

1 MR. SHIPLEY: Thank you, sir.

2 Q (By Mr. Shipley:) Mr. Cernero, if you would, turn to
3 Respondent's Exhibit 66 in your book, please.

4 This is entitled, "Registration for Underground
5 Storage Tanks." It is an Oklahoma Corporation Commission
6 document that was produced to us by the Environmental
7 Protection Agency. We have not yet gained their
8 stipulation for its admission.

9 And I want to ask you, sir, if this is one of the
10 documents that you earlier testified to that you had seen
11 when you obtained the registration for Underground Storage
12 Tanks from the OCC, or RAM, prior to your field
13 inspection.

14 MS. BEAVER: Your Honor, the Complainant needs
15 to -- we need to ask for clarity on this exhibit.

16 Respondent's counsel just said that we submitted
17 this document to them. And so it's -- it's not clear
18 to us that this is a document that we submitted to
19 Respondent. And so we need clarification on the
20 origination of this document and who sent it to whom
21 and who provided it to whom.

22 MR. SHIPLEY: Just a moment, Your Honor.

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

25 Q (By Mr. Shipley:) Laying aside whether or not this

1 came from the EPA, let me ask if you can identify this
2 document, Mr. Cernero, as one of those which you obtained
3 from the Oklahoma Corporation Commission before your visit
4 to RAM in February of '05?

5 A I'm not really sure. I'm trying -- I'm looking at
6 what I have here, and it looks very similar.

7 Q Okay.

8 A And yet it just shows just tanks 5 and 6; that's all
9 I see right here. I don't know see the other -- I don't
10 see why there's the other facts, also.

11 I mean I'm trying to compare the two here. This
12 first page compares. There's some writing on here, it
13 says, "Certified Mail, 11-25-98," that's not, it's not
14 mine for some reason. So, that one, page one looks like
15 it's the same page.

16 MR. SHIPLEY: I'm sorry, what are you comparing
17 them to, sir?

18 A I'm comparing the registration form for the Citgo
19 Quik Mart, 1400 East Carl Albert, and they look closely to
20 be the same.

21 But there's different markings on them that I -- this
22 one does not have any -- the one I have does not have this
23 thing that says, "11-25-98, Certified Mail" at the top.

24 Mine has a stamp date and date received, date entered
25 into computer. This one does not have that. Just

1 similarities between what I have, my inspection, attached
2 to my inspection report, and what's here.

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

5 THE COURT: Back on the record. You may
6 proceed.

7 Q (By Mr. Shipley:) You began to tell us that you have
8 a document that seemed to match up. And I'm going to
9 assume that you're referring to the Complainant's
10 Exhibit 1 as to what you're comparing to Respondent's
11 Exhibit 66?

12 A I do have some documentation that does compare to
13 what you have here for tanks 5 and 6, okay?

14 Q Yes, sir.

15 A So I mean I don't know what your -- what your
16 question is.

17 Q Perhaps we can ask you to tell us which of the
18 documents in Complainant's Exhibit 1 you find that is
19 similar to Respondent's Exhibit 66? And I'll note for
20 your help that there are Bates stamp numbers in
21 Government's 1 that's to the bottom right. What are those
22 numbers that you are finding comparable?

23 A The first page of this, for Citgo Quik Mart.

24 Q Yes, sir.

25 A Essentially, it's -- it's the same; however, the one

1 that I have is one that's been stamped, it looks like by
2 OCC; they received it November 30th of '98. And the date
3 entered into the computer was 12-8-98. That's what I have
4 on mine.

5 Q Give us the Bates number on the bottom right of the
6 page that you are looking at, please.

7 A I don't have the -- I don't have the EPA --

8 Q Oh.

9 A I'm just looking at my inspection report. I don't
10 have -- I'm sorry.

11 MS. BEAVER: As a point of clarification, Your
12 Honor, if I may, what -- there are several exhibits;
13 there is Complainant's Exhibit 15, and there's
14 Complainant's Exhibit 1.

15 And so Complainant's Exhibit 15 appears to be a
16 document similar to this exhibit that -- this
17 Respondent's Exhibit 66. And it's unclear what
18 exhibit and which pages in the Complainant's
19 Exhibit 1 are actually comparable to this
20 Respondent's Exhibit 66.

21 THE WITNESS: I'm totally confused. I'm sorry.

22 MR. SHIPLEY: Your Honor --

23 MS. BEAVER: And I don't think that the witness
24 has Complainant's Exhibit 15. Do you?

25 THE WITNESS: I got -- yeah, I got 15 in front

1 of me right now.

2 MR. SHIPLEY: Let's just go off the record for a
3 minute.

4 THE COURT: Off the record.

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

7 THE COURT: Back on the record.

8 MR. SHIPLEY: Thank you. Back on the record.
9 We'll withdraw that question.

10 Q (By Mr. Shipley:) At what point, Mr. Cernero, in
11 your development of the Complaint against RAM did you
12 decide to use administrative order as opposed to field
13 citation?

14 A At the point I realized that there was a considerable
15 amount of violations. The fact that we have already
16 issued a field citation at one of the facilities.

17 Essentially, when I got back to the office, this
18 essentially -- the decision was made when we got back --
19 when I got back from the office, and after reviewing all
20 the inspection reports, the documentation, and determined
21 that this was not something we would want to do a field
22 citation for.

23 Again, normally, the field citation approach is the
24 one we take. And you'll see that in most states, the
25 field citation program -- or field citations are the

1 normal process that we go through. You probably see
2 95 percent of our enforcement actions are in field
3 citation format; however, this was a situation where we
4 decided not to use the field citation because of the fact
5 that we had considerable violations.

6 Not having the spill bucket, the cathodic system
7 protection system is completely knocked out, for basically
8 all the counts.

9 This is not a small mom-and-pop company. It is a
10 very -- in my opinion, a -- probably a mid-sized company.
11 It is a sophisticated company, it's not a company where
12 the owner is the one that pumps the gas, sells the
13 groceries, and sweeps the floor, type thing.

14 This is a company that has the wherewithal to
15 maintain proper compliance and that type of thing. It
16 just did not fit the mold for the field citation.

17 And the fact is that we did issue a field citation at
18 one -- one of the facilities. Going through that process,
19 it was determined that this was more of in the realm of an
20 administrative order than writing up field citations
21 and -- that's it. It did not fit the mold of a field
22 citation.

23 Q And as I understand your testimony, is that the
24 decision to use the administrative order route was not
25 made until you completed your field inspection, returned

1 to Dallas --

2 A Right.

3 Q -- and reviewed a number of documents, correct?

4 A Well, looking at the violations I found, that's --
5 that's how I came to the conclusion that this was not
6 something we would want to do a field citation for.

7 And let me give you an example. If we came out there
8 and there were some minor violations, even recordkeeping,
9 and we went to the same -- each facility, and it was very
10 minor -- you know, minor things, we'd have probably said
11 this does not merit proceeding with an administrative
12 order from the standpoint an administrative order takes a
13 lot of time, a lot of effort, a lot of expense. It did
14 not merit a field citation.

15 We have had facilities in which there were
16 multiple -- multiple company -- or multiple -- multiple
17 sites that was owned by an owner that had multiple
18 facilities, and the normal stance would be that it was
19 probably going to end up in an order; however, after
20 looking at the particular violations at each of the
21 facilities, they were very similar, seemed to be the same
22 type of violation, and we determined that a field citation
23 approach would be better.

