

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR**

**In the matter of** )  
 )  
**Euclid of Virginia, Inc.,** ) **Docket No. RCRA-3-2002-0303**  
 )  
**Respondent** )

**INITIAL DECISION**

By: Carl C. Charneski  
Administrative Law Judge

Issued: November 9, 2006  
Washington, D.C.

**Appearances**

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**I. Statement of the Case**

This civil penalty proceeding arises under Section 3008(a) of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976 (“RCRA”), as amended by the Hazardous and Solid Waste Amendments of 1984. 42 U.S.C. § 6928(a). The U.S. Environmental Protection Agency (“EPA”), Region 3, charges Euclid of Virginia, Inc. (“Euclid”), with violating Subtitle I of RCRA, 42 U.S.C. §§ 6991-6991i, the Federal Underground Storage Tank (“UST”) regulations, and the UST regulations of the District of Columbia, the State of Maryland, and the Commonwealth of Virginia (collectively referred to as the “State regulations”).

In the First Amended Complaint, EPA alleges 70 violations of the Federal and the State UST regulations at 23 facilities owned and, or, operated by Euclid in the District of Columbia, Maryland, and Virginia. These counts involve the Underground Storage Tank regulations as they relate to tank release detection, line release detection, corrosion protection, overfill protection, spill protection, and financial responsibility for the USTs.<sup>1</sup>

EPA requests that a civil penalty of \$3,362,149 be assessed against Euclid for the 70 UST counts at issue in this case.<sup>2</sup> EPA also requests that a Compliance Order be issued directing respondent to take certain remedial action to ensure compliance with the UST regulations. Compl. Br. at 409. Euclid denies the charges of violation as set forth in the First Amended Complaint. A hearing was held in this matter in Washington, D.C., beginning on January 8, 2004,

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<sup>1</sup> EPA initially alleged 74 UST violations in the First Amended Complaint, but subsequently withdrew Counts 19, 64, 65, and 72. Also, portions of Count 18 were dismissed without prejudice. TR-1 at 34-40. (This citation format refers to Volume 1 and transcript pages 34 to 40.) See Compl. Br. at 2.

<sup>2</sup> Section 9006(d)(2) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6991e(d)(2), provides that any owner or operator of an underground storage tank who fails to comply with any requirement promulgated under Section 9003 of RCRA, 42 U.S.C. § 6991b, or any requirement or standard of a State program authorized pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991c, shall be liable for a civil penalty not to exceed \$10,000 for each tank for each day of violation. Pursuant to the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, RCRA violations which occur subsequent to January 30, 1997, are subject to a new statutory maximum of \$11,000 per violation per day. See 40 C.F.R. Part 19 (“Adjustment of Civil Monetary Penalties for Inflation”).

EPA’s penalty proposal of \$3,362,149 reflects a slight reduction in the penalty amount requested in the First Amended Complaint. EPA reached this penalty proposal amount by applying the *U.S. EPA Penalty Guidance for Violations of UST Regulations* (also known as the “Penalty Policy”). CX Y-13. See Compl. Br. at 280-401 for specific penalty calculations.

and concluding on February 5, 2004.<sup>3</sup>

For the reasons set forth below, it is held that EPA has established the violations alleged in whole, or, in part, as to 69 of the counts charged in the First Amended Complaint. A civil penalty of \$3,085,293 is assessed for these violations and EPA's request for a Compliance Order is granted. 42 U.S.C. § 6991e(d)(2).<sup>4</sup>

## **II. The UST Regulations**

This case involves the Federal Underground Storage Tank regulations promulgated by EPA pursuant to Section 9003 of RCRA. 42 U.S.C. § 6991b. This case also involves the State Underground Storage Tank regulations adopted by the District of Columbia, Maryland, and Virginia. The State UST regulations were approved by EPA pursuant to Section 9004(b)(1) of RCRA, 42 U.S.C. § 6991c(b)(1), and upon their approval served to operate in lieu of the Federal UST regulations. 42 U.S.C. § 6991c(d)(2).<sup>5</sup> With respect to the District of Columbia and Virginia, some of the events in this case occurred while the Federal UST regulations were applicable and some of the events occurred after the State UST regulations took effect. In such instances, both sets of regulations come into play. With respect to Maryland, only the State UST regulations are at issue.

The Federal UST regulations are found at 40 C.F.R. Part 280. The District of Columbia UST regulations are set forth in the District of Columbia Municipal Regulations, Title 20,

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<sup>3</sup> Pursuant to 40 C.F.R. 22.25, the parties' Joint Motion To Conform The Transcript previously was granted.

<sup>4</sup> In Section 9006(c) of RCRA, 42 U.S.C. § 6991e(c), Congress sets forth the specific factors to be considered in determining a civil penalty for a RCRA violation. Section 9006(c) provides:

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).

<sup>5</sup> Section 9004(b)(1) of RCRA allows for the adoption of State UST programs if they are "no less stringent" than the corresponding standards promulgated by EPA. *Id.* Also, the State UST regulations are enforceable by EPA pursuant to Section 9006 of RCRA. 42 U.S.C. § 6991e.

Chapters 55 *et seq.* (“20 DCMR § 5500 *et seq.*”). The Maryland UST regulations are set forth in Section 26.10.02 *et seq.*, of the Maryland Department of the Environment’s Code of Maryland Regulations (“COMAR § 26.10.02 *et seq.*”). The Virginia UST regulations are set forth in the Virginia Administrative Code, Title 9, Agency 25, Chapter 580, Sections 10 *et seq.* (“9 VAC 25-580-10 *et seq.*”).

### **III. The Euclid Investigation**

This case involves 23 facilities owned and, or, operated by Euclid in the District of Columbia, Maryland, and Virginia, where respondent sells gasoline and diesel fuel. The President and Chief Operating Officer (“COO”) of Euclid is Mr. Koo Yuen. TR-12 at 188.

The present 70-count First Amended Complaint filed by EPA against Euclid was the product of a number of Federal and State inspections of the USTs and UST systems at these 23 facilities. These inspections took place between 2001 and 2003. They were conducted by EPA, the District of Columbia Department of Health (“DCDOH”), the Maryland Department of the Environment (“MDE”), and the Virginia Department of Environmental Quality (“VADEQ”).

In that regard, in March of 2001, VADEQ conducted an inspection of the Euclid Spotswood Trail facility in Ruckersville, Virginia. TR-1 at 107-108. Also, in March of 2001, EPA conducted an inspection of the Euclid facility at 420 Rhode Island Avenue, Washington, D.C. TR-3 at 181-182. The DCDOH participated in this EPA inspection and subsequently conducted its own inspections of Euclid facilities in 2001 and 2002. TR-2 at 207-208, 222-223, TR-3 at 21-24, 36-38, 45-51, 59-61, 65-69. In June of 2001, the MDE conducted a series of inspections in the cities of Hyattsville (TR-2 at 24), Brentwood (TR-2 at 42), Landover Hills (TR-2 at 59, 69), and Langley Park, Maryland (TR-2 at 73). In the Spring and Summer of 2001, it was decided among EPA, the District of Columbia, Maryland, and Virginia that the Federal government would take the lead in any enforcement action. TR-4 at 9.<sup>6</sup>

Aside from inspecting Euclid’s individual facilities, EPA also took a broad investigative approach concerning the company’s operations. For instance, on June 14, 2001, EPA conducted an inspection of respondent’s main corporate office in Washington, D.C. During this inspection, Euclid was asked to provide release detection records, inventory records, as well as records relating to the ownership of the facilities, including the USTs at these facilities. TR-4 at 5-6.

According to EPA, many of the records produced by respondent “were not responsive” to the Agency’s request. Compl. Br. at 26. Nonetheless, “[t]he EPA inspectors would flag anything which appeared to be pertinent,” and they “photocopied approximately seven boxes of documents, including a large number of what Euclid refers to as Daily Recap forms.” Compl. Br. at 27, citing TR-4 at 6-8 & CX Y-8 at 1206.

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<sup>6</sup> See Complainant’s Brief at 12-34, for a detailed discussion of the government’s investigation of Euclid.

Thereafter, on February 26, 2002, EPA submitted an informational request to Euclid pursuant to Section 9005 of RCRA, 42 U.S.C. § 6911d, concerning the company's UST compliance methods and activities. TR-4 at 14-15; CX Y-1. In response to this informational request, a meeting was held between EPA and Euclid beginning on April 22, 2002. TR-4 at 23, TR-15 at 131; CX Y-4.

During this meeting, Euclid's General Manager, Leon Buckner, explained respondent's methods of inventory control. Buckner subsequently prepared a draft declaration describing the company's inventory control methods. TR-4 at 24-26; CX Y-8. Although Buckner never signed this declaration, Euclid has stipulated that it accurately sets forth the company's methodology for taking its inventory. Stip. 6 (First Set).

EPA then met with company President and COO Koo Yuen on April 29, 2002. While there is some dispute as to what Yuen actually told EPA at this meeting, it was the belief of EPA Inspector Marie Owens that the information offered by Yuen was no different from the information earlier provided by the company's General Manager, Buckner. TR-15 at 131-132; *see* Compl. Br. at 28-29.

What is certain, however, is that EPA was dissatisfied with Euclid's response to its informational request. In that regard, complainant states, "[a]t the conclusion of the April, 2002, meetings, EPA made it clear to Euclid that EPA did not consider Euclid's response to be complete, and that EPA continued to require Euclid to provide answers to the many questions which Euclid had been unable to answer during the meetings." Compl. Br. at 30, citing TR-4 at 48. Ultimately, EPA never did receive from respondent what it believes is a complete and acceptable informational response. Thus, the government initiated the present enforcement action.

#### **IV. Summary of EPA's First Amended Complaint**

As noted, there are 70 counts charged in the First Amended Complaint. These counts can be grouped into the following six categories.

