfied that the adjustments are well-supported and fall within the range allowed under the UST Penalty Policy.[182] We, therefore, do not think that downward adjustments are merited.

b. *Economic Benefit Component*

As noted above, the Region's penalty consisted of a gravity-based and an economic benefit component. Since Euclid does not question the calculation of the economic benefit component, we will not elaborate on this matter.[183] Euclid, however, argues that the economic benefit of non-compliance in this case was

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[180] *See* TR-11 at 127, 145-46 (Jan. 28, 2004) (testimony of Mr. Eric Dana, Euclid's pollution insurance broker).

[181] The financial responsibility charges relate only to facilities located in D.C.

[182] We have also reviewed the remaining two violator-specific factors (i.e., history of non-compliance and other unique factors) and are convinced that the adjustments the Region made fall within those allowed under the penalty policy. *See* Complainant's Initial Post Hearing Brief at 269-77. Because Euclid did not raise any other arguments that could be construed as challenges to these two factors, we do not find necessary to elaborate any further on this matter.

[183] We, however, have reviewed the Region's analysis and find its economic benefit analysis reasonable. *See* Complainant's Initial Post Hearing Brief at 277-80.

"minimal for all violations," somehow suggesting that this warrants lower penalties. *See* Respondent's Appellate Brief at 17. Euclid does not cite any authority, nor does it offer any analysis in support of this proposition.

It is unclear whether Euclid is trying to argue that the gravity-based component in this case should be reduced in proportion to the economic benefit component or whether no economic benefit should be assessed in this case. In any event, we reject both attempts as they find no support in the applicable penalty policy or in Board case law.

Both propositions ignore that the economic benefit and the gravity-based components of a penalty serve different purposes. The former represents the "economic advantage that a violator has gained by delaying capital and/or non-depreciable cost and by avoiding operational and maintenance costs associated with compliance." UST Penalty Policy § 2.1. The latter takes into account the specific violation and circumstances of the case, and one of its purposes is to deter potential violators by ensuring that "violators are economically disadvantaged relative to owners/operators of those facilities in compliance, *and* to penalize current and/or past noncompliance." *Id*. at 9 (chapter 3) (emphasis added). Nothing in the applicable penalty policy suggests that one depends upon the other or that the final penalty should be adjusted to reflect proportionality among these two components, let alone that the economic benefit should be used to adjust the gravity-based component downward. *Compare* UST Penalty Policy §§ 2.1-.3 *with id*. §§ 3.1-.4. If anything, the economic benefit component of a penalty calculation is used to adjust the penalty upward, not downward. *See In re Newell Recycling, Co. Inc*., 8 E.A.D. 598, 635-36 (EAB 1999) (agreeing with administrative law judge's conclusion that "the economic benefit component of the penalty calculation is employed to ensure that a penalty assessment will provide adequate deterrence, and is therefore used only to adjust a penalty upward, not downward.").

Moreover, the applicable penalty policy is clear that deterrence is achieved by removing the economic benefit that the violator may have gained and by assessing an amount reflective of the gravity of the respondent's violation. *See* UST Penalty Policy § 1.3 (stating that deterrence is achieved by "removing any significant economic benefit that the violator may have gained from noncompliance *and* [by] charging an additional amount, based on the specific violation and circumstances of the case, to penalize the violator for not obeying the law") (emphasis added). While in this case the economic benefit the Region calculated may have been smaller than the gravity-based component, the amount calculated ($103,656) is far from insignificant. *See, e.g*., UST Penalty Policy § 2.1 ("All penalties assessed must include the full economic benefit unless the benefit is determined to be 'incidental' (i.e., less than $100)."). Notably, the Board has, in the context of another environmental statute, rejected the proposition that no economic benefit should be assessed when the gravity-based component exceeds the economic benefit. In rejecting the proposition that the economic benefit need not be included in

the final penalty when the gravity-based component exceeds the former, the Board noted in *In re Phoenix Construction Services, Inc*., that "where a complainant successfully proves both an economic benefit to the respondent and that the gravity of the respondent's violation warrants a penalty, the presiding officer may, and, in most circumstances, should, add these two penalty amounts together with any other penalty factor components to derive the final penalty amount." 11 E.A.D. 379, 422-23 (EAB 2004).

c. *Other Challenges to Penalty Assessment*

Euclid raises three other challenges to the penalty assessment. First, Euclid claims that the penalties associated with the facilities located in D.C. are too high because Euclid was conducting inventory reconciliation with the acquiescence of D.C. DOH. *See* Respondent's Appellate Brief at 32, 34-37. Euclid claims that it is D.C. DOH's practice "to permit or at least tolerate inventory control to be used for tanks which are less than 10 years old," and that it is entitled to rely on the interpretation and practice of D.C. in this regard and not be penalized. *Id.* at 32. However, as noted earlier in this decision, *see supra* Part II.B.2.g.(i), Euclid did not provide any evidence to support this argument. Therefore, under the circumstances of this case, there is no basis for a penalty reduction.