24 So it's not -- there's not always a clear-cut
25 determination. You have to look at the particular

1 facility, the violations. Also the gravity of the
2 violations, the length of the violations that it had
3 continued on; those type of things would have to go into
4 doing an order.

5 Because believe me, an order, it takes a lot of time.
6 If I can get -- if it can get compliance and if I could
7 get -- if I could use a field citation, that's the
8 preferred method.

9 Because the field citation program was developed in
10 our region, actually, because we had so many facilities to
11 look at, so many -- a large university -- universe of
12 regulated community, that we developed the field citation
13 program for us.

14 It was not -- it was also to help the small owner and
15 operator also, too, so they could get in compliance. So
16 you would normally -- our normal procedure is to use a
17 field citation; however, this situation, because of the
18 number of violations and the type of violations that we
19 were finding, did not merit itself to field citation
20 approach.

21 And like I said, we did try that at one of the
22 facilities, and the investigating other facilities of the
23 same company, we saw a trend that did not fit the mold of
24 the field citation.

25 Q Again, my question --

1 A I don't know; maybe I forgot your question now.

2 Q The question was simply this position was not reached
3 until you returned to Dallas --

4 A That's correct.

5 Q -- after your field inspection in February -- on
6 February 16 --

7 A Right.

8 Q -- and 17.

9 A And that is in discussion, also, with my supervisor.
10 It wasn't something I just said, "well, I'm going to do
11 this regardless of anybody." I talked to my supervisor
12 and advised him what we found, and made a determination
13 that this was much more in the spectrum of the complaint
14 enforcement.

15 Q Sorry, I'm just waiting for the siren to stop
16 outside.

17 Okey-doke. Who besides your supervisor -- first, let
18 me ask you, what's your supervisor's name?

19 A His name is Willie Kelley: K-E-L-L-E-Y.

20 Q And who, besides Mr. Kelley, did you discuss this
21 decision with before you reached your conclusion to use
22 the administrative order?

23 A Mr. Greg Pashia was also involved in the discussion,
24 since it was his state. And based on input from all three
25 of us; and of course, the ultimate decision had to be made

1 by my supervisor which way to go, and we felt that field
2 citation was the approach.

3 Now again, I want to reiterate here that we don't
4 have to use a field citation; there's nothing in our
5 policy says you have to use it. We can go with an order
6 every time, if we want to. Or we can go with field
7 citation if it fits the mold. But in this particular
8 case, it did not merit multiple field citations.

9 Q And I gather from your answer at no point did you
10 discuss this decision before you reached it with any of
11 the personnel at the Oklahoma Corporation Commission?

12 A The decision to go with a standard enforcement action
13 really had nothing to do with the state, other than they
14 had provided us the documentation, we had some indication
15 that there was some problems there from -- from
16 Mr. Roberts, that they had problems. And essentially, the
17 decision was made from my observations of the violations
18 in those facilities.

19 Q What documents are you referring to that OCC showed
20 you which showed problems?

21 A I'm sorry, not -- not -- I would just -- I'd have to
22 say not documentation from the state. But what I would
23 say was my inspection report, the registration forms, that
24 type of thing.

25 The registration forms confirmed the dates of

1 installation and that type of thing. I wanted to be sure
2 that I had that correct, because a lot of times, we get
3 information from the operators or someone that's out
4 there, and we'll put that down.

5 But I had to get verification on the registration
6 forms, so I did have to use the state registration forms
7 to make sure that the documentation was correct.

8 Q So there were no documents which you reviewed from
9 the Corporation Commission that showed any problems?

10 A No, huh-uh. No, I didn't -- I didn't have any
11 inspection reports that I reviewed, that type of thing --

12 Q Okey-doke.

13 A -- that would say the state was having these multiple
14 problems.

15 Q All right.

16 A It was just basically hearsay. So that's why we did
17 not want to proceed with an enforcement action, until we
18 agreed amongst EPA which route we would take.

19 Q Sure. In -- in your answer, you ticked off several
20 points that are part of what you considered before you
21 reached an administrative order decision; one of which was
22 that the owner of RAM didn't pump the gas, sweep the
23 floor, et cetera.

24 And I would like for you to look at page 1 of
25 Respondent's Exhibit 68. Drawing your attention to the

1 Farris Express Fuels, which had stores in Muskogee, two of
2 them, Eufaula, Tulsa, Claremore, Coweta, another Tulsa --
3 actually five in Tulsa. And wondering whether the guy
4 that owns that sweeps the floor and pumps the gas at all
5 of those facilities?

6 A No.

7 MS. BEAVER: Your Honor, I would like to object.
8 The witness was -- does not have the knowledge to
9 testify on this. He was not the inspector for
10 these -- or the inspector for these facilities.

11 Again, we object to this information on the
12 basis of relevance. We don't know; that's part of
13 the challenge -- well, part of the challenge is --
14 part of the challenge to this line of questioning is
15 that we don't have before us the documentation with
16 the specific facts and information that -- that --
17 this is a surprise to us to get into this right now.
18 This is a surprise to me and my co-counsel to get
19 into this right now, because we don't have these
20 documents and did not have -- these documents did not
21 come into play in this -- in our pursuit of this
22 enforcement action.

23 MR. SHIPLEY: I don't know what to say in
24 response, Your Honor.

25 THE COURT: Well, I think, again, you know, when

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you are trying to compare various cases, you get into this problem of collateral issues; in other words, are you trying the case before you, or are you bringing in other cases? And in order to make the argument you are making, some of these questions would be -- would be relevant.

But I think you have to -- have to curb that -- that type of questioning, because it tends to prolong this proceeding, and you do get into the collateral issue matter.

And so I have allowed the -- I believe I admitted Exhibit 68, right, or has that been admitted yet?

MR. SHIPLEY: Yes, Your Honor, it has. So I'll withdraw the question. I understand your inclination.

Let me -- the definition of what a mom-and-pop is, as we have found throughout the regulations, is a term that appears in EPA regulations, and the witness just raised it as one of the criteria that he considers in deciding to go within the administrative order in trying to define how he determines what that means. I was simply trying to use another example.

Q (By Mr. Shipley:) So rather than look at Exhibit 60, let me just ask the witness: What criteria do you use,

1 sir, when you decide whether an entity is a mom-and-pop,
2 as opposed to what you have described as sweeping the
3 floors and pumping the gas?

4 A Well, first of all, the use of -- whether we use a
5 field citation or an administrative order, there is no
6 criteria; there is no written criteria. Just basically,
7 we can go -- every time we go to the facility, we can
8 issue an order.

9 Q In other words, it's completely up to you.

10 A Exactly.

11 Q Thank you. Let me ask you --

12 A And I also want to bring this out. Also, the field
13 citation program that was -- the policy for the field
14 citation program that EPA headquarters developed, it never
15 meant -- was never really implemented for a federal level.
16 It was issued for the states to use field citations.

17 EPA decided upon itself that it might not be a bad
18 idea to utilize that enforcement tool, and thus we
19 developed the field citation program for federal use.

20 And it's worked very well for us, we utilize it as
21 much as we can, but we are also cognizant of the fact that
22 we -- we still have options.

23 We still do not -- we could just take the field
24 citation off the -- off the -- off the floor and say we're
25 going to go with an order.

1 Now, again, we just don't have the time and effort to
2 do every case as an order, so we try to pick and choose
3 those facilities that are more grievous, more violations,
4 fits more of the mold of the administrative order than it
5 does a field citation.

6 And as I said, RAM was issued a field citation.
7 Normally, you get one shot with field citation, and after
8 that, it's again at the discretion of the inspector and
9 supervisor and so forth of EPA.