##### **Tank Release Detection**

Counts 1, 6, 9, 10, 15, 22, 30, 35, 39, 43, 47, 50, 54, 57, 62, and 70 involve tank release detection. They charge that respondent failed to provide adequate monthly methods by which to detect releases from its Underground Storage Tanks. The tank release detection counts involve 15 of respondent's 23 facilities.

##### **Line Release Detection**

Counts 2, 4, 7, 11, 12, 16, 20, 23, 24, 25, 27, 28, 31, 36, 40, 44, 48, 51, 55, 58, 63, 66, 68,

and 71 involve line release detection. They charge that respondent failed to provide adequate monthly or annual methods by which to detect releases from underground pressurized piping associated with its USTs and that it failed to conduct annual testing of line leak detectors required for the detection of catastrophic piping failure. The line release detection violations involve all of respondent's 23 facilities.

### **Corrosion Protection**

Counts 8, 13, 14, 17, 18, 32, 37, 41, 45, 52, 59, and 73 involve corrosion protection violations. They charge that respondent failed to provide adequate corrosion protection for underground metal tanks, failed to conduct adequate periodic testing and inspection of "cathodic protection systems" intended to protect underground metal tanks, and failed to isolate or protect metal pump and piping fittings which were in contact with the ground. The corrosion protection violations involve 10 of respondent's facilities.

### **Overfill Prevention**

Counts 21, 26, 29, 33, 42, 46, 49, 53, 60, and 74 involve overfill protection. They charge that respondent failed to maintain equipment to prevent the overfilling of Underground Storage Tanks by setting off an alarm or shutting down the flow of petroleum into tanks at specified levels prior to overfilling. The overfill prevention counts involve 10 of respondent's facilities.

### **Spill Protection**

There is only one spill protection count. Count 34 charges that respondent failed to maintain adequate containment at the fill ports of Underground Storage Tanks at one of its facilities so as to prevent any spills from entering the environment.

### **Financial Responsibility**

Counts 3, 5, 38, 56, 61, 67, and 69 allege a failure to maintain financial mechanisms to ensure the availability of clean-up funds in the event of a release of regulated substances from the Underground Storage Tanks. Seven of respondent's 23 facilities are involved in the financial responsibility counts. All seven facilities are located in the District of Columbia.

## **V. Respondent's "Notification to the States" Argument**

As an initial matter, Euclid claims that this case should be dismissed for lack of jurisdiction. Respondent specifically argues that the First Amended Complaint should be dismissed due to complainant's purported failure to notify the District of Columbia, Maryland, and Virginia of the UST violations at issue here, prior to the filing of the complaint, as required

by Section 9006(a)(2) of RCRA, 42 U.S.C. § 6691e(a)(2).<sup>7</sup> See Resp. Br. at 2-4.

Euclid maintains that “there is absolutely no evidence that any notification was given to any state officials that the instant Complaint or Amended Complaint was being filed.” Resp. Br. at 2. In addition, respondent cites to *Brenntag Great Lakes, LLC*, RCRA-05-2002-0001, 2002 WL 31926407 (December 19, 2002), a case decided by this Tribunal, as further support for its argument that EPA’s failure to notify the involved States prior to initiating the present enforcement action results in a loss of jurisdiction. Resp. Br. at 3.

While EPA opposes Euclid’s argument that this matter should be dismissed for failure to provide the proper state notification, it does appear to concede that there was no formal, written notification from EPA to the States informing them that the Federal government intended to bring an enforcement action against Euclid. EPA submits, however, that the provisions of RCRA Section 9006(a)(2) were nonetheless fully met inasmuch as the District of Columbia, Maryland, and Virginia were part of the investigative and prosecutorial team from beginning to end. Compl. R.Br. at 4-7. As explained below, the facts of this case support EPA’s position that there effectively was “notification” and that the complaint should not be dismissed.

In that regard, the record shows that EPA and the States acted in concert in preparing for, and in bringing, the present enforcement action against respondent. For example, in the Spring of 2001, EPA, the District of Columbia, Maryland, and Virginia, met and agreed that the Federal government would be the “clearing house” for the investigative information compiled on Euclid’s facilities which spread across the three states. TR-3 at 193-195, TR-4 at 4-5. A second meeting was held between EPA and the States in 2001, at which time it was determined that EPA would take the lead in any enforcement action against Euclid. TR-4 at 9-11. The States and EPA reached this decision because any case brought against Euclid would cut across state lines, and because it was EPA that had the experience in these matters, as well as the requisite technical and legal resources. *Id.*

Furthermore, subsequent to this 2001 meeting, EPA, the District of Columbia, Maryland, and Virginia held monthly conference calls to discuss the status of the enforcement action. TR-4 at 11-12. Finally, through various witnesses at the hearing, all three States actively participated in and fully supported EPA’s prosecution of the case. See TR-1 at 190, 242-244, TR-2 at 40-41, 80,

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<sup>7</sup> Section 9006(a)(2) of RCRA provides:

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

42 U.S.C. § 6991e(a)(2).



& TR-3 at 10, 27, 104.

This cooperative enforcement effort between the District of Columbia, Maryland, Virginia, and EPA easily lays to rest respondent's "long shot" argument that there was no Section 9006(a)(2) notification (42 U.S.C. § 6991e(a)(2)) and thus no jurisdiction. Acceptance of Euclid's argument would, under the facts of this case, lead to an absurd result, surely not one contemplated by Congress in the Resource Conservation and Recovery Act.

Euclid's reliance upon *Brenntag, supra*, fares no better. In that case, which also involved an EPA-approved state program under RCRA, it was held that because the state authorities knew that EPA would be bringing an enforcement action, "requiring EPA to give some sort of official notice to the state would be a pointless exercise, as it was the state who asked EPA to enforce the case." *Brenntag* at 6 n.4. If anything, *Brenntag* supports EPA's position on the notification issue in this case, and not Euclid's.

## **VI. Respondent's General Admissions**

As noted, in its First Amended Complaint, EPA charges Euclid with 70 counts of violating UST regulations at 23 facilities located in the District of Columbia, Maryland, and Virginia. In its Amended Answer, Euclid admits certain facts broadly applicable to these counts.

In that regard, Euclid admits that it is the owner and, or, operator of the cited USTs and UST systems and that the USTs and UST systems qualify as either "new tank systems" or "existing tank systems." Respondent also admits that the USTs and UST systems were used to store petroleum products, *i.e.*, "regulated substances," within the meaning of Section 9001(2) of RCRA, 42 U.S.C. § 6991(2), and that for the time periods at issue the USTs were not "empty" (except for two tanks at a Ruckersville, Virginia, facility that it claims had been pumped out and removed from service), as that term is defined in the regulations. Euclid further admits that the underground piping associated with the USTs routinely contained and conveyed regulated substances under pressure. *See* Amend. Ans. ¶¶ 3-7, 9, 30-34, 36, 44-50, 53, 62, 76-83, 85, 90, 94, 100, 114-118, 122, 131, 214-218, 220, 225-228, 230, 239-245, 247, 252, 277-284, 286, 293, 307-314, 316-317, & 323. *See also*, Stips. 14, 15, & 23 (First Set).

## **VII. The "Hennessy" and "Rotenberg" Expert Reports**

As noted, Euclid has been found in violation of the RCRA statute. Accordingly, for these violations a civil penalty must be assessed. As will be discussed, *infra*, one of the considerations in assessing a penalty in this matter is the "seriousness" of the particular violation. With respect to this seriousness penalty consideration, EPA has introduced into the record two expert reports examining the hazards that would be presented to human health and to the environment were a petroleum release to occur. Both reports identify the potential environmental and health hazards peculiar to each of Euclid's 23 facilities and assign a numerical value from "1" to "5," with "1" presenting the least hazardous circumstances and "5" presenting the most hazardous circumstances. Because the Hennessy and Rotenberg expert reports influence the penalty

assessment for each of the violations found in this case, their general conclusions are highlighted below.

### **A. The Expert Report of Joel Hennessy**

The expert report prepared by Joel Hennessy (also referred to as the “Hennessy Report”) addresses the potential for contamination of groundwater at each of Euclid’s 23 facilities, should a petroleum release occur.<sup>8</sup> The opinions expressed in the report “are based on hydrogeologic factors which control how releases can move through soil and contaminate groundwater resources or create exposure to vapor-phase contamination.” CX Y-22 at 1767.

The Hennessy Report states that gasoline is a petroleum hydrocarbon that may contaminate the soil and groundwater in the event of a release. *Id.* The Report explains:

Gasoline has a density less than water, and may form a separate phase which floats on the water table. This floating separate phase layer may be called a free product layer, and may also be called a Light Non-Aqueous Phase Liquid (LNAPL). Some of the chemical constituents of gasoline can dissolve into the groundwater, forming what is called a dissolved-phase plume of groundwater contamination. Some of the more common constituents of gasoline which can dissolve into the groundwater include benzene, toluene, ethylbenzene, and xylene (collectively referred to as “BTEX”), and methyl tertiary butyl ether (“MTBE”). These substances are in a class of chemical compounds known as volatile organic compounds. Groundwater flows in aquifers from areas of higher groundwater elevation or pressure head to areas of lower groundwater elevation or pressure head. Contamination dissolved within groundwater will also migrate as the groundwater flows. In this way, groundwater which becomes contaminated by gasoline can flow to wells, springs, and surface water streams where human and/or ecological receptors can be exposed to the contamination.

CX Y-22 at 1767.

