UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

| | | |
|---|---|---|
| **In the Matter of** | ) | |
| | ) | |
| **B&R Oil Company, Inc.,** | ) | **[UST] Docket No. RUST-007-91** |
| | ) | |
| **Respondent** | ) | |

**INITIAL DECISION**

By: Carl C. Charneski

Administrative Law Judge

Issued: September 4, 1997

Washington, D.C.

Appearances

For Complainant: Thomas Nash

Assistant Regional Counsel

U.S. Environmental Protection Agency

Region 5

Chicago, Illinois

For Respondent: James F. Groves

Hardig, Lee & Groves

South Bend, Indiana

I. Introduction

This case arises under the Resource Conservation and Recovery Act, as amended ("RCRA"). 42 U.S.C. § 6901 *et seq.* The U.S. Environmental Protection Agency ("EPA") charges B&R Oil Company, Inc. ("B&R Oil"), with one count of violating Section 9003 of RCRA. 42 U.S.C. § 6991b. Specifically, EPA alleges that B&R Oil failed to timely demonstrate, as required by statute, financial responsibility for taking corrective action and compensating third parties in the event of an accidental release arising from respondent's operation of certain petroleum underground storage tanks ("USTs"). EPA seeks a civil penalty of $76,601 for the cited Section 9003 violation.[(1)]

A hearing was held in this matter on June 18, 1996, in South Bend, Indiana. For the reasons set forth below, it is held that B&R Oil violated RCRA Section 9003 as alleged by EPA. A civil penalty of $60,000 is assessed for this violation.

## II. The Statute and Regulations

Section 9003 of RCRA is titled, "Release, detection, prevention, and correction regulations." Section 9003(a) provides in part that the Administrator "shall 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).

Pursuant to the mandate of RCRA Section 9003, the Administrator published regulations concerning USTs on September 23, 1988. *See* 53 Fed. Reg. 37082. These regulations are codified at 40 C.F.R. Parts 280 and 281. This case involves the Part 280 regulations. Part 280 addresses "Technical Standards And Corrective Action Requirements For Owners And Operators Of Underground Storage Tanks." In particular, Subpart H of Part 280 contains the "Financial Responsibility" provisions. The regulatory provisions involved in this case are discussed below.

### 40 C.F.R. 280.91(b)

Section 280.91(b) requires that owners and operators of between 100 and 999 petroleum underground storage tanks comply with the financial responsibility provisions of 40 C.F.R. Part 280, Subpart H, by October 26, 1989.

### 40 C.F.R. 280.93

Section 280.93(a) requires that owners and operators of petroleum underground storage tanks "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 underground storage tanks." Section 280.93(a)(1) further requires a minimum of $1 million per occurrence financial responsibility where the USTs are located at petroleum marketing facilities.

While Section 280.93(a) addresses "per-occurrence" financial responsibility coverage, Section 280.93(b) addresses "annual aggregate" coverage. In that regard, Section 280.93(b)(2) requires a minimum aggregate financial responsibility coverage of $2 million for owners or operators of 101 or more underground storage tanks.

40 C.F.R. 280.94(a)(1)

For purposes of establishing financial responsibility, Section 280.94(a)(1) provides that compliance can be achieved by use of any one, or a combination, of the mechanisms listed in 40 C.F.R. 280.95 through 280.103. These financial responsibility assurance mechanisms include self-insurance (§ 280.95), guarantee (§ 280.96), insurance and risk retention group coverage (§ 280.97), surety bond (§ 280.98), letter of credit (§ 280.99), state-required mechanism (§ 280.100), state fund or other state assurance (§ 280.101), trust fund

(§ 280.102), standby trust fund (§ 280.103), local government bond rating test (§ 280.104), and local government financial test (§ 280.105).