Euclid also argues that "if penalties like the one imposed in this case are the norm, then the service station business will be transformed into an enforcement lottery, with those selected for enforcement being driven out of business." *Id*. at 19. It is unclear to us what Euclid means by "enforcement lottery." If Euclid's intention is to argue that this penalty might take Euclid out of business, Euclid has not raised any ability to pay defense. As we have held in the past, in RCRA penalty cases, ability to pay may be raised, but only as an affirmative defense upon which respondents bear the burden of proof. *In re Carroll Oil Co.*, 10 E.A.D. 635, 663 (EAB 2002). Euclid has provided no evidence of inability to pay.[184]

Euclid's last argument against the penalties assessed in this case is that the ALJ allegedly imposed, in some instances, a penalty much higher than the Region requested, without record support and without providing an explanation in the Initial Decision. Respondent's Appellate Brief at 16. This argument is mistaken. Euclid's confusion may stem from the fact that the ALJ followed the proposed penal-

[184] Likewise, if what Euclid is trying to argue is that this is a case of selective enforcement, such a claim is unsupported. To substantiate a claim of selective enforcement or selective prosecution, Euclid must establish: (1) that it was singled out while other similarly situated violators were left untouched, and (2) that the government selected Euclid for prosecution invidiously or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights. *In re Newell Recycling Co., Inc*., 8 E.A.D. 598, 635 (EAB 1999), *aff'd*, 231 F.3d 204 (5th Cir. 2000); *In re B&R Oil Co.*, 8 E.A.D. 39, 51 (EAB 1998). Euclid has not established any of these elements.

ties in Complainant's Initial Post Hearing Brief, which had been modified from the Amended Complaint to reflect the findings adduced at the Hearing. *Compare* Complainant's Initial Post Hearing Brief at 254-398 *with* Init. Dec. at 23-116; *see* Complainant's Cross-Appeal & Response at 105-07. Our review of these two documents and the record shows that the ALJ only deviated from the Region's proposed penalty in circumstances where he thought it appropriate to assess lower penalties.[185]

III. *COMPLAINANT'S CROSS-APPEAL*

As noted in the introductory section of this decision, the Region filed a cross-appeal challenging the ALJ's decision finding Euclid not liable for the violation alleged in count 47, and for the full period of violation alleged in counts 54 and 57. These counts charge Euclid with violations to the tank release detection program. Therefore, the cross-appeal focuses only on tank release detection violations, particularly on Euclid's use of inventory control to satisfy its regulatory obligations.

The ALJ concluded that, for these counts, the Region failed to prove its prima facie case with respect to its claim that Euclid's inventory control was inadequate, and, therefore, inconsistent with the tank release detection regulations. The Region takes issue with these determinations, particularly because the ALJ found that Euclid's inventory control, as performed in all its facilities, was flawed. The Region frames the issue on appeal as follows: whether the ALJ, having found that Respondent's system of inventory control, as performed at all of its facilities, did not meet the regulatory requirements for tank release detection, erred in finding that Complainant did not specifically prove Respondent's failure to properly perform inventory control at the Barlow Road, Wisconsin Avenue and Florida Avenue Facilities, as alleged in counts 47, 54 and 57. Complainant's Cross-Appeal & Response at 4.

Having reviewed the record, we agree with the Region that the ALJ erred in ruling that the Region failed to establish a prima facie case of violation for the entire period of alleged violation for these three counts. Our analysis follows, first with a summary of the charges, followed by the ALJ's decision, the Region's appeal, and our findings.

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[185] Particularly, the ALJ assessed lower penalties for the violations alleged in counts 13, 14, 21, 29, 39, 41, 46, 47, 54, 57, 70 and 73.