The Hennessy Report also identified the hazards presented by the exposure to gasoline vapors. The Report states that “[v]olatile organic compounds in gasoline released to the

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<sup>8</sup> Joel Hennessy is a Geologist in the Technical and Program Support Branch, Waste and Chemicals Management Division, with EPA Region III. His duties “include evaluating the adequacy of hydrogeologic investigations conducted by facility owners and operators and their consultants to determine the extent of soil and groundwater contamination at the facilities, and evaluating proposed remedies for groundwater cleanup.” CX Y-22 at 1765.

subsurface can vaporize and migrate in the vapor phase into overlying and nearby buildings, such as homes or businesses, and expose humans via inhalation or create a risk of explosion.” CX Y-22 at 1767. It further states that vapor transport can occur in the subsurface through permeable soils or along preferential pathways such as backfill placed around buried utility lines such as gas, electric, water, phone, cable, storm sewer, sanitary sewer, underground tanks, and piping from tanks to dispensers. CX Y-22 at 1768. Thus, “urban areas may have a greater likelihood of rapid subsurface vapor transport to inhabited living space than less developed areas.” *Id.*

The Hennessy Report identified another hazard, stating that “[e]xposure to vapor is also a concern wherever dissolved-phase plumes of volatile organic compounds exist in groundwater, particularly where shallow contaminated groundwater lies beneath occupied buildings.” CX Y-22 at 1768. This presents a danger of volatile organic compounds in the groundwater vaporizing and contaminating the air in the unsaturated zone above the water table and thus contaminating the indoor air space in the overlying buildings in what is known as the “stack effect.” *Id.*

In providing groundwater use ratings for each of Euclid’s 23 facilities that are involved in this case, the Hennessy Report considered “(1) groundwater use, and (2) the likelihood that a release would contaminate the groundwater.” CX Y-22 at 1768. With respect to groundwater use, “[a]reas where groundwater is the only source of water and no public water supplies are available, or where the public water supply comes from groundwater, would be the most impacted.” *Id.* With respect to the likelihood that a petroleum release would contaminate the groundwater, the Report considered the “[d]epth to groundwater and soil type” as the two controlling factors. CX Y-22 at 1772. In general, the shallower the depth of the soil, the more likely that any such release would contaminate the groundwater. Also, permeable coarse-grained soil, such as sand, make it easier for a release to migrate to the groundwater, while finer-grained soil, such as clay, make it more difficult. *Id.*

Accordingly, as noted, the Hennessy Report evaluated each of respondent’s facilities and provided a specific “Groundwater Use Rating” and a “Likelihood that Release would Contaminate Groundwater” rating. These ratings are discussed, *infra*, in the penalty assessment segment of each violation.

## **B. The Expert Report of Dr. Samuel Rotenberg**

Another expert report submitted by EPA was prepared by Dr. Samuel Rotenberg (also referred to as the “Rotenberg Report”).<sup>9</sup> Like the Hennessy Report, the Rotenberg Report casts significant light as the seriousness of Underground Storage Tank violations found in this case. CX Y-23. First, Dr. Rotenberg identified a fire and explosion hazard when gasoline is released

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<sup>9</sup> Dr. Rotenberg is the Regional Toxicologist for EPA Region III. He is assigned to the Technical and Program Support Branch of the Waste and Chemicals Management Division. Dr. Rotenberg’s duties include evaluating, predicting, and quantifying toxic effects of chemicals found in the environment on humans. CX Y-23 at 1786.

into the soil, noting that this is a “particular concern in confined spaces, such as in the basements of homes or other structures.” CX Y-23 at 1786.

Next the Rotenberg Report addressed “two principal toxicological issues related to gasoline.” One issue is the “central nervous system (CNS) and irritant effects of vapor exposure.” The other issue is the “increased cancer risks from benzene in the gasoline,” a known human carcinogen that is usually present at one per cent of the gasoline volume. CX Y-23 at 1786-1787. Also, the Report noted that “no safe threshold of exposure exists for benzene” and that “any exposure increases the risk of cancer.” CX Y-23 at 1787.<sup>10</sup>

As in the case of the Hennessy Report, the Rotenberg Report analyzed each of the 23 Euclid facilities involved in this case, taking into account “population and exposure potential.” CX Y-23 at 1789. “The *population* factor simply represents how many people are expected to be near the facility (at any given time). Thus, sites that are in residential communities within the urban Washington D.C. area are expected to have a large number of people nearby that could be exposed if a release occurs.” CX Y-23 at 1789 (emphasis in original). “The *exposure potential* factor represents the degree to which an environmental pathway exists.” CX Y-23 at 1790 (emphasis in original).

Like the Hennessy Report, the Rotenberg Report evaluates the 23 Euclid facilities involved in this case using a “1” to “5” rating system, with “1” presenting the least hazardous conditions and “5” representing the most hazardous conditions. Also, Dr. Rotenberg grouped the facilities according to the likely risk to the surrounding population in the event of a petroleum release. “This grouping reflected the degree of urbanization surrounding each site, the presence of nearby residences, the direct use of groundwater as a drinking water source, and the likelihood that groundwater would become contaminated.” *Id.*

## **VIII. Discussion**

### **A. The Violations**

#### **1. The Tank Release Detection Violations**

##### **a. The Regulations**

The tank release detection regulations require owners and operators of Underground Storage Tanks to provide adequate monthly methods by which to detect releases from the USTs. Specifically, owners and operators of new and existing UST systems must provide a method, or

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<sup>10</sup> Dr. Rotenberg states that his report assumes that any exposure would be by means of “inhalation.” He further states, however, that “the central nervous system, irritant effects, and increased cancer risk from benzene are also the toxic effects of most concern should gasoline exposure occur by ingestion.” CX Y-23 at 1786.

combination of methods, of release detection monitoring that can detect a release from any portion of the tank, and the associated underground piping, that routinely contains product. 40 C.F.R. 280.40, 20 DCMR § 6000, COMAR § 26.10.05.01 & 9 VAC 25-580-130. Release detection is required unless the UST system is “empty.” 40 C.F.R. 280.70(a), 20 DCMR § 6100.7(a), COMAR § 26.10.10.01.A, & 9 VAC 25-580-310.1.<sup>11</sup>

The UST regulations provide that tanks that are part of a petroleum UST system must be monitored at least every 30 days for releases, using one of the methods listed in 40 C.F.R. 280.43(d) through (h), 20 DCMR §§ 6008 through 6012, COMAR §§ 26.10.05.04.E through I, and 9 VAC 25-580-160.4 through 8. 40 C.F.R. 280.41(a), 20 DCMR §§ 6003.2 through 6003.5, COMAR § 26.10.05.02.B & 9 VAC 25-580-140.1.

The UST regulations, however, provide two exceptions regarding the permissible methods for detecting tank releases. The first exception provides that new tanks or newly upgraded USTs may use a combination of “inventory control” and “tank tightness testing,” as prescribed by 40 C.F.R. 280.43(a) through ©, 20 DCMR §§ 6005 through 6007, COMAR §§ 26.10.05.04.B through D, and 9 VAC 25-580-160.1 through 3. Under the Federal program, and in Maryland and Virginia, inventory control and tank tightness testing may have been used only prior to December 22, 1998, or within 10 years after the tank is installed or upgraded under 40 C.F.R. 280.21(b), COMAR § 26.10.03.02.B, or 9 VAC 25-580-60, whichever is later. 40 C.F.R. 280.41(a), COMAR § 26.10.03.02.B, & 9 VAC 25-580-140.1.

This inventory control and tank tightness testing monitoring alternative was available in the District of Columbia only until December 22, 1995. After December 22, 1995, it was not available, regardless as to whether the tanks qualified as being new or newly upgraded. All of the tank release detection violations at issue in this case that occurred in the District of Columbia took place after this cut-off date. *See* 20 DCMR §§ 6003.3 & 6003.4.

The second tank release detection method exception applies to tanks with a capacity of 550 gallons or less. Such tanks may be tested using weekly tank gauging conducted in accordance with 40 C.F.R. 280.43(b), 20 DCMR § 6006, COMAR § 26.10.05.04.C, and 9 VAC 25-580-160.2.

Insofar as the present case is concerned, Euclid claims to have conducted “inventory control” and “tank tightness testing” with respect to the gasoline and diesel USTs involved in all of the tank release detection counts, with the exception of the tanks involved in Count 10.<sup>12</sup>

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<sup>11</sup> A UST system is “empty” when all materials have been removed using commonly employed practices so that not more than 2.5 centimeters, or one inch, of residue, or 0.3 percent by weight of the total capacity, remains in the system. 40 C.F.R. 280.70(a), 20 DCMR § 6100.7(a), COMAR § 26.10.10.01, & 9 VAC 25-580-310.1.

<sup>12</sup> “Inventory control” is a method of release detection for tanks used to meet the requirements of 40 C.F.R. 280.41(“Requirements for petroleum UST systems”). With respect to

Respondent also claims to have engaged in “automatic tank gauging” for each of these USTs, with the exception of the tanks involved in Count 35.<sup>13</sup> With respect to the used-oil tanks (also known as “waste oil” tanks), Euclid engaged in “manual tank gauging.”<sup>14</sup> Regarding the four USTs involved in Count 35, Euclid also claims to have utilized “interstitial monitoring” to satisfy its tank release detection obligations.<sup>15</sup>

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inventory control, Section 280.43(a) states, in part, “[p]roduct inventory control (or another test of equivalent performance) must be conducted monthly to detect a release of at least 1.0 percent of flow-through plus 130 gallons on a monthly basis.” 40 C.F.R. 280.43(a).

“Tank tightness testing” is another method of release detection for tanks to meet the requirements of Section 280.41. “Tank tightness testing (or another test of equivalent performance) must be capable of detecting a 0.1 gallon per hour leak rate from any portion of the tank that routinely contains product while accounting for the effects of thermal expansion or contraction of the product, vapor pockets, tank deformation, evaporation or condensation, and the location of the water table.” 40 C.F.R. 280.43©.

<sup>13</sup> Section 280.43(d) provides:

*Automatic tank gauging.* Equipment for automatic tank gauging that tests for loss of product and conducts inventory control must meet the following requirements:

(1) The automatic product level monitor test can detect a 0.2 gallon per hour leak rate from any portion of the tank that routinely contains product; and

(2) Inventory control (or another test of equivalent performance) is conducted in accordance with the requirements of § 280.43(a).

40 C.F.R. 280.43(d).

<sup>14</sup> “Manual tank gauging” involves, in part, “stick readings” taken “at the beginning and ending of a period of at least 36 hours during which no liquid is added or removed from the tank.” 40 C.F.R. 280.43(b).