III. Facts

The underlying facts of this case essentially are undisputed. B&R Oil is a privately held company incorporated in the State of Indiana. Answer, ¶ 1; Tr. 130. Virtually all of B&R Oil's activities involve the distribution of petroleum products. Part of this petroleum distribution business involves the developing of what are commonly referred to as "convenience stores." Typically, B&R Oil purchases the land, erects the building, and then leases the operation to a retailer. B&R Oil then serves as the sole fuel supplier for the convenience store. Tr. 132-135.

B&R Oil owns or operates more than 101 underground storage tanks within the meaning of Sections 9003(3) and (4) of RCRA. *Id.* In

fact, B&R Oil owned 138 underground storage tanks at approximately 35 service facilities in Indiana at the time of the events which resulted in the present EPA complaint. Tr. 160; Resp. Br. at 3. Because B&R Oil owned more than 101 USTs, it was one of nine such companies randomly selected by EPA to submit to the Agency a certification of financial responsibility for its underground storage tanks. EPA made this request for certification of financial responsibility in 1990, pursuant to Section 9005 of RCRA. Tr. 19.[(2)] A summary of this information request, and the subsequent events leading up to this litigation, follow.

A. The Correspondence Between EPA and B&R Oil

In EPA's Section 9005 information request letter to B&R Oil, dated June 15, 1990, the Agency explained that because the company was a petroleum marketer which owned between 100 and 999 USTs, it was subject to the financial responsibility provisions of 40 C.F.R. Part 280, Subpart H. EPA therefore requested that respondent "demonstrate coverage in the amounts of $1 million per occurrence and $2 million annual aggregate." The purpose of this financial coverage is to ensure that in the event of an accidental underground storage tank release the owner and, or, operator has the capability to pay for any corrective action and resulting third party liability. Compl. Ex. 1; Tr. 16-17.

B&R Oil responded to EPA's information request in a letter dated July 5, 1990. The company's response in part read:

B&R Oil Co. owns and operates underground storage tanks in two states - Michigan and Indiana. All tanks are properly registered with the appropriate regulatory agencies. All locations comply with current regulations dealing with leak detection, spill and overfill protection, and cathodic protection. Many of those same locations comply completely with the regulations that affect tank installations by December 1998....

The state of Michigan had developed the Michigan Underground Storage Tank Financial Assistance Fund ... as a marketers financial responsibility program. The program meets all criteria necessary to be a complete financial assurance program, including third party liability and off site cleanup....

*The state of Indiana has also developed a financial responsibility program to begin July 1, 1990. The exact details of the program are still being worked out* .... In the event that

the fund is inadequate we are seeking "wrap around" policies from the private insurance sector.

* * * * *

During the time between the original deadline for compliance (October 26, 1989) and now, the State of Indiana developed the program outlined in this letter. We have contributed $23,490.00 to the fund through May of 1990. Additionally we will contribute $27,000.00 to the program once the new program is in place (July 1, 1990). Our projected annual expense for the Indiana UST fund is $40,600.00. *It seems unreasonable to expect us to also provide full coverage from a private carrier (projected cost + $75,000.00) when Indiana is developing a good financial assurance program.*

Compl. Ex. 2 *(Emphasis added)*.

EPA responded to B&R Oil in a letter dated October 24, 1990. *See* Compl. Ex. 3. Citing 40 C.F.R. 280.101(a), EPA informed B&R Oil that reliance upon the Indiana tank fund as a financial assurance mechanism to demonstrate financial responsibility under Part 280, Subpart H, would be proper *only* "if the Regional Administrator determines that the state's assurance is at least equivalent to the financial mechanisms specified in [Subpart H]." EPA stated further that the Indiana Department of Environmental Management ("IDEM") "has *not* formally submitted their state fund to the U.S. EPA for approval," and that the Agency did not anticipate the formal submission of the fund until sometime in 1991. *(Emphasis added.)* Accordingly, EPA concluded, "at this time you *cannot* use Indiana's fund as your financial responsibility mechanism." *(Emphasis added.)* EPA went on to demand that B&R Oil demonstrate coverage in the amounts of $1 million per occurrence, and $2 million annual aggregate, to pay for corrective action and third party liability cost in the event of a UST release.