A. *Overview of Counts and ALJ's Decision*

Count 47 charges Euclid with violations of the Maryland UST regulations at its Barlow Road facility located in Palmer Park, Maryland. *See* Amend. Compl. at 87-90. Specifically, the complaint alleges failure to provide adequate monthly methods by which to detect releases from the USTs at this facility. *See id.* ¶ 374, at 88. The period of alleged violation is September 30, 1997, through February 17, 1999, and March 19, 1999, through April 4, 2003. *Id*.

As with the majority of the other tank release detection counts, Euclid claimed to have used inventory control and ATG to monitor the two USTs located in this facility.[186] Based on the totality of the circumstances and on Euclid's own admissions, the ALJ concluded that Euclid could not rely on its ATG system monitoring defense. Init. Dec. at 39 (concluding that because Euclid stipulated that it had no documentation of passing in-tank testing results from the ATG system associated with the tanks in the Barlow facility prior to August 2003, and the lack of documentation covers the entire period of alleged violation, Euclid's reliance upon its ATG system monitoring defense had to fail). The ALJ, however, reached a different conclusion with respect to Euclid's inventory monitoring defense. Unpersuaded by the Region's approach in presenting its case, the ALJ concluded that the Region did not prove that Euclid's inventory control as performed in this facility failed to conform to the regulations, stating as follows:

> Despite [having the burden to demonstrate that a violation occurred as set forth in the complaint], all that EPA could argue in its brief was that "[a]ny inventory control being conducted by Euclid was subject to all the shortcomings discussed in Section V.A.2.b(ii), above."
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> * * *
>
> This offering by EPA simply is not enough to establish the charged violation. In order to establish a prima facie case of violation, complainant must at a minimum articulate more of a legal basis for its position and further, explain how the facts of the case support its legal position. Merely referencing an earlier passage in its brief, without a discussion as to the quality of the evidence is just not enough to carry the traditional burdens of proof and persuasion.

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[186] According to the ALJ, the Region conceded that this is one of the few facilities involved in this case that can rely on inventory control for the entire period of violation. Init. Dec. at 39 n.34. The Region does not dispute this statement.

Init. Dec. at 40 (citing Complainant's Initial Post Hearing Brief at 77).

The ALJ reached a similar conclusion with respect to counts 54 and 57. Specifically, count 54 charges Euclid with violations of the federal and D.C. UST tank release detection regulations at the Wisconsin Avenue facility. *See* Amend. Compl. at 97-100. The period of alleged violation for this count is September 30, 1997, through April 15, 2003. *Id*. ¶ 426 at 100. The complaint charges that prior to May 4, 1998, Euclid violated the federal UST regulations and that after that day, Euclid violated their D.C. counterpart.[187] *Id*. Likewise, count 57 involves violations of the federal and D.C. UST tank release detection regulations at Euclid's Florida Avenue facility. *See id.* at 12-105. The periods of alleged violation for this count are September 30, 1997, through December 28, 1998, and January 28, 2000, through April 21, 2003. *Id*. ¶ 446, at 104. As with count 54, the complaint charges Euclid with violations of the federal UST regulations prior to May 4, 1998, and thereafter with violations of their D.C. counterpart. *Id.*

Euclid claimed to have used inventory control and ATG as methods of tank release detection for three of the four tanks involved in count 54, and for the three tanks involved in count 57. Euclid also claimed to have used manual tank gauging for the remaining tank in count 54. Based on the totality of the circumstances and Euclid's own admissions about not having documentation of passing in-tank testing results for the tanks in these facilities, the ALJ concluded that Euclid could not rely on its ATG system monitoring defense. Init. Dec. at 43-44 (counts 54 and 57). The ALJ reached the same conclusion with respect to Euclid's claim about the use of manual tank gauging in count 54, as Euclid stipulated that it had no documentation of manual tank gauging results, and one of the inspectors testified that tank release detection had not been consistently performed on this tank. *Id.* at 43. With respect to Euclid's inventory control defense, the ALJ reached a two-part decision. As with the other defenses, the ALJ ruled that Euclid could not rely on the use of inventory control as a defense for these facilities after the May 1998 deadline because the D.C. regulations only allowed the use of inventory control until December 22, 1995. However, with respect to the use of inventory control before May 1998, the ALJ concluded that the Region failed to meet its burden of proving violations of the federal UST regulations, stating as follows:

> In arguing that a violation of the Federal regulations did in fact occur, EPA cites to the testimony of DCDOH employee Kofi Berko and to Complainant's Exhibit R-7 at 0871 for the proposition that the USTs were installed in 1983. EPA then concludes that "under the federal UST regulations, tanks installed in 1983 would not be eligible

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[187] As we have previously noted, *see supra* note 68, the D.C. UST regulations began operating in lieu of the Federal UST regulations on May 4, 1998.