<sup>15</sup> 40 C.F.R. 280.43(g) in part provides that “[i]nterstitial monitoring between the UST system and a secondary barrier immediately around or beneath it may be used, but only if the system is designed, constructed and installed to detect a leak from any portion of the tank that routinely contains product.” While interstitial monitoring is raised by Euclid as a method of tank release detection for one of the counts, it is more prominently relied upon by Euclid as a method of monitoring compliance with respect to the line release detection counts that are discussed, *infra*.

## **b. Euclid's Defenses**

Euclid raises several tank release detection defenses that involve all 16 tank release detection counts. These defenses are discussed below.

### **(i). Recordkeeping**

Euclid argues that 40 C.F.R. 280.45(b) essentially imposes a one-year statute of limitations for the retention of sampling, testing, and monitoring for release detection.<sup>16</sup> It states that August, 1998, and not September 30, 1997, is the earliest date for inventory control records for nine of the facilities, and that for the other six facilities, the earliest date is January 1, 1999. Respondent further states that it “is not required, in April of 2002, to maintain records of tank release detection from September 1997.” Resp. Br. at 14.

Euclid's record retention argument is rejected insofar as respondent seeks to use it as a shield to the tank release detection charges. The tank release detection charges set forth in the First Amended Complaint involve Federal and State monitoring regulations that specifically require tank release detection monitoring every 30 days. The First Amended Complaint does not charge recordkeeping violations; it charges tank release detection violations. The regulations at issue here clearly and unambiguously require monitoring for tank releases every 30-day period. Even Euclid does not argue to the contrary. Instead, respondent reaches to a separate recordkeeping requirement found elsewhere in the regulations, *i.e.*, 40 C.F.R. 280.45(b), in an attempt to excuse its non-compliance with the rather clear tank release detection requirements.

Moreover, Section 280.45(b) does not create the level of conflict with the monitoring requirements of Sections 280.40 and 280.41(a) (and the State regulations) that respondent suggests is the case. For example, Section 280.45(b) states that any monitoring results “must be maintained for *at least* one year.” (Emphasis added.). Nothing prevented Euclid from maintaining any tank release detection records for five-years (*i.e.*, back to September 30, 1997), to cover the five-year statute of limitations period applicable to the tank release detection charges. 28 U.S.C. § 2642.

Accordingly, given the clear tank release detection monitoring requirements involved in this case, respondent's records retention argument is rejected. Also rejected is its reliance upon *Baltimore Gas & Electric Co.*, 76 Md. PSC 181 (1985), *C&P Telephone Co. v. Comptroller* (a decision of the Maryland Tax Court), *Comptroller v. DIGI-Data Corp.*, 317 MD 212, 562 A.2d 1259 (1989), and *Bly v. Tri-Continental Industries, et al.*, 663 A.2d 1232, 1236 (D.C.App. 1995). See Resp. Br. at 14-15. Euclid asserts that the cited cases “establish the proposition that an entity cannot be held liable for an alleged violation if a defense of that violation would require the entity

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<sup>16</sup> In its post-hearing reply brief, Euclid expands its record retention argument regarding the tank release detection violations to encompass the line release detection and the cathodic protection violations as well. Resp. R.Br. at 1-2.

to produce records which the entity is not required to retain.” *Id.* Given the plain language of 40 C.F.R. 280.40 and 280.41(a), and the corresponding State regulations, however, this Tribunal again does not find this argument to be persuasive.

Lastly, Euclid cites to a collage of rather generalized testimony as to the document retention practices of the Internal Revenue Service (“IRS”) and the Small Business Administration, as well as the general practice of maintaining tank release detection records. Resp. Br. at 15-17. The record retention practices of the Internal Revenue Service and the Small Business Administration have no relevance to the tank release detection regulations at issue. Therefore, the testimony regarding the record retention practices of these entities is accorded no weight.

Also entitled to no weight are Euclid’s arguments that the company’s business records were not retained due to the fact that they were discarded following an IRS audit in 2001, as well as the fact that some business documents were misplaced during bankruptcy proceedings involving the company. *See* Resp. Br. at 15. Even assuming that respondent can substantiate these claims (not a view shared by this Tribunal, at least not on this record), the fact of the matter is that EPA is alleging tank release detection violations. It is not alleging records retention violations as one might conclude from respondent’s argument. Accordingly, Euclid’s records retention argument is unpersuasive and is rejected.

#### **(ii). Inventory Control**

Respondent stipulates that, with the exception of the six waste-oil tanks, it conducted inventory control combined with tank tightness testing (also referred to as “inventory control”) for monthly tank release detection for all the USTs involved in the tank release detection counts. Stips. 16, 30, 37, 46, 56, 70, 79, 80, 87, 88, 98, 108, 116, 124, 132, 144 & 155 (First Set). For the six waste-oil tanks, respondent claims to have used “manual tank gauging” pursuant to 40 C.F.R. 280.43(b), 20 DCMR § 6006, and COMAR § 262.10.05.04.C. Stips. 21, 92, 100, 119, 127 & 157 (First Set).

At the outset, it is important to keep in mind that, pursuant to the Federal UST regulations and the authorized State UST programs in Maryland and Virginia, the option to monitor tanks using a combination of inventory control and tank tightness testing is an available option either prior to December 22, 1998, or 10 years after a tank is newly installed or upgraded, whichever is later. 40 C.F.R. 280.41(a)(1), COMAR § 26.10.05.02.B, & 9 VAC 25-580-140.1. As for the District of Columbia, this inventory control method was available only until December 22, 1995, regardless as to the new or newly upgraded status of any tanks. 20 DCMR §§ 6003.3 & 6003.4.<sup>17</sup>

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<sup>17</sup> The rationale for allowing inventory control to be used as a temporary method of tank release detection is based upon EPA’s “recognition of the limited reliability of this method,” as well as certain practical difficulties in changing over to other tank release detection methods, as explained by the Agency in rulemaking. *See* Compl. Br. at 46-47. For instance, in the preamble to the proposed Federal UST regulations, EPA noted the large risk of human error in using



Thus, as EPA concludes, “[b]ecause of the temporary nature of the inventory control option, most of Euclid’s tanks no longer qualify to use inventory control.” Compl. Br. at 48.<sup>18</sup>

As earlier noted, insofar as respondent’s inventory control monitoring is concerned, Leon Buckner, the company’s General Manager, prepared a Declaration explaining the manner in which Euclid conducts inventory control at its facilities. CX Y-8.<sup>19</sup> Specifically, Buckner declares that he is responsible for receiving documents known as “Daily Business Recap Control Sheets,” or “Daily Sheets,” from the operators of all the gasoline stations where the Underground Storage Tanks are owned or operated by Euclid. These Business Recap Control Sheets are received daily by Buckner. CX Y-8, ¶ 2.

The Daily Sheets contain entries showing on-hand inventory for each grade of gasoline at the end of the day for each facility, as determined using either “Veeder Root automatic tank gauging system” or manual stick readings. CX Y-8, ¶ 3. Also, “[i]f there is more than one tank of a particular grade of gasoline at a location, the on-hand inventory on the daily sheet for that grade would be the total of the on-hand inventory for all tanks containing that grade of gasoline.”

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inventory control as a release detection method. 52 Fed. Reg. 12662, 12669 (April 17, 1987). In the preamble to the final Federal UST regulations, the Agency noted that “inventory control was capable of detecting only larger leaks of about one gallon per hour, whereas automatic tank gauging could detect leaks at a much lower scale of 0.2 gallon per hour. 53 Fed. Reg. 37082, 37150 (September 23, 1988).” Compl. Br. at 46. Thus, EPA concludes that “[b]ecause of the temporary nature of the inventory control option, most of Euclid’s tanks no longer qualify to use inventory control.” Compl. Br. at 48.

Also, while other release detection methods, such as ATG monitoring (*i.e.*, Automatic Tank Gauging), are more effective than inventory control, an immediate change over from inventory control to these alternative release detection methods was not practical. More time was needed for this change over to take place. EPA explains, “In the late 1980’s, when the regulations were proposed and promulgated, other methods of tank release detection were not as readily available, and, given the large number of existing USTs, the Agency was concerned that ‘not enough equipment and qualified installation personnel would become available over the next several years to perform such a retrofitting task reliably on such a mass scale basis.’ 52 Fed. Reg. at 12676.” Compl. Br. at 46; *see* Compl. Br. at 47 (Another rationale for allowing the use of inventory control as an interim measure concerned “the comparatively low risk of failure associated with new or newly upgraded USTs.”) .

<sup>18</sup> EPA does concede, however, that respondent’s Enterprise Road and Barlow Road (Maryland) facilities qualified for use of the inventory control option for the entire period at issue in this case, as did two of the four USTs at respondent’s Spotswood Trail (Virginia) facility. *Id.*

<sup>19</sup> Buckner did not sign the Declaration, but Euclid stipulates that it accurately describes the company’s protocol for conducting inventory control. Stip. 6 (First Set).

*Id.* In addition, the Daily Sheets also “provide information as to the amount of gasoline delivered to the facility and sold during the course of the day, although this information is not typically broken down by grade of gasoline.” CX Y-8, ¶ 4.<sup>20</sup>

At the end of each calendar month, Buckner reviews the sales and delivery records for each of Euclid’s facilities and calculates a “book” amount of gasoline which would be expected to be on-hand at each facility. “This figure is derived by subtracting the month’s sales and adding the month’s deliver[ies] to the previous month’s expected ‘book’ amount of on-hand gasoline.” This “book” amount represents the total amount of gasoline expected to be on-hand at the facility in all tanks combined. CX Y-8, ¶ 5.

Next, Buckner explained that he prepares a Monthly Summary Sheet. This summary contains the “actual” amount of gasoline on-hand at each facility on the last day of the month, as prepared from “that day’s Daily Sheet for each facility.” Furthermore, “on some Monthly Summary Sheets another column is present, representing the difference, for each facility, between the ‘actual’ amount on-hand for each facility and the ‘book’ amount expected to be on-hand.” CX Y-8, ¶ 6.