10 And just the fact that it's a mom-and-pop does not
11 negate that we will not issue an order, which we have. We
12 have issued orders, very high -- high -- high penalties
13 against mom-and-pops because of the situation that was
14 imposed.

15 So it's not -- I mean it's not common that we do
16 that; we try to look at that. The fact that they were
17 a -- whether they were a mom-and-pop or not a mom-and-pop
18 is not the only thing that we look at.

19 Again, if you sue a mom-and-pop for \$100,000,
20 \$200,000, most likely what's going to happen is they are
21 not going to have the financial capability to pay that
22 fine, and you end up with a negotiated small fine anyway,
23 so you develop a procedure where you try to get the
24 best -- use -- utilize the best tool to get the compliance
25 that you need and the deterrents.

1 MR. SHIPLEY: Thank you for your time and
2 attention, Mr. Cernero.

3 I have no further questions at this time.

4 THE COURT: Do you have any redirect,
5 Ms. Beaver?

6 MS. BEAVER: I do, Your Honor. Yes, sir.

7 And I must ask Your Honor to excuse me if I seem
8 a bit disjointed or disjointed or -- in my redirect,
9 having to respond to this phenomenal tag team of two
10 minds against my one.

11 If I ask questions more than once, it's because
12 I have heard information more than once from the two
13 different people that crossed the witness.

14 *****

15 REDIRECT EXAMINATION

16 BY MS. BEAVER:

17 Q So let's start, Mr. Cernero. Let us start first with
18 this proverbial elephant in the room with these OCC
19 reports, and you know, the showings of the Respondent
20 passing these inspections.

21 Mr. Cernero, how does an owner/operator in the
22 business of owning and operating a UST know what's
23 required of them by federal and state regulations?

24 A They have to obtain the rules and regulations from
25 the state. Or if it's not a delegated state, from the --

1 from the federal register.

2 There's websites the EPA has. The state has
3 websites. There's publications. There's a lot of good
4 information an owner can -- can read and determine what
5 they need to do to get in compliance.

6 They can hire consultants that will help them, walk
7 them through the requirements and advise them.

8 The state provides outreach to the regulated
9 community.

10 EPA has some to some extent, but mainly through the
11 state agencies.

12 Q What are -- what, if any, are compliance assistance
13 measures that an UST enforcement officer can provide
14 during inspection?

15 A Now, say that -- can you repeat that question again?

16 Q Yes. What, if any, assistance can an UST enforcement
17 officer provide to an owner and operator during -- during
18 the inspections?

19 A It's limited to what we can -- what we can say and
20 do, if we are there to do a compliance enforce -- if we're
21 doing actual enforcement. However, many times, we can
22 make suggestions as to options that they have.

23 We can't demand that they do a certain type of leak
24 detection; we could give them some options, try to give
25 them some information.

1 A lot of times, we'll pass out booklets. I know the
2 state agency has a lot of the publications that they pass
3 out. We pass those publications out.

4 We try to do an entrance conference and an exit
5 conference when we finish our inspection to let the owner
6 and operator know what some of the deficiencies may be and
7 maybe how to correct them, give them some options about
8 how to correct them, or direct them to a -- direct them to
9 the state agency.

10 Q Can a -- can an UST enforcement officer use
11 discretion during an inspection?

12 A Yes.

13 Q What type of enforcement discretion -- or what --
14 what does that generally look like, enforcement
15 discretion?

16 A The enforcement officer also has the option of
17 looking at the violation, and make -- because they always
18 have to make that determination; if you find a violation,
19 you know, do you put it on a Notice of Violation, give
20 them a time to get it corrected? Do you issue a field
21 citation? Do you defer to the state?

22 Those types of things can be enforcement discretion.
23 Now, obviously, if you find gasoline bubbling out of the
24 ground and you see leaks and you see -- I mean just very
25 grievous type of violations, that type of discretion would

1 probably not be used, but if you are looking at areas that
2 are borderline or minor incidences, you can -- you can
3 hopefully work with the operator and -- or owner and just
4 try to get compliance sometimes without actually having to
5 do an enforcement action.

6 But normally -- normally, EPA uses discretion in
7 those areas that are a minor -- minor areas.

8 Q You -- Respondent's counsel went to great lengths
9 to -- to compare, I guess to make reference to the OCC --
10 various OCC inspection reports that predated and came
11 after your 2005 -- February of 2005 inspection.

12 A Right.

13 Q How do you reconcile those inspection reports with
14 your findings of violations during your February 2005
15 inspection?

16 A I guess a couple of ways. One is the inspector
17 missed it; the inspector didn't see it, didn't note it.

18 The other one, it could be that the inspector did
19 notice it, decided not to -- used the enforcement
20 discretion, decided not to write it up, and essentially
21 verbally told the owner/operator, "these are violations
22 that I will not tolerate," that type of thing. "I will be
23 back in the next 30 days, get it corrected or I will write
24 up an order." They have that discretion.

25 Particularly, state inspectors have more -- more

1 flexibility than we would, because they are out there at
2 least, you know, once a year, maybe twice -- maybe once
3 every two years, so they have a little bit more leeway.

4 They have the ability to be able to come back to a
5 facility to work with them; whereas maybe EPA does not
6 have as much discretionary, because we're -- we may be
7 going out of state to go ahead and review those
8 facilities.

9 Q Have you had any communications from the owner of RAM
10 requesting enforcement compliance assistance?

11 A Not that I'm aware of, no.

12 Q Let's go to the Complaint, Mr. Cernero.

13 Specifically -- actually, before we go -- before we
14 go to the Complaint, there were some of the counts that
15 were brought up in your first cross.

16 What was your ultimate authority for your UST
17 enforcement activities?

18 A Statute.

19 Q Is there -- what, if any, notice requirement appears
20 in the statute, vis-à-vis the state, that requires you to
21 give notice before an inspection?

22 A There is none.

23 Q What, if any, is the only notice requirement in the
24 statute as regards to your federal enforcement activities?

25 A The only --

1 Q -- vis-à-vis the state.

2 A The only requirement that I have is to -- before I
3 issue a complaint or a penalty or an administrative order,
4 I have to notify the state.

5 Q Did you notify the state in this case before you
6 issued your penalty report --

7 A Yes.

8 Q -- and complaint?

9 A Yes.

10 Q Is there any requirement in the statute that requires
11 you to enforce a state penalty policy?

12 A No.

13 Q Let's turn to the Complaint now. Specifically,
14 Counts 3, 4, 12, and 14.

15 A Okay.

16 Q As a point of clarification, were these counts
17 allegations for recordkeeping, or for underlying
18 violations of nonperformance?

19 A Nonperformance.

20 Q Are you aware of requirements for recordkeeping in
21 the OCC regs?

22 A Yes. The records are required to be kept, even under
23 the state regs.

24 Q I'd like to call your attention to Complainant's
25 Exhibit 30, the 2004 OCC regulations.

1 A All right.

2 Q Specifically, pages 16 through 18: "Part 11,
3 Recordkeeping."

4 A Okay.

5 Q What does 165:25-1-53 require?

6 A It says: "Owners and operators of Underground
7 Storage Tank --

8 COURT REPORTER: Excuse me.

9 THE WITNESS: Okay.

10 COURT REPORTER: I can't hear you.

11 THE WITNESS: Sorry. It says: "Owners and
12 operators of Underground Storage Tank systems
13 regulated by this chapter must cooperate with
14 Commission requests for submission of inventory and
15 monitoring records. All leak detection records,
16 including but not limited to sampling, testing,
17 inventory and monitoring records, must be available
18 for each tank for at least the preceding 12 months.
19 Copies of all records required to be kept pursuant to
20 this chapter must be available to the fuel specialist
21 at the time of the facility's annual UST inspection.
22 Failure to have the required records available when
23 requested by the Commission may result in enforcement
24 action."