> for * * * use of inventory control as a monthly tank release detection method subsequent to December 22, 1998." While that may indeed be the case, the problem for EPA here is that it alleges a violation of the federal UST regulations for a time period (i.e., prior to May 4, 1998) that predates December 22, 1998. This argument, therefore, is of no help to complainant. Also, EPA's refrain that "any inventory control being conducted by Euclid was subject to all the shortcomings discussed in section V.A.2.b(ii), above" alone does not satisfy the Agency's burden of proof on this issue.

Init. Dec. at 42-43 (internal citations omitted) (count 54); *see also id*. at 44 (similar conclusion for count 57).

B. *The Region's Appeal*

The Region argues that these rulings appear to turn not on the actual quality of the evidence but instead on the propriety of citing an earlier discussion of the evidence at a later point in Complainant's Initial Post Hearing Brief. Complainant's Cross-Appeal & Response at 10. The Region explains that, in addressing the deficiencies in Euclid's method of inventory control for the three facilities in question, the Region referred the ALJ to an earlier section of its brief – section V.A.2.b(ii) – which discussed the general flaws in Euclid's approach to inventory control. *Id*. The Region attributes the ALJ's partial denial of liability to a perceived flaw in the structure of Complainant's Initial Post Hearing Brief, which divided its discussion of the tank release detection violations into two main sections, the first being a general discussion of the evidence common to all Euclid's facilities, and the second a facility-by-facility discussion, which addressed the facility-specific evidence for facility-specific deficiencies. *See* Complainant's Initial Post Hearing Brief at 37-64 (general discussion); *id*. at 64-86 (facility-by-facility discussion). The Region concedes that, unlike the facility-specific discussion for the other tank release detection counts, the discussion for the three facilities at issue here was rather brief. Complainant's Cross-Appeal & Response at 11. The reason for this, the Region explains, is that these facilities were not subject to the facility-specific inventory control problems which, to varying degrees, applied to many other Euclid facilities. *Id*. However, the Region continues, these facilities were subject to the generally-applicable deficiencies in the method Euclid used to reconcile inventory in all its facilities. The Region adds that its discussion of the Florida Avenue facility (count 57) included a facility-specific deficiency; that is, the diesel tank at this facility was neither manifolded to, nor blended with, any

other tank at the facility.[188] *Id.* at 13. Similarly, the Region notes that its general discussion in section V.A.2.b(ii) utilized documentation from the Barlow facility (count 47), which the Region used to illustrate the general deficiencies in the method of inventory control Euclid employed. *Id*. at 36; *see* Complainant's Initial Post Hearing Brief at 55-58.

C. *Did the Region Establish a Prima Facie Case?*

We agree with the ALJ that, to establish a prima facie case of violation, a complainant must articulate a legal basis for its position and explain how the facts of the case support its legal position. Under the circumstances of this case, however, we disagree with the part of his ruling that suggests that specifically referencing an earlier passage is, in itself, not enough to carry the burdens of proof and persuasion. Theoretically, at least, there is no *per se* problem with the approach the Region adopted in this case of incorporating by reference an earlier discussion of general deficiencies in its facility-by-facility discussion. Notably, this case involves numerous facilities, various jurisdictions and a voluminous record, thus lending itself to a cross-referencing approach. More importantly, however, we find the Region's approach adequate in this case because the referenced section thoroughly discusses the evidence proving that the alleged violations did occur as alleged in all of Euclid's facilities. While it may have been clearer and easier to the ALJ to follow if the Region had avoided cross-referencing, cross-referencing by itself is not *per se* impermissible.

In our view, the general discussion in section V.A.2.b(ii) sufficiently supports the Region's case with respect to the use of inventory control in all the facilities charged with tank release detection violations and, therefore, in the facilities involved in this cross-appeal. Section V.A.2.b(ii) identifies the main problems with Euclid's inventory control reconciliation. *See* Complainant's Initial Post Hearing Brief at 49-62. There is no question that section V.A.2.b(ii) and the record show that Euclid used the same inventory control method in all its facilities,[189] and that such method was flawed. Similarly, there is no question that the

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[188] As discussed above, the ALJ found that combining inventory amounts from multiple tanks is an exception to the regulatory requirement that inventory control be performed on a tank-by-tank basis, but is only appropriate when the tanks are manifolded together or connected to blending dispensers and share a common inventory of fuel. *See* Init. Dec. at 19 n.23.