B&R Oil responded to EPA by letter dated October 31, 1990. *See* Compl. Ex. 4. In this letter, the respondent acknowledged that "[b]ecause the IDEM has not applied for certification of the Indiana tank fund, *we cannot show financial responsibility* in the manner prescribed by Subpart H of 40 CFR Part 280." *(Emphasis added.)* B&R continued: "It is our position that the [Indiana tank] fund serves as our financial responsibility program. *However your letter states that we are incorrect in the position that the fund can be our program*." *(Emphasis added.)* After recounting the difficulties in obtaining private insurance

for its underground storage tanks, B&R Oil stated that they had "discontinued further efforts to obtain private coverage because of the state fund." B&R Oil then opined that its efforts were "best spent" working with the IDEM to get the state tank fund approved by EPA and, as to that endeavor, B&R Oil requested EPA's assistance.

On April 24, 1991, EPA sent a Notice of Violation to B&R Oil notifying the respondent that it was in violation of the Resource Conservation and Recovery Act for failing to satisfy the financial responsibility requirements relating to its USTs. *See* Compl. Ex. 5. B&R Oil responded to EPA by stating that it expected that an amended Indiana Underground Storage Tank Excess Liability Fund ("ELF") would be signed into law and that the state tank fund, as amended, would receive EPA certification as an allowable financial mechanism. *See* Compl. Ex. 6.

B. Indiana's Request For Formal Review By EPA

At the time that the events in this case occurred, Gerald Phillips was responsible for EPA Region V's underground storage tank program. Tr. 16. Phillips testified that for the period of time referenced in EPA's complaint, the State of Indiana's tank fund, *i.e.*, the Excess Liability Fund, did not satisfy the financial responsibility provisions of 40 C.F.R. Part 280, Subpart H.[(3)]

Phillips testified that in early 1990, the IDEM had asked EPA to look at a bill that had been introduced in the Indiana state legislature regarding the establishment of a financial responsibility mechanism for underground storage tanks. According to Phillips, EPA found problems with this proposed state legislation and informed the IDEM that if enacted into state law it would be an unacceptable financial mechanism for purposes of Part 280, Subpart H, compliance. Tr. 25, 52-54. Phillips added that the IDEM, in approaching EPA in early 1990, "clearly indicated that they just wanted technical assistance" as to what it would take to make the ELF an acceptable financial mechanism. Tr. 68.

Subsequently, the ELF bill was modified by the state, apparently to address the concerns raised by EPA to the IDEM. In July, 1991, the State of Indiana formally submitted the ELF to EPA for approval. Tr. 25-26. EPA considered B&R Oil to be in compliance with Part 280, Subpart H's, financial responsibility provisions once Indiana "formally" sought the Agency's review of its tank fund provisions. Tr. 54, 68-69.

IV. Discussion

A. The Violation

EPA argues that B&R Oil failed to comply with three regulatory requirements of 40 C.F.R. Part 280, Subpart H, and that this failure constitutes a single violation of RCRA Section 9003. The regulatory requirements cited by EPA are: Section 280.91(b), setting a compliance date of October 26, 1989, for the Part 280, Subpart H provisions; Section 280.93(a)(1), setting a minimum financial responsibility coverage of $1 million per occurrence and $2 million annual aggregate; and Section 280.94, requiring owners and operators of petroleum USTs to demonstrate financial responsibility by way of the allowable mechanisms set forth in Section 280.95 through Section 280.103.

On the basis of the record in this case, it is found that EPA has established by a preponderance of the evidence that B&R Oil violated the UST financial responsibility provisions of 40 C.F.R. Part 280, Subpart H. Furthermore, respondent's failure to comply with the Part 280, Subpart H, provisions constitutes a violation of Section 9003 of RCRA.