Lastly, Buckner forwards the completed Monthly Summary Sheets to Koo Yuen, Euclid’s President and COO. The Monthly Summary Sheets are the only documents that Buckner provides to Yuen “which show the expected and actual gasoline on-hand at any of Euclid’s facilities.” CX Y-8, ¶ 7.<sup>21</sup>

EPA takes issue with respondent’s tank release detection defense that it properly relied upon inventory control to meet its regulatory monitoring obligation. Complainant argues that “[w]hether or not the Daily Sheets contain sufficient information from which to calculate a tank-by-tank reconciliation, the Declaration is quite clear that such ‘reconciliation’ as may be done is done on a facility-wide basis, and not tank-by-tank.” Compl. Br. at 50.

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<sup>20</sup> At the hearing, Buckner testified that the information contained in the Daily Sheets is in fact broken down by grade of gasoline. TR-10 at 138; *see* Compl. Br. at 50. Specifically, referring to “Sample A” that was attached to his Declaration (CX Y-8 at 1206), Buckner referred to subdivision “G” to identify that particular day’s sales of regular grade, mid-grade, and super grade gasoline.

<sup>21</sup> Euclid cites to Respondent’s Exhibit 5, a computer print-out of monthly inventory summaries, in arguing that it “produced records of release detection utilizing the inventory control method.” Resp. Br. at 13. Euclid submits that “[t]his reconciliation shows results of inventory reconciliation on a facility-wide basis for all facilities, commencing on January 1, 1999.” *Id.* Essentially, respondent states that it maintains daily inventory sheets that are examined for variances, “more frequently than monthly,” and that at the end of the month, any discrepancies in inventory are investigated by company personnel. *Id.*, citing TR-10 at 158-164.

As support for this argument, EPA cites Paragraph 6 of the Buckner Declaration. *See* n.10, *supra*. EPA also cites to the testimony of General Manager Buckner, which is most instructive on this issue. In that regard, Buckner provided the following answer to a question posed at the hearing by Koo Yuen:

- Q. Why we combine all the grades together so that we have one grand total to determine our reconciliation results?
- A. One this is it's easy and faster, but we have a lot of pumps that -- or a lot of tanks that are blended and, therefore, it's kind of hard to get to the mid[-]grade from that.

TR-10 at 153.<sup>22</sup>

EPA submits that Euclid's facility-wide inventory reconciliation method is inconsistent with the tank reconciliation method mandated by the regulations. On this point, EPA is correct. A plain reading of 40 C.F.R. 280.43(a), 20 DCMR § 6005, COMAR § 26.10.05.04.B, and 9 VAC 25-580-160.1 establishes that inventory control measurements are to be made on each individual tank, and not on a facility-wide basis.

A review of the inventory control scheme as set forth in the Federal UST regulations, and that scheme's use of the singular term "tank," well illustrates this important point. Section 280.43(a) provides:

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

(1) Inventory volume measurements for regulated substance inputs, withdrawals, and the amount still remaining in the *tank* are recorded each operating day;

(2) The equipment used is capable of measuring the level of product over the full range of the *tank's* height to the nearest one-eighth of an inch;

(3) The regulated substance inputs are reconciled with delivery receipts by measurement of the *tank* inventory volume

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<sup>22</sup> Buckner explained that blending is the combining of super and regular grade gasoline to form mid-grade gasoline. *Id.*

before and after delivery;

(4) Deliveries are made through a drop tube that extends to within one foot of the *tank* bottom;

(5) Product dispensing is metered and recorded within the local standards for meter calibration or an accuracy of 6 cubic inches for every 5 gallons of product withdrawn; and

(6) The measurement of any water level in the bottom of the *tank* is made to the nearest one-eighth of an inch at least once a month.

40 C.F.R. 280.43(a)(1) (emphasis added).

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

In any event, another significant problem with Euclid's inventory control reconciliation is that it does not follow the methodology of the regulations. The UST regulations require that inventory measurements be recorded each operating day. 40 C.F.R. 280.43(a)(1), 20 DCMR § 6005, COMAR § 26.10.05.04.B(1)(a), & 9 VAC 25-580-160.1.a. Also, EPA's UST guidance pamphlet makes it clear that inventory must be compared each day to the measured on-hand inventory of the previous day, and a plus-minus amount calculated for each day. The daily pluses and minuses for each month are then totaled to determine if the regulatory standard has been exceeded. CX Y-18 at 1589-1591, 1597. In this regard, as noted by EPA, "[t]he preamble to the final UST rule confirms that inventory control was intended to provide 'nearly continuous (daily) release detection.' 53 Fed. Reg. at 37150." Compl. Br. at 51.<sup>23</sup>

Accordingly, for the foregoing reasons, it is held that the manner in which Euclid conducted inventory control at its facilities is not in compliance with the inventory control methodology prescribed by the regulations.<sup>24</sup>

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<sup>23</sup> An EPA guidance pamphlet on inventory control does allow the combining of figures from multiple tanks, but only when the tanks are manifolded together or connected to blending dispensers and share a common inventory of fuel. CX Y-18 at 1583. This guidance, however, makes clear that in all other cases the requirement exists that a separate inventory record and calculation be done for each tank. CX Y-18 at 1589.

<sup>24</sup> Even for those tanks where inventory control is an acceptable method of release detection, this method must be combined with tank tightness testing conducted at least every five

**(iii). “USTMAN”**

In addition, respondent argues that “Mr. Yuen also testified that he had USTMAN sheets prepared under contract with USTMAN and that he examined the USTMAN sheets for inventory variances.” Resp. Br. at 13, citing TR-13 at 61-71.<sup>25</sup> Respondent adds, however, “USTMAN for some unknown reason did not prepare monthly reports from the inventory sheets.” *Id.* Also, the USTMAN sheets relied upon by Euclid are incomplete. They were prepared beginning in August of 1998, and cover only 9 of the 15 facilities involved with the tank release detection issue. Resp. Br. at 13-14. Respondent’s reliance upon is USTMAN contract as somehow constituting a defense to the tank release detection charges (or to any line release detection charges for that matter) is rejected.

**(iv). Automatic Tank Gauging**

Automatic Tank Gauging, or “ATG,” is listed at 40 C.F.R. 280.43(d) as a method of release detection. *See* n.13, *supra*. Katherine Willis, a Petroleum Facility Senior Inspector with the Virginia Department of Environmental Quality, described automatic tank gauging as “basically a computer that ties into magnetic probes that are installed inside the tank.” TR-1 at 92, 115. Generally, there are floats on the probes that will measure the liquid level of the product, as well as the water level. Willis added, though, “It’s much more complicated than that, but, but the ATG is capable of performing what would -- we consider the equivalent of a tank tightness test.” TR-1 at 115.

Euclid claims to have used automatic tank gauging for some of the periods of alleged violation at each of the 16 facilities, pursuant to 40 C.F.R. 280.43(d), 20 DCMR § 6008, COMAR § 26.10.05.04.E, and 9 VAC 25-580-160.4. Stips. 16, 30, 37, 46, 56, 70, 79, 80, 87, 88, 98, 108, 116, 124, 132, 144 & 155 (First Set).<sup>26</sup>

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years for tanks meeting the upgrade performance standards, and every year for all other tanks. 40 C.F.R. 280.41(a), COMAR § 26.10.05.02.B, & 9 VAC 25-580-140.1. As discussed, *infra*, with respect to the individual tank release counts, for the most part, respondent failed to provide the requisite tank tightness testing results.

<sup>25</sup> As noted, Koo Yuen is the President and Chief Operating Officer of Euclid. He stated that “[t]he responsibility of the entire company falls on my shoulder.” TR-12 at 188-189. Yuen added, “I try to know every facet of the operations.” *Id.*

<sup>26</sup> Citing to the testimony of Euclid company officials Koo Yuen and Leon Buckner (TR-10 at 202-203, 205, & TR-13 at 118), EPA suggests that respondent has abandoned its automatic tank gauging argument. Compl. Br. at 37-38. Given Euclid’s stipulations in this matter, discussed above, and its Amended Answer to the First Amended Complaint (Amend. Ans. ¶¶ 15, 56, 87, 126, 179, 249, 290, 319, 347, 373, 397, 424, 445, 483, & 543), and given the

Also, respondent raises somewhat of a curious argument with respect to ATG testing. It submits, “[t]he regulations regarding leak detection do not require that any of the leak detection tests indicate a passing result.” Resp. Br. at 19 (regulatory citations omitted). Euclid further submits that “[i]f the ATG or inventory control test is conducted and the reason for the failure is ascertained, then the requirements are met.” *Id.* Finally, as if somehow seeking to shield itself from all of the leak detection counts, Euclid declares that “[t]here is no evidence that Respondent ever generated any test results as a result of a leak; in fact, Complainant’s and respondent’s witness all testified that there were no leaks in the tanks or lines during the relevant period. *Id.*

Respondent’s preceding ATG arguments are rejected. To the extent that Euclid submits that a non-passing ATG test result satisfies the applicable UST leak detection regulations, that position is contrary to the UST regulatory scheme and the requirement that there be such leak detection monitoring in the first place. In addition, such a position defies common sense. Also, the fact that no test results were generated as a result of a leak (an argument not entirely understood by this Tribunal) and the fact that there were no leaks in the tanks or lines has no bearing on the issue as to whether Euclid complied with its clear regulatory obligation to test for product releases.