Indeed, as the Region points out, its Initial Post Hearing Brief notes this facility-specific deficiency, and the Region's argument that the failure to reconcile these tanks separately violated the requirement that a separate reconciliation be performed for all non-blended and non-manifolded tanks. Complainant's Initial Post Hearing Brief at 82-83.

[189] *See* Parties' First Set of Stipulations ¶ 6 (stipulating that the Declaration of Leon Buckner, Euclid's General Manager – a document submitted into evidence by the Region – accurately describes the method of inventory control as performed by Euclid in all its facilities).

general flaws the Region identified in section V.A.2.b(ii) apply to all the facilities involved in the tank release detection charges, which include the Barlow Road, the Florida Avenue and the Wisconsin Avenue facilities.[190] In particular, the general discussion in section V.A.2.b(ii) explains that Euclid conducted inventory control on a facility-wide basis, as opposed to tank-by-tank,[191] and that Euclid failed to follow regulatory requirements such as recording inventory measurements each operating day to verify that the regulatory standards have not been exceeded in accordance with 40 C.F.R § 280.43(a)(1).[192] *See id.* at 51-62.

Indeed, the ALJ agreed with the Region that the regulations require tank-by-tank monitoring and that the regulations require that inventory measurements be recorded each day of operation, and found that Euclid's facility-wide approach and methodology were inconsistent with the regulations. Init. Dec. at 18-19. After these observations the ALJ specifically held: "Accordingly, for the foregoing reasons, it is held that the manner in which Euclid conducted inventory control *at its facilities* is not in compliance with the inventory control methodology prescribed in the regulations." *Id*. at 20 (emphasis added).

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[190] This is particularly true for the Barlow Road facility since the Region used this facility's "Monthly Summary Sheets" – the document Euclid utilized for its monthly inventory reconciliation, *see* Complainant's Ex. Y-8 ¶¶ 6-7 – to demonstrate the deficiencies in the method of inventory control Euclid employed in all its facilities. *See* Complainant's Initial Post Hearing Brief at 55-58; *see also id.* at 36 (explaining that Euclid claimed to have conducted inventory control in all fifteen facilities at issue in the tank release detection counts); *id*. at 49-62 (discussing Euclid's method of inventory control, used in all Euclid's facilities, and how method fails to meet regulatory standards).

[191] Specifically, Euclid stipulated that the only methods of tank release detection it conducted at the Barlow Road, Wisconsin Avenue and the Florida Avenue facilities were inventory control and ATG. Parties' First Set of Stipulations ¶¶ 108,124, 132. The Declaration of Leon Buckner, which describes the methodology Euclid employed in conducting inventory control, reveals that Euclid had been conducting inventory control on a facility-wide basis, as opposed to a tank-by-tank-basis. Complainant's Ex. Y-8 ¶¶ 5, 6. While Mr. Buckner did not sign the declaration, Euclid stipulated that the method described in Buckner's declaration accurately describes the method used in all its facilities. Parties' First Set of Stipulations at ¶ 6.

[192] Specifically, section 280.43(a)(1) requires that: "[I]nventory volume measurements for regulated substance inputs, withdrawals, and the amount still remaining in the tank [be] recorded each operating day." 40 C.F.R § 280.43(a)(1). In section V.A.2.b(ii), the Region explains how Euclid's method of reconciliation fails to comply with daily monitoring requirements by not combining daily totals and by using a "*running book*" amount instead of resetting "book" totals each month based upon the previous month's actual measured on-hand inventory. *See* Complainant's Initial Post Hearing Brief at 51-53. That section also explained that not combining daily totals and not resetting "book" totals add to an already unreliable methodology making it difficult to spot trends and discover relatively small leaks. *Id.* at 52-54. To put it into perspective, that section makes reference to the 0.2 gallon per hour standard for monthly release detection for ATG, *see* 40 C.F.R. § 280.43(a)(1), explaining that a leak at the 0.2 gallon per hour standard would generate a loss of only 4.8 gallons in one day. *Id*. at 52 n.11. That section demonstrates that the method Euclid employed may easily mask small leaks of this magnitude.