As explained earlier, by virtue of B&R Oil's owning or operating more than 101, but less than 999, underground storage tanks, it was to have achieved compliance with the applicable Part 280, Subpart H, underground storage tank financial responsibility provisions no later than October 26, 1989. 40 C.F.R. 280.91(a). By that date, respondent was to have secured financial coverage of at least $1 million per occurrence, and $2 million annual aggregate, in order to pay for corrective action, or to compensate third parties for bodily injury or damage, resulting from any accidental tank releases. 40 C.F.R. 280.92. In addition, respondent was required to set forth the Section 280.95 through 280.103 allowable financial mechanisms relied upon to meet its Part 280, Subpart H, financial responsibility obligations.

40 C.F.R. 280.94.

B&R Oil does not take issue with the fact that October 26, 1989, was the compliance date for the Part 280, Subpart H, UST financial responsibility provisions. Nor does B&R Oil take issue with EPA's assertion that it didn't obtain the minimum $1 million per occurrence, and $2 million annual aggregate, coverage through an approved financial mechanism, or combination

of mechanisms, set forth in 40 C.F.R. 280.95 through 280.103. Finally,

B&R Oil also does not take issue with the fact that the State of Indiana's Excess Liability Fund was not an EPA approved underground storage tank program within the meaning of 40 C.F.R. Part 280 on October 26, 1989. Indeed, in its correspondences with EPA on the subject of UST financial responsibility, B&R Oil readily admitted that it was unable to show "financial responsibility in the manner prescribed by Subpart H of 40 CFR Part 280." Compl. Ex. 4.

Nonetheless, B&R Oil still maintains that it cannot be held liable for violating the financial responsibility provisions of Part 280, Subpart H. In that regard, B&R Oil argues that the EPA enforcement action is invalid because the Agency has arbitrarily singled it out for prosecution. Resp. Br. at 8. Respondent contends that EPA "has chosen to prosecute B&R and ignore the rest of the industry," thus abusing its prosecutorial discretion. Resp. Br. at 15; *see also,* Resp. Br. at 8-17. Finally, B&R Oil states that EPA's reliance upon the Paperwork Reduction Act as a reason for not conducting a broader Part 280, Subpart H, financial responsibility investigation than was done in this case is improper and supports a dismissal of the complaint. Resp. Br. at 17-18.

B&R Oil's argument that it was "singled out" for prosecution by EPA, and that the Agency's enforcement action in this case is otherwise flawed, are arguments not well-taken. The record evidence simply does not support respondent's assertions. In that regard, the contrary testimony of Gerald Phillips, formerly the chief of EPA's Region V underground storage tank program, as to the propriety of EPA's enforcement conduct is given considerable weight.

Phillips' testimony adequately explains why Region V focused its UST enforcement efforts upon the State of Indiana, and why only B&R Oil was cited for a violation of Part 280, Subpart H. Phillips testified that at the time that the events in this case occurred, Indiana was the only state in Region V which did not have a state financial mechanism approved by EPA. Tr. 18. He stated that no enforcement action was taken in Wisconsin, a Region V state, because that state's financial mechanism plan had been submitted to EPA for formal review. Tr. 50-51. Phillips further testified that the States of Michigan and Illinois, also included in Region V, likewise had acceptable financial mechanism plans up until around the time of the hearing in this

case, when both state plans were declared insolvent. Tr. 55-60. At that point, the State of Michigan entered into an agreement with EPA whereby the state would ensure financial responsibility compliance with the UST program. Tr. 62.