25 Q Okay. You can stop there.

1 A Okay.

2 Q And then in 16 -- let's see. Let's go to one -- on
3 page 18.

4 A Okay.

5 Q 165:25-1-56.

6 A Okay.

7 Q What's -- what's the basic gist of the requirement
8 there? I mean you can read it, or --

9 A Essentially, you have to maintain your release
10 detection records for at least one year. Cathodic
11 protection records must be maintained, also for a specific
12 time. Must be -- be able to be presented to the inspector
13 upon -- you know, upon arrival of the -- of the
14 inspection.

15 Q In your complaint, did you include counts for these
16 two requirements? Did you include counts for violations
17 of these two requirements?

18 A No, I did not.

19 Q Why not?

20 A I felt that it would -- the cascading effect would
21 not -- it would just be more -- increase the penalty, so I
22 went right to the performance violation, and then
23 basically did not include any recordkeeping violations or
24 failure to produce the records upon request. So I did
25 not -- I did not add those counts into that.

1 Q So would you say you were being lenient or trying to
2 be lenient by not adding these additional counts?

3 A Yes, that was the -- that was the idea, not to double
4 or triple various violations.

5 Q And you could have added these two additional counts,
6 correct, for the violations cited in Counts 3, 4, 12 and
7 14; is that correct?

8 A I -- I believe so, yes.

9 Q Let's go now -- let me ask you this question: At
10 what point does a violation cease to be a violation?

11 A When it's corrected.

12 Q Besides Counts 8 and 9 in the Complaint, were there
13 violations that ceased to be violations prior to your
14 inspection during the time periods that you calculated
15 penalty?

16 A No.

17 Q Let's turn our attention now to Counts 8 and 9.

18 A Okay.

19 Q Along with these counts, looking at the counts in the
20 Complaint, I'd also like to have you turn to Respondent's
21 Exhibit 24.

22 A Okay. In this book? I guess you are talking about
23 this book. Okay.

24 Q Right, it's the big black binder.

25 A Okay. All right. The Hydrostatic Line Tightness

1 Test?

2 Q What is that exhibit, Mr. Cernero?

3 A It is a -- it's a worksheet of a line tightness test.

4 COURT REPORTER: A line what?

5 THE WITNESS: A line tightness test; it's a
6 Hydrostatic Line Tightness Test.

7 And also, I believe there was a test of the
8 Pressurized Product Line Leak Detector Test. It's
9 all part of the same test, the same day, it looks
10 like.

11 Q (By Ms. Beaver:) Does that document show performance
12 of those two tests, the tests that are the subject of
13 Counts 8 and 9 of the Complaint?

14 A Yes. That's -- that is the test results and the
15 field notes for conducting a pressurized test on the
16 piping and the line leak detector for the Thrif-T-Mart
17 store.

18 Q Okay. What is the date of that test?

19 A January 10th, 2005, which was before my inspection.

20 Q Right. And we -- we carved out these two counts from
21 my previous question, too.

22 Does this test date have any bearing upon your
23 penalty calculation for these two counts?

24 A Yes.

25 Q What would that effect be?

1 A It -- it would reduce the days of noncompliance.

2 Q What would the reduction of those days of
3 noncompliance do to your penalty calculations,
4 specifically?

5 A It would reduce the penalty calculation.

6 Q Is there a specific factor that it reduces? For
7 example, if you could turn to --

8 A Yes.

9 Q -- your penalty calculation worksheets 8 and 9.

10 A Okay.

11 Q Could you tell us what factor would be --

12 A Yes.

13 Q -- affected by that?

14 A Yeah. For 8, since I had calculated a 94 day -- days
15 of noncompliance, the multiplier for that would be 1.5.
16 Since it's going to be less than 90, which would be
17 approximately 60 days, it's going to be a factor of 1.

18 So from that standpoint, it would reduce it. Instead
19 of it being 1.5 times 1,500 -- or 4,500 times 1.5, it
20 would be one, so it would be about -- it would be about a
21 \$2,000 reduction.

22 Q Okay.

23 A For that count and for Count 9.

24 Q Okay. So your new penalty calculation for Counts 8
25 and 9 would be what?

1 A \$4,940.96 for Count 8, and then \$4,940.96 for
2 Count 9.

3 Q Okay. Let's turn -- let's turn now to Count 17 and
4 20.

5 A Sure.

6 Q And as we look at these two counts, 17 and 20, let's
7 also look at Respondent's Exhibit -- here, let me -- Your
8 Honor, if I may have a moment to find an exhibit.

9 A I think 39; I think you're looking at 39.

10 Q Is it 39?

11 A I think so.

12 Q No.

13 A No? All right.

14 Q Documents -- it's -- it's an exhibit that are
15 documents that were requested EPA correspondence between
16 OCC --

17 A Oh --

18 Q -- and the EPA that we provided to Respondent.
19 It's Respondent's Exhibit 61.

20 A Sixty-one?

21 Q Yeah.

22 A Okay. All right.

23 Q Okay. The second page of that exhibit; starting with
24 the second page of that exhibit.

25 A Okay.

1 Q Can you tell the Court what that is? Or starting
2 with the second page of that exhibit, and going through --

3 A Okay. This --

4 Q -- five -- the next five or six pages.

5 A This is what we call a suitability test or
6 suitability study or what I call an integrity test. It
7 was -- it's basically an actual report that was conducted
8 by Corrosion Control, Incorporated, out of Edmond,
9 Oklahoma, for a facility that has nothing to do with RAM,
10 but it was for the Star Fuel Market in Oklahoma City.

11 This was performed by a NACE technician and a
12 cathodic protection specialist that are expertise in
13 corrosion protection (sic).

14 The second -- the third -- or the second page of the
15 report has information about the particular tank, the type
16 of system it is, the length of piping; that type of
17 information.

18 The next page, again, has to do with electrical
19 conductivity from the various metal portions of the tank.
20 It talks about internal corrosion, which did not have any
21 information on that.

22 Information not in the immediate vicinity of the
23 tanks. There's -- apparently -- there's a lot of detailed
24 information, data collection that the company obtained for
25 that particular site to try to determine whether the tank

1 was suitable or had the integrity to have cathodic
2 protection added to it for upgrade purposes.

3 Q Where did you obtain this document from?

4 A I got it from the Oklahoma Corporation Commission.
5 The person I got it from is Terry Roberts of OCC in
6 Oklahoma City. This report --

7 Q Is the information in this report objective or
8 subjective?

9 A It's objective. It is -- it --

10 Q And in your -- in your experience, when an integrity
11 test is performed, is the -- what type of document -- is
12 the documentation that's received -- that's received to
13 demonstrate performance of the integrity test similar to
14 this document?

15 A Yes. Yes. There is detailed information, there's
16 soil boring information, particularly about the types of
17 soils that surround the tank. There is resistivity (sic);
18 in other words, the resistance of that particular soil
19 for -- potential for corrosion.

20 There's a lot of scientific detailed sampling that's
21 collected. And again, the ultimate reason why you get all
22 that information is for the last page of that document.
23 And it says page 7 on our fax number; I don't know exactly
24 what page number it is in the document itself.