### **c. The Charges of Violation**

#### **Count 1**

This count involves respondent’s facility located at 420 Rhode Island Avenue, Washington, D.C. EPA charges that prior to May 4, 1998, Euclid violated 40 C.F.R. 280.40 and 280.41(a), and that beginning on May 4, 1998, it violated 20 DCMR §§ 6000 and 6003, by failing to provide methods of tank release detection for Underground Storage Tanks RI-1, RI-2, RI-3, and RI-4. F. Amend. Compl. ¶18. The period of violation alleged for Tanks RI-1, RI-2, and RI-3 is September 30, 1997, to March 17, 2001, April 17, 2001, to December 28, 2001, January 28, 2002, to February 3, 2003, and March 3, 2003, to April 15, 2003. The period of violation alleged for Tank RI-4 is September 30, 1997, to February 3, 2003, and March 3, 2003, to April 15, 2003. *Id.*<sup>27</sup>

With respect to Tanks RI-1, RI-2, and RI-3, all gasoline tanks, Euclid claims to have conducted inventory control and tank tightness testing, and in-tank ATG testing to detect UST

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ATG arguments in respondent’s post-hearing brief (Resp. Br. at 18-19), despite the cited testimony of Yuen and Buckner, it is clear that respondent has not abandoned this defense.

<sup>27</sup> Many of the counts at issue in this case allege violations beginning on September 30, 1997. This date reflects EPA’s application of the general Federal statute of limitations set forth at 28 U.S.C. § 2462. *See* Compl. Br. at 104. *See also*, *3M Co. v. Browner*, 17 F.3d 1453, 1455-59 (D.C. Cir. 1994) (28 U.S.C. § 2462 applies to civil penalty cases brought in administrative proceedings).

leaks. Stip. 16 (First Set). Inasmuch as inventory control combined with tank tightness testing could not be used as a tank release monitoring method in the District of Columbia after December 22, 1995, respondent's reliance upon this optional monitoring method must fail, at least insofar as the District of Columbia's UST regulations are concerned. *See* 20 DCMR §§ 6003.3 & 6003.4.

In that regard, in the First Amended Complaint, EPA charges a violation of the District of Columbia Municipal Regulations beginning on May 4, 1998. Prior to May 4, 1998, the complaint charges that Euclid violated 40 C.F.R. 280.40 and 280.41(a), both Federal regulations to which the District of Columbia's inventory control cut-off date of December 22, 1995, does not apply. F. Amend. Compl. ¶ 18. Thus, the charge that Euclid violated the Federal UST regulations prior to May 4, 1998, must be viewed separately.

With respect to the Federal regulation charge, Euclid's inventory control defense fails for two reasons. The first reason is that Euclid used a combined inventory for Tanks RI-1, RI-2, and RI-3, despite the fact that the tanks separately stored regular grade, plus grade, and super grade gasoline. TR-5 at 39; CXs Y-8 at 1206 & A-6 at 0041-0045. Thus, the manner in which respondent conducted its inventory control was in a manner not in compliance with the Federal UST regulations. *See* CX Y-18 at 1583, 1589. Moreover, in response to an information request made by EPA in March, 2001, Euclid produced only a single tank tightness test from March 17, 2001. TR-4 at 72; CX A-6.

Respondent's ATG argument likewise must fail. In that regard, Euclid stipulates, "[p]rior to January, 2002, Tanks RI-1, RI-2 and RI-3 were not equipped with an automatic tank gauging system ('ATG system') which was capable of performing in-tank testing." Stip. 17 (First Set). Euclid further stipulates that it has "no documentation, testimony or other evidence to show that the ATG system installed at the 420 Rhode Island Avenue facility was programed to automatically perform 'in-tank' testing prior to April 15, 2003." Stip. 18 (First Set). In fact, Euclid has no documentation of Tanks RI-1, RI-2, and RI-3 passing in-tank ATG testing prior to July 14, 2003, which is beyond the time of the alleged violation. *See* Stip. 20 (First Set).

Lastly, as for Tank RI-4, a used-oil tank, respondent's only claimed method for tank release detection was weekly manual tank gauging, as set forth in 40 C.F.R. 280.43(b) and 20 DCMR § 6006. Stip. 21 (First Set). The evidence, however, proves the contrary. First, General Manager Buckner admitted during EPA's April 15, 2003, inspection of the facility that no tank release detection was being performed on Tank RI-4. TR-3 at 12 & TR-4 at 75. Second, Euclid stipulates that it "has no documentation of manual tank gauging for Tank RI-4." Stip. 22 (First Set).

Accordingly, it is held that EPA has proven the violations charged in Count 1. Based upon the above findings, a civil penalty of **\$180,100** is assessed.

This penalty assessment reflects the seriousness of the tank release detection violation at the 420 Rhode Island Avenue facility and Euclid's high degree of negligence. With respect to the seriousness of the violation, it is significant that the four USTs at this facility had a combined

capacity of 31,000 gallons. Amend. Ans., ¶ 4. In addition, the Hennessy Report assigns a “Groundwater Use Rating” of “1” and a rating of “5” for “Likelihood that Release would Contaminate Groundwater.” CX Y-22, Tables 1 & 4. The Rotenberg Report assigns the 420 Rhode Island facility a rating of “5” for the “population factor” because it is an urban site and another rating of “5” for the “exposure potential factor.” CX Y-23 at 1790, 1794 (Euclid site # 1).<sup>28</sup>

In addition to the seriousness of this violation, a substantial penalty is warranted here due to the high degree of Euclid’s negligence. First, Euclid allowed the tank release detection violations involved in Count 1 to exist at this facility for a significant period of time. Second, respondent allowed the same type of violative condition to exist at other facilities involved in this case, thus evidencing an across-the-board lack of compliance with the tank release detection regulations. Finally, respondent’s overall lack of compliance with the UST regulations at all of its 23 facilities is another factor warranting a high penalty.<sup>29</sup>

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<sup>28</sup> See Compl. Br. at 275 n.60, for identification of specific Euclid sites in the Rotenberg Report.

<sup>29</sup> EPA argues that “Euclid has exhibited high levels of culpability with regard to the majority of the violations in this case.” Compl. Br. at 267. This Tribunal agrees. A compelling factor necessitating such a finding is the breadth of the violations committed by Euclid. Specifically, EPA has established that respondent committed numerous UST violations that cut across three jurisdictions -- Washington, D.C., Maryland, and Virginia. These violations involve non-compliance by Euclid with a wide array of important Underground Storage Tank regulations. For example, time after time Euclid was found to have failed to comply with applicable tank release detection regulations, line release detection regulations, corrosion protection regulations, overfill prevention regulations, financial responsibility regulations, and, in one instance, a spill prevention regulation. Indeed, respondent repeatedly violated the same regulations throughout its facilities and its non-compliance often lasted for several years.

Moreover, as pointed out by complainant, the fact that the government (Federal and State) was concerned with Euclid’s overall UST regulation compliance record should have come to no surprise to respondent. EPA and the States began their inspection of the Euclid facilities in 2001. Thereafter, EPA met with respondent in April of 2002, to discuss respondent’s UST compliance. This meeting was followed by more EPA inspections. See Compl. Br. at 267. Yet, these activities seemed to have little effect on Euclid’s efforts to comply with the UST regulations as the inspection of each facility, for the most part, continued to reveal a pattern of non-compliance.

Accordingly, Euclid’s overall record of non-compliance cannot be ignored in the penalty assessment phase of this case. It is a consideration that is taken into account by this Tribunal in the determination of each penalty. As such, it provides substantial support for the penalty amounts requested by EPA.



EPA also has established that respondent sustained an economic benefit by not implementing an ATG system as alleged. This benefit includes “Delayed cost savings - ATG installation” in the amount of \$1,275, “Delayed cost savings - polling” and “Avoided cost - monthly polling.” See Compl. Br. at 285-286.

### **Count 6**

This count involves respondent’s facility located at 42382 John Mosby Highway, Chantilly, Virginia. EPA charges that prior to October 28, 1998, Euclid violated 40 C.F.R. 280.40 and 280.41(a), and that beginning on October 28, 1998, it violated 9 VAC 25-580-130 and 140.1 by failing to provide methods of tank release detection for Underground Storage Tanks 50-1, 50-2, 50-3, and 50-4. F. Amend. Compl. ¶ 58. The period of alleged violation is September 30, 1997, to June 20, 2001, and July 20, 2001, to May 5, 2003. *Id.*

For the four USTs at this facility, Euclid claims to have conducted inventory control combined with tank tightness testing, and in-tank ATG testing. Stip. 30 (First Set). Insofar as respondent’s inventory control claim is concerned, in its Answer to the First Amended Complaint, respondent admits that the USTs were installed in 1976. Amend. Ans. ¶ 45. Therefore, respondent cannot rely upon inventory control combined with tank tightness testing to satisfy the tank release detection monitoring requirements for the periods of alleged violation occurring after December 22, 1998. 40 C.F.R. 280.41(a) & 9 VAC 25-580-140.1.

With respect to the period of alleged violation preceding December 22, 1998, EPA argues that the configuration of the four USTs at this facility made it impossible for Euclid to rely upon the inventory control option. In that regard, complainant notes that two of these tanks were manifolded together and that they were connected to a third tank via a blending dispenser. CX C-3 at 0163-0165. All three tanks contained gasoline. No problem so far. The problem, however, develops because the fourth tank contains diesel fuel (Amend. Ans. ¶ 49) and thus cannot be blended with gasoline from the other USTs. As a result, Euclid was required to provide a separate inventory for the three gasoline tanks and for the single diesel tank. See CX Y-18 at 1583. Because respondent failed to do so, it’s reliance upon inventory control as a defense to the tank release detection charges for the period prior to December 22, 1998, is rejected.

Euclid’s in-tank ATG system at this facility likewise fails to satisfy the tank release detection regulations. In that regard, while EPA concedes that respondent did have an ATG system in place at the John Mosby Highway facility prior to March of 2002, it argues that the operators of the facility never used this ATG system for tank release detection. EPA Inspector George Houghton testified that the individuals who operated a convenience store at this facility (the Desai brothers) and sold the gasoline for Euclid on a commission basis, had no idea as to how the ATG system in place functioned as a tank leak detector. TR-2 at 168, 170. Houghton explained, “I don’t believe the, the operators understood leak detection, so the questions were almost like a learning experience for them.” TR-2 at 170. Houghton determined that the Desai brothers were not conducting any tank release detection monitoring, but rather were using the ATG printouts for inventory purposes only. TR-2 at 171.