Insofar as Indiana is concerned, Phillips testified that there were as many as 37 petroleum marketers in the state which, like B&R Oil, owned or operated more than 100, but less than 999, underground storage tanks. The fact that EPA requested financial information from only 9 of these 37 companies does not alone suggest that the Agency acted arbitrarily and capriciously as respondent asserts. *See* Tr. 37-38. The key here is that the 9 companies that were chosen by EPA for the Part 280, Subpart H, financial responsibility survey were selected randomly. The fact that EPA proceeded against only B&R Oil for violating the subject financial responsibility provisions is not evidence of prosecutorial indiscretion given the fact that of the 9 petroleum marketers approached by EPA, only respondent was unable to show proper financial responsibility coverage.

In sum, there is simply no evidence in the record showing that the respondent was improperly targeted by EPA for enforcement action. As Phillips testified: "Since we had Indiana without state mechanism coverage and since the period of time that Indiana did not have a mechanism is relatively short ... we brought action against one facility." Tr. 55. Given the aforementioned testimony of former Region V UST program chief, Gerald Phillips, B&R Oil's assertion that the company was unlawfully singled out for prosecution must fail. The record contains adequate justification for EPA's proceeding against the respondent in this matter.[(4)]

B. The Penalty Assessment

Section 9006(d) of RCRA, 42 U.S.C. § 6991e(d), provides the statutory authority for the assessment of a civil penalty in this case. Section 9006(d) in part provides:

(2) Any owner or operator of an underground storage tank who fails to comply with --

(A) any requirement or standard promulgated by the Administrator under section 6991b of this title; ...

shall be subject to a civil penalty not to exceed $10,000 for each tank for each day of violation.

42 U.S.C. § 6991e(d)(2)(A).

While RCRA Section 9006(d) provides for the daily maximum penalty assessment of $10,000 per tank, it is RCRA Section 9006(c) which provides specific guidance for determining the appropriate penalty amount. Section 9006(c) states:

Any order issued under this section shall state with reasonable specificity the nature of the violation, specify a reasonable time for compliance, and assess 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.*

42 U.S.C. § 6991e(c) *(Emphasis added).*

Here, EPA seeks a civil penalty of $76,601. The complainant calculated this proposed penalty in accordance with the "U.S. EPA Penalty Guidance for Violations of UST Regulations." Compl. Ex. 9. The actual penalty calculations of the Agency are contained in complainant's Exhibit 8, "UST Penalty Calculation Worksheet."

In the penalty calculation worksheet, EPA took into account what it believed was the "economic benefit" to B&R Oil as a result of its non-compliance with the UST financial responsibility regulations, the seriousness of the violation, and the negligence of the respondent.[(5)] Breaking down the penalty calculation of $76,601, EPA determined that the Gravity-Based Component (*i.e.*, the gravity, negligence, ESM, and days of non-compliance factors) amounted to a penalty of $3,938. EPA assigned the lion's share of the proposed penalty to the Economic Benefit Component (i.e., the money that it contends B&R Oil saved by not complying with the financial responsibility regulations). EPA determined the Economic Benefit Component to be $72,663. Compl. Ex. 8 at 3.

Considering the record as a whole, the evidence supports the assessment of a civil penalty of $60,000. Clearly, B&R Oil's reliance upon the Indiana Excess Liability Fund to satisfy the Part 280, Subpart H, financial responsibility provisions, prior to its submission for EPA approval, violated Section 9003 of RCRA. The facts which support a finding of violation are all but admitted by respondent. The assessment of an appropriate monetary sanction for the violation, however, poses a more difficult issue.

A particularly relevant factor for penalty assessment purposes is the conduct of B&R Oil prior to the complaint being filed by EPA in this case. As shown in complainant's Exhibits 1 through 6, respondent was informed that it was not in compliance with the UST financial responsibility provisions of Part 280, Subpart H, well in advance of any enforcement action being taken by EPA. Indeed, B&R Oil acknowledged that it was not in compliance with Part 280, Subpart H, and insisted on relying upon an Indiana state fund which it knew had not as yet been submitted to the Administrator for approval. In short, B&R Oil ignored the enforcement warnings of EPA and knowingly cast its lot with a state tank fund which did not satisfy the applicable financial responsibility regulations. Accordingly, given these facts, it is found that B&R Oil was highly negligent in not complying with the Part 280, Subpart H, financial responsibility provisions.