25 You will see where it talks about the facility, the

1 site owner, and it says, "In accordance with ASTM G158-98,
2 Schmaltz Engineering Service Company has evaluated the
3 Underground Storage Tank at the above referenced location.
4 The results of that evaluation are listed in the table
5 below." And then it has a table, has capacity of each
6 tank, the product that it holds, the age of the tank.

7 And then it says, "the expected leak-free life,
8 years." And this one had 11 for one, 11 for the other,
9 and 24.

10 Then it had a probability of corrosion failure. Each
11 one of these -- two of them had 4.7 percent probability of
12 failure; the other one had 2.1, because it was a younger
13 tank.

14 And then the ultimate analysis was: "Can cathodic
15 protection be applied?" And the -- and the expert said
16 yes for all three of those tanks. And it said that
17 cathodic protection can be applied. Now again --

18 Q What is -- let me interject. What does the
19 require -- is there -- does there appear, and where does
20 it appear, if so, the requirement in -- in the regs for
21 such a report to be kept and maintained?

22 A It's in the portion of -- and I don't know the exact
23 citation; I could tell you it would be 2.81 --

24 Q Did we just look at it?

25 A Yeah.

1 Q Did we just look at one of them?

2 A Yeah.

3 Q Let me --

4 A Oh, I'm sorry. That's the -- the Oklahoma regs?

5 Q Right, of the Oklahoma regs.

6 A Okay. Now, it's -- okay.

7 Q I will help everybody --

8 A Yeah.

9 Q -- and look on page 18, 165:25-1-56(b).

10 A Oh, (b)? Okay. "The owners and operators of
11 Underground Storage Tanks systems regulated by this
12 chapter who use cathodic protection must maintain records
13 that demonstrate compliance with the performance standards
14 of this chapter."

15 Q Was it a performance standard -- was it a performance
16 standard at the time of the inspection for an integrity
17 test to have been performed?

18 A Yes.

19 Q Okay. Let's -- oh, and you know, you didn't include
20 in your Complaint -- did you include in your Complaint
21 additional counts for the failure to maintain records?

22 A No.

23 Q No? Let's now turn -- and we're going to dance a
24 little bit around the Respondent's exhibits. Okay. Let's
25 look at Respondent's Exhibit 2.

1 A Two?

2 Q Yes. Respondent's Exhibit 2.

3 No, no, no, no. Sorry. Just a second.

4 It's Respondent's Exhibit 2, but it's an attachment;
5 Attachment 1.

6 A All right.

7 MS. BEAVER: Okay. Okay. And the reason, Your
8 Honor, that I took time with that is because we've
9 stipulated to the attachments to Exhibit 2, we did
10 not stipulate to the other information in Exhibit 2.

11 Q (By Ms. Beaver:) Let's look at this exhibit,
12 Respondent's Exhibit 2, Attachment 1.

13 A Okay.

14 Q In conjunction with the Complaint Count -- I believe
15 it's Count 7. Count 7.

16 On yesterday, Mr. Cernero, you testified regarding
17 Respondent's Exhibit 23, testing performed on the cathodic
18 protection system. Which you read that no -- that the
19 failure of an anode, the failure of Component 16, and the
20 note spoke about an anode. Do you remember that?

21 A You are talking about Count 7?

22 Q Right, we're looking at Count 7.

23 A And that is for the -- it's the Thrif-T --

24 Q Okay. We are looking at several exhibits all at one
25 time.

1 A Okay.

2 Q We're looking at Respondent's Exhibit 7, which is the
3 Complaint, if you need to refer to it get that Count 7 to
4 refresh your memory on what Count 7 is.

5 A I got Count 7 right here.

6 Q Do you see Count 7, "Failure to Operate Cathodic
7 Protection System Continuously"?

8 A Yes.

9 Q At the Citgo Thrif-T-Mart?

10 A Okay, yes. I got it.

11 Q Okay. Yesterday you testified regarding Respondent's
12 Exhibit 23, which was a test --

13 A Right.

14 Q -- on the system performed by a contractor.

15 A Right.

16 Q That's noted yes, the system passed; however, you
17 noted that it had a component that failed, Component
18 Number 16 on page two that failed.

19 A Correct.

20 Q And you noted in the remarks section -- you noted in
21 the remarks section that talked about an anode not
22 functioning.

23 A Right.

24 Q Okay. So look -- comparing Respondent's Exhibit 2,
25 Attachment 1 to this information -- first of all, what's

1 the date on this exhibit?

2 A Attachment 1?

3 Q Attachment 1, to your --

4 A It's February 13, 2006. It's an invoice.

5 Q I'm sorry.

6 A I think you want --

7 Q Maybe I'm on the wrong attachment.

8 A That was for a Quik Mart.

9 Q Yes. February 13, 2006.

10 A Attachment 2 shows it is was for -- somebody had
11 written in here, "Thrif-T-Mart."

12 Q Okay. Count 2 shows Thrif-T-Mart?

13 A Yes.

14 Q And what is the date on Count 2?

15 A February 4th, 2006.

16 Q So what's the description of the work that was
17 performed?

18 A All I see on this invoice says, "CP repair and anodes
19 installed."

20 Q Can you make -- can you reasonably make a connection
21 between the invoice of an anode install with Respondent's
22 Exhibit 23?

23 A Well, it looks like it was almost a year after my
24 inspection, the cathodic protection system was repaired
25 and then anodes were installed.

1 Apparently, the anodes must have burned out or were
2 not sufficient. And apparently, Underground Services
3 Company has hopefully corrected that situation. So
4 apparently, it had to be corrected.

5 Q Okay. And again, in the -- in the "Comments" section
6 of Respondent's Exhibit 23, page 2.

7 A Right. Yeah, there was -- it says, "unleaded
8 pumping, pump sump readings are low, cannot adjust" -- I
9 can't read what that says. It said -- then it says, "one
10 five-pound anode would correct the problem."

11 That was March 19th of '04. The invoice is dated
12 February 4, 2006.

13 Q Did you -- have you received any invoices or other
14 evidence to indicate that a repair to an anode at this
15 facility was performed prior to this date?

16 A No.

17 Q I'm sorry, I should have said prior to the date of
18 your inspection.

19 A No.

20 Q Let's now turn to Respondent's Exhibit 11.

21 A Okay.

22 Q Let me double-check and make sure. And Respondent's
23 Exhibit 11, Mr. Cernero, what does this appear to be to
24 you?

25 A It looks like -- well, it says at the top,

1 "Installation Agreement," so it must be some kind of
2 contract between W.E. Allford, Company, and Visual
3 Inspections, Incorporated. It's dated --

4 Q It's dated --

5 A Okay.

6 Q Go ahead, it's dated when?

7 A It's dated August 12th, 1996.

8 Q Okay. And let's look specifically at the fourth
9 paragraph.

10 A Okay. Says, "Allford agrees to furnish suitable" --

11 Q No, no, no.

12 A Oh, I'm sorry.

13 Q The fourth.

14 A Fourth?

15 Q Four from the top --

16 A Oh, I'm sorry, I'm sorry.

17 Q -- one, two, three, four.

18 A Okay. It says -- okay. "VI" -- Visual -- or VI
19 stands for Visual Inspections -- "has agreed to install
20 the systems or system for the lump sum consideration of
21 \$33,350." And in parentheses, it says, "individual
22 pricing in Section 6.2 of the design report,"
23 unparentheses.