We note, however, that despite this conclusion, in his count-by-count analysis, the ALJ focused on the facility-specific evidence the Region had presented rather than on the facility-wide discussion in section V.A.2.b(ii).[193] Whether the fact that the Region did not provide similar facility-specific evidence for the three facilities involved in this cross-appeal played a role in the ALJ's ruling against the Region is unclear since the ALJ was silent as to whether additional evidence would have tipped the scale in the Region's favor. We, however, do not think that any such evidence was necessary. In our view, the facility-specific evidence served to bolster the Region's case, not to make its case against Euclid's use of inventory control.

In sum, we believe that the discussion in section V.A.2.b(ii) is sufficient to prove that Euclid's method of inventory control was inadequate in the three facilities at issue here, throughout the entire period of alleged violation. There is no question that the methodology described in Mr. Buckner's declaration is the method Euclid had been using since at least 1997. Indeed, Euclid confirms as much in its appeal where it states that "since prior to September, 1997, Mr. Buckner receives daily inventory sheets from the various facilities, which he reviews for loss of inventory on a daily basis."[194] Respondent's Appellate Brief at 22. Moreover, Euclid does not claim that it performed tank-by-tank inventory control in any of its facilities, neither does it claim that the tanks at these particular facilities were manifolded together or connected to blending dispensers and shared a common inventory of fuel.[195]

Because the record shows that Euclid's approach to inventory control as employed at all its facilities during the entire period of alleged violation was flawed, we vacate the ALJ's ruling with respect to count 47 and the part of the ruling with respect to counts 54 and 57 in which the ALJ declines to find Euclid liable for violations of the federal UST regulations. Instead, we rule in the Region's favor on these counts.

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[193] For instance, the ALJ noted that Euclid combined products (e.g., gasoline and diesel in counts 6, 22, 30) and grades (e.g., different grades of gasoline in counts 1, 15, 35) in its inventory, and that there was no indication that in some of these facilities Euclid utilized blending dispensers or that the tanks were manifolded.

[194] The record also shows that this had been the methodology throughout the entire period of alleged violation. Specifically, at the hearing, Mr. Buckner testified that he began working for Euclid of Virginia in 1993, *see* TR-10 at 68 (Jan. 27, 2004), and that prior to that, since 1981, he worked for Mr. Yuen at his various service station operations. *Id.* at 68. According Mr. Buckner's testimony, the responsibility of conducting inventory control for all Euclid facilities has always been his and Mr. Yuen's. *Id.* at 85-86.

[195] Once the Region met its burden of showing that Euclid's inventory control was inadequate, the burden of showing that an exemption applied shifted to Euclid, because the burden of proving an affirmative defense, e.g., that tanks were connected together or manifolded, falls on the party seeking to invoke the exception. *See In re Adams*, 13 E.A.D. 310, 321 (EAB 2007).

D. *Penalties*

The Region requests that we increase the total penalty by $79,262 to reflect the violation set forth in count 47 ($50,339) and the full period of violation in count 54 (a $16,899 increase) and 57 (a $12,024 increase). *See* Complainant's Cross-Appeal & Response at 41-43. We have reviewed the Region's penalty calculation for these three counts, *see* Complainant's Initial Post Hearing Brief at 304-05, 307-09, 309-11, and found, as with the other counts, that the Region reasonably applied the UST Penalty Policy and that the penalty assessment falls within the range specified therein. We therefore grant the Region's request to increase the penalty in the proposed amounts and assess a total penalty of $3,164,555 (i.e., $3,085,293 + $79,262).[196]

IV. *CONCLUSION*

For the foregoing reasons, we affirm the ALJ's findings of liability, with the exception of his liability rulings with respect to count 47, and a portion of his ruling with respect to counts 54 and 57. With respect to these counts, we find that the Region met its burden of showing that the violations had occurred as alleged, and therefore assess a total penalty in this case of $3,164,555. Accordingly, Respondent shall pay the full amount of the civil penalty assessed within thirty (30) days of receipt of this final order. Payment should be made by forwarding a cashier's or certified check payable to the Treasurer, United States of America, at the following address:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

A transmittal letter identifying the case name and the EPA docket number must accompany the check. 40 C.F.R. § 22.31(c).

So ordered.

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[196] Section 22.30 of 40 C.F.R. authorizes the Board to assess penalties that are higher or lower than the amount assessed by the ALJ. *See* 40 C.F.R. § 22.30(f).