In addition, as complainant further argues, “Euclid has never been able to produce any evidence of a passing in-tank test for this ATG.” Compl. Br. at 67, citing Stip. 31 (First Set). Indeed, the first passing ATG test result provided by Euclid was for July 18, 2003, which was after the period of alleged violation.

Accordingly, the record evidence supports EPA’s assertions that Euclid committed the violations charged in Count 6. A penalty of **\$89,878** is assessed for the violations.

Insofar as the seriousness of the Count 6 violations are concerned, it is significant that the USTs involved have a capacity of 29,000 gallons. Amend. Ans. ¶ 45. The significant period of non-compliance here (approximately 5 1/2 years) is also taken into account. In addition, the Hennessy Report assigns the John Mosby Highway facility a “Groundwater Use Rating” of “5.” It notes that 98.8 % to 100 % of the housing units in the survey areas had wells. CX Y-22, Table 2. As for the “Likelihood that Release would Contaminate Groundwater,” the Hennessy Report assigns the facility a rating of “3.” CX Y-22, Table 5. Here, the soil was noted to be “clay loam, silty, clay loam, sandy loam.” *Id.*

The Rotenberg Report assigns the John Mosby Highway facility a rating of “2” for the “population factor” and a rating of “3” for the “exposure potential factor.” CX Y-23 at 1794 (Euclid site # 3). With respect to the population factor, the Rotenberg Report states that it was clear that this area was non-urban based upon U.S. Geologic Survey maps and the estimated population within a quarter-mile radius. CX Y-23 at 1791. With respect to the exposure potential factor, the Report states:

Site 3 [the John Mosby Highway facility] was assigned an exposure potential factor of 3, because the nearest homes appear about 300 feet away from the facility. A lower exposure factor is not justified because 1) it is fairly certain that all of the residences use groundwater as a drinking water source, and 2) the depth to groundwater is not deep (27'). Thus, a release to groundwater would eventually either expose nearby residences or result in groundwater not being usable for future development. Thus, an exposure factor of 3 is assigned.

CX Y-23 at 1792.

In addition to the seriousness of the violations here, the facts surrounding Euclid’s actions relative to these violations evidence a high degree of negligence. Indeed, while respondent in part relies on ATG testing as a defense to the charges, EPA has shown that the individuals selling gas at the facility for Euclid used this system to monitor inventory, and not to monitor tank release.

Finally, penalty for the Count 6 violations includes the Delayed Cost Savings for ATG installation and polling, and the Avoided Cost for monthly polling as sought by complainant. *See* Compl. Br. at 288.

## **Count 9**

This count involves respondent's facility located at 13793 Spotswood Trail, Ruckersville, Virginia. EPA charges that respondent violated 9 VAC 25-580-130 and 140.1 by failing to provide methods of tank release detection for Underground Storage Tanks 29-1 and 29-2. F. Amend. Compl. ¶ 88. The period of alleged violation for Tanks 29-1 and 29-2 is April 5, 1999, to June 1, 1999, and July 1, 1999, to May 7, 2003. *Id.* Euclid submits that it conducted inventory control combined with tank tightness testing and, or, in-tank ATG testing for Tanks 29-1 and 29-2 in order to satisfy the applicable tank release detection requirements. Stip. 37 (First Set).

With respect to respondent's inventory control and tank tightness testing claim, because the tanks were installed in April of 1999, they qualify as "new tank systems" as that term is defined at 9 VAC 25-580-10 and are eligible to use this method of tank release detection. Amend. Ans. ¶ 77; Compl. Br. at 67.<sup>30</sup> Nonetheless, EPA asserts that "at the time of VADEQ's [the Virginia Department of Environmental Quality] inspection on March 1, 2001, neither the facility operators nor Euclid's representative made any claim that inventory control was being used, thus casting considerable doubt on the later claim that this method was being relied upon." Compl. Br. at 67-68. EPA's argument is not addressed by respondent. Insofar as Count 9 is concerned, Euclid offers no counter-argument and points to no testimony or exhibits to support its inventory control defense.

Still, the burden of proof rests with EPA. In that respect, its burden is carried by the testimony of VADEQ Inspector Willis. The inspector testified extensively about her inspection of Euclid's Spotswood Trail facility in Ruckersville, Virginia, in March of 2001. *See, e.g.*, TR-1 at 107-158. At the time, the Amended UST Notification Form for this facility indicated that there were two tanks that were used to store gasoline. CX D-4. In addition, the UST form identified an individual by the name of Tony Chowney as the contact person. During this inspection, Chowney was able to provide Inspector Willis with some line tightness tests and leak detector tests, but he was unable to provide adequate test results for tank release detection. TR-1 at 144. Chowney later stated that "he thought that they had an automatic tank gauge and that he would go and try to retrieve the test results from the console." TR-1 at 145. Chowney did provide Willis with June, 1999, results for both the leak detectors and line tightness tests. The inspector, however, did not consider these results to be the most current. TR-1 at 146.

Moreover, not only did Inspector Willis testify that Chowney did not provide VADEQ with inventory control records during this March, 2001, inspection, but her testimony also indicates that despite respondent's inventory control claim in Stipulation 37, it really was not relying upon inventory control to satisfy its tank release detection obligation. Willis testified:

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<sup>30</sup> Complainant's Exhibit D-4 suggests that Tanks 29-1 and 29-2 were installed in May of 1999. *See* TR-1 at 113. Even under this date, the USTs qualify as "new tank systems."

No. No, at no time did Mr. Chowney indicate that he -- or Euclid performed inventory control and I think I made a comment earlier about how this gets a little bit confusing because we're relying on the notification form to be accurate and up to date and the notification form didn't have inventory control on it, plus Mr. Chowney had given us a clear indication that they were using automatic tank gauging so there was no reason to ask for inventory control records.

TR-1 at 157-158; *see* CX D-4.

Euclid does not effectively challenge Inspector Willis' testimony, nor does it cite to testimony offering a different view or perspective as to what transpired during the inspection of the Spotswood facility. Inspector Willis' testimony is, therefore, credited. Accordingly, given Inspector Willis' description of the VADEQ investigation, to the extent that Euclid actually relies upon inventory control combined with tank tightness testing as a defense to the charges listed in Count 9, that defense is rejected.

Insofar as its in-tank ATG defense is concerned, Euclid submits that it "has no documentation of a passing in-tank test result from the ATG system associated with Tanks 29-1 or 29-2 prior to September 3, 2003." Stip. 38 (First Set). Despite that stipulation, it is EPA that notes that at least for one of the tanks, respondent did in fact provide the Virginia Department of Environmental Quality with passing test results for the period of April and May, 2003. Compl. Br. at 68, citing TR-1 at 184-187.

Accordingly, given the parties' stipulations and given Euclid's complete failure to offer any evidence to support its tank release detection claims, it is held that EPA has proven the violations charged in Count 9. A civil penalty of **\$21,016** is assessed for these violations.

With respect to the seriousness of the Count 9 violations, Tanks 29-1 and 29-2 have a total capacity of 20,000 gallons. Amend. Ans. ¶ 77. The Hennessy Report assigns the Spotswood Trail facility a "Groundwater Use Rating" of "3." CX Y-22, Table 2. This facility received a rating of "5" as to the "Likelihood that Release would Contaminate Groundwater." CX Y-22, Table 5. The soil was described as "sandy loam" and it was noted that there were "2 USGS Wells 3.8 to 5.6 miles" from the site. *Id.*

The Rotenberg Report assigns the Spotswood Trail facility a "population factor" of "1" and an "exposure potential factor" of "2." CX Y-23 at 1794 (Euclid site # 4). The low population factor reflects the fact that the area surrounding the facility is mostly rural, with only eight homes within a quarter-mile radius of the facility. The exposure potential factor takes into account the "sparsely populated rural nature of the site," the shallow depth to groundwater, and the fact that nearby residences were likely to use groundwater as a drinking source. CX Y-23 at 1791-1792.

Again, the facts establish that the tank release detection violations involved here were due to Euclid's high degree of negligence and they continued for approximately four years. Finally, the penalty assessment for Count 9 includes the Delayed Cost Savings for polling and the Avoided Cost associated with monthly polling. *See* Compl. Br. at 289.

### **Count 10**

This count involves respondent's facility located at 13793 Spotswood Trail, Ruckersville, Virginia, the same facility involved in Count 9. EPA charges that prior to October 28, 1998, Euclid violated 40 C.F.R. 280 and 280.41(a), and that beginning on October 28, 1998, it violated 9 VAC 25-580-130 and 140.1 by failing to provide methods of tank release detection for Underground Storage Tanks 29-3 and 29-4. F. Amend. Compl. ¶ 92. The period of alleged violation for Tanks 29-3 and 29-4 is September 30, 1997, to March 1, 1999. *Id.*

With respect to this count, "Respondent does not claim that Tanks 29-3 or 29-4 were ever ... monitored using any method of tank release detection other than inventory control combined with tank tightness testing." Stip. 39 (First Set). Respondent argues that, in any event, there can be no showing of a violation here because "[t]he tanks at issue in Count 10 were pumped out in 1997 and removed and properly disposed of in early April of 1999." Resp. Br. at 16, citing RX C-8.

Euclid's argument that there can be no violation because Tanks 29-3 and 29-4 were pumped out and eventually removed from service is rejected. First, contrary to its current position, in its Amended Answer Euclid admits: "From at least September 30, 1997 to at least March 1, 1999, Tanks 29-3 and 29-4 at the Spotswood Trail Facility routinely contained greater than 1 inch of regulated substances, and thus were not 'empty' as defined in 40 C.F.R. § 280.70(a) and 9 VAC 25-580-310.1." Amend. Ans. ¶ 90. Euclid is bound by this admission and it can not now change its position and argue that the tanks were actually empty. *State Farm Mutual Automobile Ins. Co. v. Worthington*, 405 F.2d 683, 686 (8th Cir. 1968); *Giannone v. United States Steel Corp.*, 238 F.2d 544, 547 (3d Cir. 1956).