24 Q Okay. And let's stop there.

25 A Okay.

1 Q I believe it was yesterday that Mr. Kellogg asked you
2 if a -- if a company were to say that we agree to
3 install -- that we agree to design your cathodic
4 protection system in compliance with the regs, does that
5 mean that integrity test was installed?

6 Does this installation agreement make reference to a
7 design report? In the paragraph you just made, a
8 reference to the design report.

9 A It just doesn't say anything about design, it just
10 says "install."

11 Q You said, in a paren, "Individual pricing in Section
12 6.2 of the design report."

13 A Okay, I'm sorry. All right. So, well, yeah --

14 Q My question is this --

15 A Yeah.

16 Q -- if there is some design report that goes along
17 with an Installation Agreement -- that goes along with
18 this Installation Agreement, does this Installation
19 Agreement include an agreement to install or to perform an
20 integrity test?

21 A This has nothing to do -- there's no indication that
22 this has anything to do with the integrity test or
23 suitability test.

24 Q What does it show that Visual Inspections has agreed
25 to perform or agreed to do?

1 A It looks like -- what I just read is agreed to
2 install the system for the lump sum consideration, with
3 the amount of money.

4 Q Okay.

5 A And how they are going to install it; Mr. Allford
6 will provide the electrical -- electricity or alternating
7 current electrical equipment.

8 Q That's sufficient, Mr. Cernero --

9 A Okay.

10 Q -- to answer my question.

11 Okay. Let's now turn to Respondent's Exhibit 35.
12 And just to back up a little bit, for the record, the
13 exhibit that we were just looking at, Respondent's
14 Exhibit 11, goes to the counts regarding the failure to --
15 goes to, you know, the argument regarding penalty
16 mitigation of Counts 17 and 20, just so that we're all on
17 the same page.

18 And again, I'm assuming the cross was to offer
19 information to mitigate penalty, and so I'm attempting to
20 respond to those elements that were brought up on cross.

21 Let's look at Respondent's Exhibit 35.

22 A Okay.

23 Q Okay. And what is that document?

24 A Well, it says -- it says, "your request for temporary
25 closure of the UST systems located at the referenced

1 facility is approved. The subject USTs are considered to
2 be temporary closed by the OCC effective September 10th,
3 2001.

4 "Compliance with the removal and closure requirements
5 is governed by Oklahoma Administrative Code" -- and it
6 mentions the code. "A brief summary of these rules is as
7 follows."

8 Q Okay. What's the -- who -- who is the sender of this
9 document?

10 A The sender is the Oklahoma Corporation Commission.

11 Q And who is the document sent to?

12 A It's sent to RAM, Incorporated.

13 Q What's the date on the document?

14 A September 10th, 2001. And they apparently --

15 Q What are the -- are there -- is there guidance
16 information? And if so, what is it in this document?

17 A Essentially, the -- the Oklahoma Corporation
18 Commission is providing RAM, Incorporated, the
19 requirements that must be met to maintain temporary
20 closure of those particular tanks.

21 Q Is it safe to assume that Respondent had information
22 of what was necessary, the necessary OCC regulations
23 required for tanks in temporary closure?

24 A Yes. It's basically --

25 Q What -- what rules are identified in this document?

1 A It's -- it's the OAC 165:25-3-62, "Temporary Removal
2 From Service: A, when an Underground Storage Tank system
3 is taken temporarily out of service, then owner or
4 operator must; 1, continue the operation and maintenance
5 of corrosion protection as required by this chapter; two,
6 continue release detection as required by this chapter;
7 and three, comply with the requirements of this chapter
8 concerning release reporting and corrective action.

9 "B, release detection is not required as long as the
10 Underground Storage Tank system' --

11 Q We can -- we can stop there.

12 A Okay.

13 Q And the next requirement that's there?

14 A It's 165:25-3-63. It's "Temporary Closure
15 Requirements for Returning to Service."

16 Q Okay, that's fine. I believe it was yesterday that
17 counsel for Respondent asked you questions about an
18 emergency tank. Would -- what would be required to show
19 that a tank was used as an emergency tank and not a tank
20 in temporary closure?

21 A Emergency tanks is basically set up for spills. Let
22 me give you an example. If you have a garage somewhere
23 where, you know, you are doing oil changes or you are
24 doing some kind of a repair and you're afraid that if
25 you -- if the fuel spills, you can have a collection

1 device where it collects it, goes into a drain and it goes
2 into an emergency underground tank; that's considered an
3 emergency tank.

4 It's emergency because in case you had a spill, you'd
5 have some place to pill it (sic) -- some place to fill
6 that -- that excess whatever fuel is that you spilled into
7 a tank.

8 EPA essentially says those tanks are exempt, if; one,
9 it's considered an emergency tank; and two, that once it
10 is -- if you had an emergency and you filled the tank with
11 a product or, you know, half full or whatever, that you
12 could take -- you would -- you would remove the product
13 from that tank expeditiously so that it would not
14 accumulate over a long period of time.

15 Which is basically common logic, is that if a tank
16 normally does not have anything in it, why would we
17 regulate it?

18 EPA even went a little step further and said, well,
19 if you -- you have it and you have to fill it up because
20 there was a spill, we'll even let you get by our
21 regulations if you expeditiously remove the product from
22 the tank as soon as the spill -- or within a reasonable
23 time. Again, EPA doesn't say what a reasonable time is,
24 but normally it's within a few days that it's removed.

25 Q Okay.

1 A The tank at -- that this refers to, Monroe, I believe
2 it is -- no, this is the one -- yeah, the Monroe facility
3 was not an -- an emergency tank.

4 Q Was the tank that you testified you were told by
5 Ms. Monroe was in temporary closure at I believe it was
6 the Citgo Thrif-T-Mart facility, was that an emergency
7 tank?

8 A No.

9 Q Did you have any evidence to show you that it was
10 being used as an emergency tank?

11 A No.

12 Q Did anyone tell you it was being used as an emergency
13 tank?

14 A No.

15 Q Okay. What measures does EPA -- or has EPA taken to
16 ensure that small businesses, what Respondent's counsel
17 refer to as little-old, quote unquote, business owners --
18 let me start over with the question.

19 What measures has EPA or the state taken to ensure
20 that these, quote unquote, "little-old business owners"
21 understand what is required of them and have assistance in
22 understanding what is required of them under the regs?

23 A It's kind of the same answer that the other question
24 had, is there are considerable amount of publications that
25 the state and EPA provide to the owner -- that they can

1 get them online, or that they can have them delivered or
2 mail -- mailed to them.

3 The state agency can go there and help them. I know
4 that a lot of the states, when they -- they get a lot of
5 calls from new owners, and -- or operators, and they'd
6 like to know what the requirements are. A lot of times
7 they will go out and do a compliance inspection as a
8 courtesy to them to get them into compliance, without
9 actually having to do enforcement.

10 There are seminars that states puts on, websites that
11 the state has that owners and operators can -- can look
12 at. There's just --

13 Q In your -- in your opinion, was -- is the Respondent
14 company a little-old, quote unquote, business owner?

15 A No. In my opinion, RAM, Incorporated would not be
16 considered a little-old company or a mom-and-pop shop.
17 It's not an Exxon or a Chevron, but it's certainly not a
18 mom-and-pop.

19 Q There was -- there were questions on cross asking you
20 about NACE specialists and the reliance on NACE certified
21 specialists. Is the use of a NACE certified specialist
22 sufficient to transfer liability for the regulation?

23 A No. It still doesn't transfer liability.

24 Q Okay. Now, let's go to Count 1 of the Complaint and
25 walk through some of the -- what was asked of you

1 yesterday during the first cross.