To be sure, obtaining adequate underground storage tank insurance coverage prior to the State of Indiana's submission of the Excess Liability Fund to EPA was not an easy matter. Respondent's witnesses, Ralph Dobson and Mark Dobson, documented the company's attempts to obtain private insurance. These witnesses essentially testified that it was impractical at best, and impossible at worst, to obtain the necessary insurance because either the premiums were too high, or the liability coverage was inadequate. Tr. 155, 166-172, 203. In fact, even EPA witness Gerald Phillips conceded that obtaining private insurance was an expensive proposition, and also that there was a limited insurance market. Tr. 32-33.

Nonetheless, while insurance may have been expensive, and even difficult to obtain, B&R Oil steadfastly relied upon a state fund to meet its regulatory financial responsibility obligations, even though it was aware that the state fund did not comply with 40 C.F.R. Part 280, Subpart H. Other than requesting insurance premium quotations, B&R Oil took no steps to ensure that it had the financial mechanisms available to cover at least $1 million per occurrence, and $2 million aggregate, in the event of an accidental petroleum release.

In that regard, B&R Oil did not seek to obtain coverage with the insurance carrier Petromark prior to that company's going out of business (an event which the record does not suggest respondent anticipated and for that reason did not purchase coverage). Tr. 172, 178, & Compl. Ex. 2. Nor did the respondent seek to obtain even partial insurance coverage. While obtaining partial insurance coverage could not serve as a defense to the Part 280,

Subpart H, charges, it is a factor which could have been considered favorable to respondent in mitigation of the penalty.

Aside from the seriousness of the violation and the respondent's good faith effort to comply penalty criteria, another relevant factor here is the economic benefit derived by B&R Oil as a result of its noncompliance. *See U.S. v. EKCO Housewares, Inc.*, 62 F.3d 806, 814 (6th Cir. 1995). As noted, EPA concluded that the economic benefit to respondent in this case was $72,663. Compl. Ex. 8. The key figure in this calculation was an "Avoided Expenditures" of $86,000. EPA witness George Halloran testified that EPA received an insurance binder figure of $43,000 for a company the size of B&R Oil to obtain adequate insurance coverage for underground storage tanks. Complainant then multiplied that figure by the roughly two years that respondent was in noncompliance. Tr. 83-85.[(6)]

After performing other calculations identified in Exhibit 8, EPA concluded that B&R Oil received an economic benefit of $72,663 due to its failure to comply with the subject financial responsibility provisions. In other words, EPA submits that B&R Oil ultimately benefited in the amount of $72,663 over a two-year period for its noncompliance with 40 C.F.R. Part 280, Subpart H.

B&R Oil challenges EPA's economic benefit analysis. Respondent argues that because it was unable to obtain insurance coverage for all of its tanks, in an amount sufficient to satisfy the regulations concerning financial responsibility, it was improper for EPA to consider these so-called "avoided costs." Resp. Br. at 23.

B&R Oil's argument is supported by the testimony from both sides, discussed *supra*, that insurance coverage for underground storage tanks was difficult to obtain. This, on the one hand, raises some question as to the validity of the $86,000 avoided expenditures figure. On the other hand, however, the avoided expenditures figure used by EPA can be said to be a conservative estimate of obtaining coverage in an admittedly high-priced insurance market. As such, it is a factor appropriately considered in the penalty assessment portion of this case.

B&R Oil alternatively argues that if these avoided expenditures are taken into account, they should be reduced by the amount of payments that the respondent made into the State of Indiana Excess Liability Fund. Resp. Br. at 24. This argument is easily defeated. Payment into the state tank fund constitutes a legal

obligation separate and apart from respondent's obligation to comply with the Federal regulations contained in Part 280, Subpart H.