2 A Okay.

3 Q And so I will attempt to follow -- kind of follow
4 along with the first cross, and then wrap up with the
5 second cross, redirect regarding the second cross. And so
6 again, if this is kind of leap froggy, it's because that's
7 what I had to go by.

8 On Count 1, there were questions about what was
9 required, the spill and overflow requirements. Where do
10 spill and overflow protection get installed?

11 A I'm sorry?

12 Q Where do spill and overflow protection get installed?

13 A Where does it get installed?

14 Q Yeah.

15 A The spill buckets are installed where the fill ports
16 are, where you drop fuel.

17 Q Are fill ports part of the tank?

18 A Not really. I mean it's not -- it's an extension
19 pipe that goes from the tank up. It's kind of semantics
20 whether you say it's part of the tank. It could be
21 considered part of the tank, it could be part of the
22 piping.

23 Q Where would you put -- where would you put spill --
24 where -- where could you put spill and overflow protection
25 if you don't put it on fill ports?

1 A For -- for overfilling, you could actually have a
2 device that goes right in the -- the drop-to right in the
3 fill port, or you can have what they call ball float
4 valves which go in the vent line --

5 COURT REPORTER: Excuse me?

6 THE WITNESS: Ball float valves that go in the
7 vent line, that prevents the escape of air as you are
8 filling your tank to slow the fuel from overfilling.

9 Or you can use an electronic device that will
10 set off an alarm when the product gets up to a
11 certain level.

12 Q (By Ms. Beaver:) Based on the type of tanks and the
13 way the tanks are at the Quik Mart, where is the place
14 that you can have spill protection?

15 A Really, generally speaking, the only place you have a
16 spill bucket or spill prevention is at the fill ports.

17 Q Okay. How do you reconcile -- and I asked a similar
18 question, this is a bit different. How do you reconcile
19 the specific OCC inspection reports that you were
20 questioned on; specifically, Report 7-15-05, exhibit --
21 Respondent's Exhibit 5 --

22 A Uh-huh.

23 Q -- Respondent's Exhibit 6, 7-2-04; Respondent's
24 Exhibit 7, 9-4-03.

25 You were crossed on these three inspection reports.

1 How do you reconcile the fact that these three inspection
2 reports passed the facility when it is undisputed that
3 spill prevention or spill buckets were never installed on
4 the north fill port?

5 A Well, again, you can probably give two reasons why
6 that happened. One is the inspector did not realize there
7 was two fill ports on each tank; or, the inspector used
8 enforcement discretion by saying, "next time I come by
9 here, please have this corrected." It's possible --

10 Q Did the lack of having spill ports -- or I'm sorry, I
11 said that wrong -- spill buckets on the north fill ports
12 cease to be a violation simply because these cited OCC
13 reports passed the facility?

14 A No.

15 Q You were questioned in both crosses, I believe,
16 regarding at what point you calculated your penalty and at
17 what point you determined to pursue an administrative
18 complaint and so forth. What's the ordinary process at
19 the point in time where a penalty is calculated for
20 administrative compliance?

21 A I do my penalty calculations as soon as I determine
22 what those violations are for -- for each facility.

23 Q Is it -- how can you determine a penalty prior to
24 assessing the violation?

25 A Well, you really can't, because you've got to have

1 all the particulars. You have to know when the violation
2 occurred and when it was correct -- when it occurred and
3 when it stopped, if it ever stopped.

4 You have to -- because you have to know the days of
5 noncompliance, you have to determine that. You have to
6 determine number of tanks that were not in compliance.

7 Q Were you acting consistently with standard operating
8 procedure at the agency when you calculated your
9 penalties?

10 A Yes. I -- I used the EPA Underground Storage Tank
11 penalty policy, which is based on the statutory factors.

12 Q Okay. Let's -- okay. I think we can move to
13 Count 2. There were questions regarding -- again,
14 regarding the usage of the state penalty policy versus,
15 apparently, the EPA penalty policy.

16 Is the EPA penalty policy a regional policy or
17 national policy?

18 A It's national.

19 Q To your knowledge, do any of the regions apply state
20 penalty policies?

21 A No. I don't think we -- we would have authority to
22 use state penalty policy.

23 Q Okay. I'm moving now to the questions that were
24 asked during Respondent's counsel's cross for Count 3.

25 Are there other ways -- and if so, what are they --

1 that -- that the OCC and OCC inspector, or any UST
2 inspector, can notify a respondent of a violation besides
3 noting it on the inspection report?

4 A Oh, yeah, verbally. I mean verbal -- they could
5 verbally say, "this is a problem, get it taken care of,
6 you know, by a certain period of time, or when I come
7 back..." I mean that would be the other way of notifying
8 them without actually officially documenting it.

9 Q I okay. Now, there were -- moving to Count 4, there
10 were questions asked. Again, actually for every count
11 there seem to be these pervasive questions on those
12 notices to the Respondent through these inspection
13 reports.

14 Do the regulations require OCC to notify a respondent
15 of a violation on an inspection report as a prerequisite
16 for a respondent being assessed a penalty for a violations
17 noted in an EPA inspection?

18 A Run that by me again.

19 Q It's a convoluted question. Are there -- and if so,
20 what are they -- regulations that make it a prerequisite
21 before EPA can assess a penalty, for OCC to have first
22 notified on an inspection report that a respondent was in
23 violation?

24 A No.

25 Q Was your inspection report sufficient to notify the

1 Respondent that it was in violation?

2 A Yes.

3 Q There seem to be -- I don't know if it was an attack
4 or just questions about you assessing the competence of
5 Mr. Roberts. Does Mr. Roberts' competence factor into
6 your penalty assessment?

7 A No. Which is the reason why any previous inspections
8 was irrelevant to me. I did my inspection based on my
9 expertise, based on my knowledge. Reviewed the
10 violations, calculated penalties, that type of thing, was
11 all contingent on what I had found.

12 Q There were -- I believe these -- you were -- you were
13 crossed regarding counts -- the tanks at Monroe Service
14 Station.

15 A Correct.

16 Q That were apparently in temporary closure, a tank
17 having product in it remaining. You were questioned on
18 the cathodic protection -- or is it corrosion protection
19 system?

20 A Yeah, cathodic protection, yeah, corrosion
21 protection; you can use either one.

22 Q Regarding the -- you know, there being -- your
23 penalty assessment for per tank as opposed to for a
24 system. Can you explain why you calculated the penalty
25 per tank instead of per system?

1 A Yes. At the Monroe facility, the type of system that
2 was installed there for corrosion protection was what they
3 call an impress -- impressed current system.

4 It is a system that actually uses low voltage, it
5 uses alternating current that's transferred at the
6 rectifier box to a DC current that is essentially pumped
7 into the ground through the anodes, forcing electrons
8 toward the tank; basically preventing corrosion.

9 And again, rust is basically the loss of electrons
10 from the metal surface. The impressed current, or
11 cathodic protection system is a way of -- of keeping the
12 electrons from being lost -- lost from the metal surfaces.

13 Again, I'm oversimplifying what corrosion protection
14 is, but essentially, that's what it is. The impressed
15 current is one system; however, each tank has to be wired
16 in. The anodes have to be provided for each tank, enough
17 anodes for each tank.

18 When you do a cathodic protection test, you have to
19 test each tank and various parts of the tank to ensure
20 that not only is one tank protected, but all the tanks are
21 protected, and all of the metal components that are in
22 contact with the soil are protected.