Finally, B&R Oil argues that avoided expenditures considered by EPA in proposing a penalty should be reduced by the expenditures that respondent has made to comply with (and in its view exceed) other environmental regulations. *Id.* For the same reason mentioned above, this argument likewise must fail.

In sum, taking into account the seriousness of the violation, the respondent's efforts to comply with the applicable Part 280, Subpart H, regulations, and the economic benefit received by B&R Oil as a result of its noncompliance, the respondent is assessed a civil penalty of $60,000. The bulk of this penalty assessment is due to respondent's insistence on relying upon a state tank fund which it knew was not to be an approved financial mechanism under Part 280, Subpart H. The fact that the penalty is less than that sought by EPA constitutes a recognition that underground storage tank insurance was not so easy to obtain and that respondent at least made some inquiries in this area. This limited effort did not, however, relieve B&R Oil of its obligation to comply with the regulations.

## ORDER

For the foregoing reasons, B&R Oil Company, Inc., is ordered to pay a civil penalty of $60,000 pursuant to Section 9006 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6991e, for violating the financial responsibility provisions of 40 C.F.R. Part 280, Subpart H.

Payment of this penalty shall be made within 60 days of the date of this order. Payment shall be made by mailing, or presenting, to the Regional Hearing Clerk, U.S. EPA Region V, P.O. Box 70753, Chicago, Illinois, 60673, a cashier's or certified check, made payable to the Treasurer of the United States.[(7)]

Carl C. Charneski

Administrative Law Judge

1. EPA filed an amended complaint on May 29, 1996, in which it requested the assessment of a $76,601 penalty.

2. Section 9005(a) in part provides:

For the purposes of developing or assisting in the development of any regulation, conducting any study[,] taking any corrective action, or enforcing the provisions of this subchapter, any owner or operator of an underground storage tank ... shall, upon request of ... the Environmental Protection Agency... furnish such information relating to such tanks, their associated equipment, their contents, conduct monitoring or testing, permit such officer at all reasonable times to have access to, and to copy all records relating to such tanks and permit such officer to have access for corrective action.

42 U.S.C. § 6991d(a).

3. In discussing this state request for EPA review, EPA refers to a correspondence between the Agency and the IDEM, marked as Exhibit 3 in B&R Oil's prehearing exchange. Compl. Br. at 10. EPA's reliance upon this document is misplaced, however, inasmuch as it was not introduced into evidence by either party. Accordingly, this letter is not a part of the record in this case.

4. For the same reason, respondent's Paperwork Reduction Act ("PRA") defense must also fail. Respondent essentially argued that EPA improperly relied upon the PRA as an excuse for proceeding against only 9 of 37 similarly situated companies. *See* Resp. Br. at 17. As discussed above, the record establishes that EPA's enforcement related actions in this case were appropriate.

5. Included in the consideration of these factors was the number of days in which B&R Oil was out of compliance with the UST regulations, as well as the Environmental Sensitivity Multiplier, or "ESM." The ESM is based on the potential or actual environmental impact at the site. *See, e.g.,* Compl. Ex. 8 at 3 & Compl. Ex. 9 at 21.

6. In calculating the proposed penalty, EPA determined that the period of noncompliance ranged from October 26, 1989, to May 13, 1991, a period actually less than two years. Tr. 84. At the hearing, it was established that the period of noncompliance, while still less than two years, extended from October 26, 1989, to July 1991, when Indiana submitted its ELF fund to the Administrator for approval. Thus, the avoided expenditures were somewhat less than those calculated by EPA. For purposes of the penalty assessment in this case, however, EPA's miscalculation of the avoided expenditures has no significance.

7. Unless this decision is appealed to the Environmental Appeals Board ("EAB") in accordance with 40 C.F.R. 22.30, or unless the EAB elects to review this decision *sua sponte*, it will become a final order of the EAB. 40 C.F.R. 22.27(c).