23 So yes, it is one system that's required or one
24 system that is actually protecting those tanks, but each
25 tank has to be protected individually.

1 Q So then is it possible to have one system, three
2 tanks of the four protected and one not?

3 A Actually, it is possible that you can have enough
4 current to protect three tanks, but one of them may not
5 have enough sufficient current to -- to be protected.

6 So you could end up -- and that's why when a
7 corrosion expert or corrosion tester tests each tank, they
8 have to make sure that all the metal parts of all those
9 tanks and all the piping have sufficient voltage to
10 prevent corrosion from occurring.

11 Q Okay. There was -- there were questions during cross
12 about the difference between upgrade and repair. What is
13 an upgrade? And this, again, I believe was Count 4,
14 Respondent asked about that and then went back to Count 4.
15 Can you explain what an upgrade is?

16 A The word "upgrade" has various meanings, you know,
17 in -- in our language, but for the Underground Storage
18 Tank program, "upgrade" meant that -- that it was -- when
19 the regs came out, it -- it split the type of tanks that
20 we dealt with into two different -- two different camps.

21 One of them was tanks that were already in the ground
22 at the time of the passing of the regulation, and then
23 tanks that were going to be put in after the passing of
24 the regulation.

25 EPA said okay, for those tanks that were installed on

1 or prior to December 22nd, 1998, are going to be
2 considered existing tanks, or -- that did not have the New
3 Tank Standards.

4 Tanks that were installed after December 22nd,
5 1998 -- 1988 were considered new tanks and before they
6 went into the ground, they had to have all the corrosion
7 protection, spill and overflow, and the release detection;
8 all the requirements as a new tank.

9 The regulations also said all those tanks that are
10 considered existing, in other words, sub-par, not meeting
11 the new requirements, had 10 years to, quote, upgrade to
12 meet the New Tank Standards by December 22nd, '98.

13 Therefore, owners and operators were giving -- were
14 given either 10 years to either upgrade those tanks by
15 December 22nd, '98, or remove those tanks.

16 But an up -- the only type of tank that could be
17 considered upgraded would be a tank that was an existing
18 tank that did not meet the New Tank Standards; in other
19 words, didn't have corrosion protection on it, didn't have
20 spill and -- or spill and overflow or both.

21 Therefore, looking at this particular case, the tanks
22 at the Citgo Quik Mart were considered new tanks because
23 they were installed after December 22nd, 1988. They were
24 actually installed in 1990.

25 Those tanks were actually -- had to be -- had to meet

1 New Tank Standards, which meant they had to have corrosion
2 protection, spill and overflow and release protection when
3 it went into the ground.

4 If -- along that time, before the '98 deadline came
5 into fruition, if those tanks were checked before '98, or
6 at some time in the future before '98 -- December 22nd,
7 '98 -- and that cathodic protection system that was
8 already installed in there did not meet the minimum
9 requirements, or even after '98 did not meet the minimum
10 requirements, then you would have to do a repair of the
11 cathodic protection system. It would not be an upgrade;
12 it would be a repair of that system.

13 Q Let me interject this question. Is it possible to,
14 under the regs, to upgrade a new tank?

15 A No, you don't upgrade a new tank. You can repair it.

16 Q So what's a repair?

17 A A repair would be adding more cathodic protection; in
18 other words, having a corrosion expert go in and say this
19 tank, at one time, did meet the corrosion protection
20 requirements, but due to age, maybe broken wires, or any
21 kind of corrosion itself, is no longer operating like it
22 should.

23 You can add more anodes to it, you can actually even
24 go in and add an impressed current system to it. But it
25 was still a new tank, and all you can do to a new tank is

1 do a repair of the corrosion protection. You can't
2 upgrade it under -- under the temple that we use in the
3 UST regulations.

4 Q Okay. How would it affect the Complaint in this case
5 if the tanks in question for Count 4 were installed
6 without the required -- the requirements of New Tank
7 Standards?

8 A Well, it would have been -- it would have been in
9 violation as soon as you put it in the ground; in other
10 words, if they put a system in there that did not have
11 corrosion protection, then it would be in violation of
12 failure to install a new tank -- standard tank -- or a
13 tank that had New Tank Standards.

14 THE COURT: Where are you going with this,
15 Ms. Beaver? It seems like we've been over this
16 amply.

17 MS. BEAVER: Well, Your Honor, there seems to be
18 confusion as far as -- it's my understanding that on
19 cross, all of the questions that came out were going
20 to penalty mitigation, reliance of Respondent, and so
21 forth. And so I just wanted to clarify the effect on
22 the penalty calculation of an upgrade versus repair.
23 And -- and if the tank had not been installed
24 properly --

25 THE COURT: Well, it's my --

1 MS. BEAVER: -- in other words --

2 THE COURT: It's my understanding that that was
3 gone through adequately, and that Mr. Cernero --
4 Cernero --

5 THE WITNESS: Cernero.

6 MS. BEAVER: Cernero.

7 THE COURT: -- has adequately explained that,
8 and there's no necessity for you and -- to redirect
9 on every one of these points. Because I want to
10 know, too, when is EPA going to complete its case?

11 MS. BEAVER: Well, Your Honor, I mean I must
12 admit that I was thrown off to have both counsels do
13 extensive crosses. And so I was simply going through
14 points that I felt like needed to be clarified.

15 But maybe Your Honor doesn't need them to be
16 clarified. And so those are the only questions I had
17 on upgrade. I wasn't necessarily going
18 point-by-point as much as I was trying to hit points
19 that I thought needed to be clarified.

20 THE COURT: Well, we'll take a short recess now.
21 But what I want to find out is when is EPA going to
22 complete its case? And then it was my understanding,
23 when we scheduled this case -- and this can be off
24 the record.

25

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

3 THE COURT: Back on the record. Complete your
4 questions, Ms. Beaver, and then we will take a
5 recess.

6 MS. BEAVER: Okay. Thank you, Your Honor.

7 I will go straight to the exhibit, then, Your
8 Honor.

9 There was -- I have what's been marked
10 Complainant's Exhibit 32, which is -- it's not in
11 there.

12 It's been marked Complainant's Exhibit 32, and
13 it's dated January 17, 2001, "Transmittal of the
14 Final Guidance on the Enforcement Principles outlined
15 in the 1984 Indian Policy."

16 There was testimony solicited about the Indian
17 policy, and I think this is the best evidence of what
18 is -- what is -- the Indian policy is and what
19 enforcement activities are allowable.

20 THE COURT: Yes.

21 MS. BEAVER: Under the Indian policy.

22 THE COURT: Is this a public document? Is it
23 available to the public, without --

24 MS. BEAVER: That's -- let's see.

25 MR. KELLOGG: Your Honor, we have no objection

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to the exhibit.

THE COURT: Yes.

MS. BEAVER: And so basically, I mean, Your Honor, I would -- I would desire to have the witness read into evidence a couple of portions, you know, and if --

THE COURT: Well, Mr. Kellogg has indicated that Respondent has no objection to the exhibit, so Exhibit 32 is admitted into evidence.

MS. BEAVER: And -- and again, Your Honor, this exhibit is admitted so that Your Honor could have the -- the actual policy. This is not entered to waive our previous objections to the relevance and materiality of the discussion of, you know, what's done with Indian tribes.

It's really for Your Honor to have an accurate review of what's actually allowed. Because there was testimony that was brought out that needed to be clarified with the best evidence available, and that's the policy itself.

THE COURT: Well, it's -- it has been admitted, so you may ask Mr. Cernero those questions that you plan to.