Second, even if Euclid were allowed to raise its present challenge, Respondent's Exhibit C-8 does not show that Tanks 29-3 and 29-4 were empty for the period of alleged violation, as Euclid believes to be the case. This exhibit merely indicates that when two unidentified tanks were removed there was no odor of gasoline. Exhibit C-8 does very little to advance respondent's argument that the tanks were empty. In fact, Complainant's Exhibit D-12 shows that at the time of disposal one of the tanks had 370 gallons and the other tank had 96 gallons of gasoline and sludge.<sup>31</sup>

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<sup>31</sup> Moreover, the testimony of VADEQ Inspector Katherine Willis supports EPA's position that these tanks contained petroleum product. *See* TR-1 at 203-204, 234.

Third, Euclid also admits in its Amended Answer that Tanks 29-3 and 29-4 were installed in 1978. Amend. Ans. ¶ 78. Thus, they were not eligible to use inventory control as a method of tank release detection subsequent to December 22, 1998. Inasmuch as this is the only method of tank release detection cited by respondent (Stip. 39 (First Set)), respondent has essentially admitted violating the UST regulations subsequent to that date. Insofar as the pre-December 22, 1998, period is concerned, respondent has offered no inventory control evidence showing tank release detection compliance.

Accordingly, it is held that EPA has proven the violations charged in Count 10. A penalty of **\$13,683** is assessed for these violations.

With respect to the seriousness of the violations in Count 10, Tanks 29-3 and 29-4 had a capacity of 20,000 gallons. Amend. Ans. ¶ 78. Otherwise, except for the fact that the period of non-compliance was substantially shorter, the penalty discussion relative to Count 9 likewise applies to this count. Given the facts established by EPA as to the seriousness of the violation and respondent's negligence, and given the fact that Euclid offers little argument in rebuttal, the penalty amount proposed by EPA (*see* Compl. Br. at 291) is adopted and assessed against respondent.

### **Count 15**

This count involves respondent's facility located at 4123 Ocean Gate Highway, Trappe, Maryland. EPA charges that Euclid violated COMAR §§ 26.10.05.01 and 26.10.05.02.B by failing to provide methods of tank release detection for Underground Storage Tanks TR-1, TR-2, and TR-3. F. Amend. Compl. ¶ 127. The period of alleged violation is September 30, 1997, to June 11, 2002, and July 11, 2002, to November 25, 2003 (the date of the First Amended Complaint).

Euclid stipulates that it is not claiming that it monitored the USTs other than by means of inventory control combined with tank tightness testing and, or, in-tank testing using an ATG system. Stip. 46 (First Set). Euclid further stipulates, however, that it "has no documentation of a passing in-tank testing result from the ATG system associated with Tanks TR-1, TR-2 or TR-3 prior to September 2, 2003." Stip. 47 (First Set).

Insofar as respondent's inventory control argument is concerned, EPA states that because Tanks TR-1, TR-2, and TR-3 were installed in 1991 (Amend. Ans. ¶ 115), respondent could not use inventory control as a method of monthly tank release detection after 2001. Compl. Br. at 68. EPA's reading of the Maryland Department of the Environment's UST regulations is correct. *See* COMAR § 26.10.03.02.B.

Furthermore, EPA also is correct in arguing that respondent did not, in any event, properly engage in inventory control for the period of time prior to 2001. In that regard, Tanks TR-1, TR-2, and TR-3 were used to separately store regular grade, mid-grade, and premium grade gasoline. CXs E-8 at 02538 & E-9 at 02531-0253hh. There is no indication, however, that at the Ocean

Gate Highway facility Euclid utilized blending dispensers. Accordingly, it was required to reconcile each tank separately and its failure to do so (it used an inventory control method combining all three) violated the UST regulations. *See* Compl. Br. at 69.<sup>32</sup>

EPA also states that at the parties' April, 2002, meeting, respondent was unable to produce any tank tightness testing results for the Ocean Gate Highway facility and subsequently produced only one test, dated June 11, 2002. Compl. Br. at 69, citing TR-4 at 103. Accordingly, EPA concludes that "Euclid could not demonstrate that it had conducted a tank tightness test within 5 years, as required when inventory control is combined with tank tightness testing." Compl. Br. at 69.

With respect to respondent's ATG claim, EPA submits that "documents subsequently discovered by Euclid demonstrated that two of the three tanks at the facility obtained an initial passing test on November 4, 2002, with all three tanks at the facility obtaining a passing result on December 1, 2002." Compl. Br. at 69, citing CX Y-40 at 2002 & TR-4 at 109-110.

Based upon the record evidence, it is held that EPA has proven the violations charged in Count 15 of the First Amended Complaint. In that regard, Euclid failed to provide tank release detection for Tanks TR-1, TR-2, and TR-3 beginning on September 30, 1997. Thereafter, Tank TR-1 was in compliance on June 11, 2002, with respondent conducting tank tightness testing on that date. EPA concedes that Tank TR-1 came into consistent compliance on September 15, 2003. Compl. Br. at 292. As for Tanks TR-2 and TR-3, EPA also concedes that respondent provided one month of release detection by conducting tank tightness testing on June 11, 2002. *Id.*, *see* CX Y-40 at 2001-2002. Beyond that one-month period, there is no evidence showing that Tanks TR-2 and TR-3 were otherwise in compliance with the tank release monitoring regulations.

Accordingly, as set forth above, EPA has proven the charges alleged in Count 15. A civil penalty of **\$56,288** is assessed for these violations.

Regarding this penalty assessment, the three USTs involved in Count 15 had a total capacity of 30,000 gallons. Amend. Ans. ¶ 115. The Ocean Gate Highway facility was assigned a "Groundwater Use Rating" of "5" by the Hennessy Report because there are two community water supply wells for the Town of Trappe between on-quarter and one-half mile from the site, serving a population of 1,200. CX Y-22, Table 3. Also, the Hennessy Report assigns a "Likelihood that Release would Contaminate Groundwater" rating of "4" due to the shallow depth of the groundwater and the close proximity of the community wells. CX Y-22, Table 6.

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<sup>32</sup> An EPA guidance pamphlet on inventory control states that the combining of figures from multiple tanks is allowed, but only when the tanks are manifolded together or connected to blending dispensers and share a common inventory of fuel. CX Y-18 at 1583, 1589. Such was not the case here. Euclid has not challenged this assertion. Accordingly, the inventory control provisions set forth by EPA in its guidance pamphlet are accepted as being established.

The Rotenberg Expert Report assigns a value of “3” to the “population factor” and a value of “4” to the “exposure potential factor.” CX Y-23 at 1794 (Euclid site # 5). In that regard, the Report identifies the area around the facility as being “non-urban,” but still, a “developing area.” CX Y-23 at 1791. The Report further explains the value of the exposure potential factor as being due to the proximity of the two public drinking water supply wells, and the likelihood “that utility trenches are used to supply water to some of the residences.” CX Y-23 at 1792.

The penalty amount assessed for Count 15 also takes into account the lengthy periods of violation, respondent’s high degree of negligence, and the Avoided Costs and Delayed Costs identified by EPA (*see* Compl. Br. at 293).

### **Count 22**

This count involves respondent’s facility located at 3507 Enterprise Road, Mitchellville, Maryland. EPA charges that Euclid violated COMAR §§ 26.10.05.01 and 26.10.05.02.B by failing to provide methods of tank release detection for Underground Storage Tanks DS-1 and DS-2. F. Amend. Compl. ¶ 180. The period of alleged violation is November 15, 1999, to November 26, 2001, and December 26, 2001, to April 14, 2003. *Id.* Euclid claims to have conducted inventory control combined with tank tightness testing and in-tank ATG testing. Stip. 56 (First Set).

With respect to the inventory control argument, EPA asserts that “[o]ne particular shortcoming” is that Euclid combined the inventory for the two tanks despite the fact that one of the tanks contained gasoline and the other tank contained diesel. Compl. Br. at 70. *See* Amend. Ans. ¶¶ 172-174; *see also*, CX G-4 at 0329-0330. EPA is correct on this point. Because one tank was used to store gasoline and the other tank was to store diesel, Euclid was required to reconcile each tank separately. *See* CX Y-18 at 1583, 1589. Respondent’s failure to do so is fatal to its inventory control defense.

With respect to respondent’s in-tank ATG monitoring defense, EPA notes the parties’ stipulation that the first passing ATG result that Euclid produced for the Enterprise Road facility was for August 17, 2003. *See* Stip. 57 (First Set). This is after the period of alleged violation. In fact, only one of the two tanks passed the ATG test on that date. The first passing ATG test for the other tank did not occur until September 17, 2003, which was after the period of alleged violation. *See* Compl. Br. at 70, citing CX Y-40 & TR-4 at 121-122.

Accordingly, it is held that EPA has proven the tank release detection violations alleged in Count 22. A civil penalty of **\$26,414** is assessed for the violations in this count.

With respect to the seriousness of the violations established in Count 22, it is of note that the two USTs involved here had a total capacity of 23,000 gallons. Amend. Ans. ¶ 172. Also, the Hennessy Report assigns a “Groundwater Use Rating” of “2” for this facility and a “Likelihood that Release would Contaminate Groundwater” rating of “5.” CX Y-22, Tables 3 & 6. The Rotenberg Report assigns a value of “2” for both the “population factor” and the “exposure



potential factor.” CX Y-23 at 1794 (Euclid site # 8). Dr. Rotenberg considered the area surrounding the facility to be “non-urban.” The report further notes, however, that the “groundwater is shallow, and a release is likely to get to groundwater easily.” CX Y-23 at 1791 & 1793.

This penalty also reflects the length of the periods of non-compliance, respondent’s high degree of negligence, and the Delayed Costs and Avoided Costs identified by EPA (*see* Compl. Br. at 295).

### **Count 30**

This count involves respondent’s facility located at 3900 Frederick Avenue, Baltimore, Maryland. EPA charges that Euclid violated COMAR §§ 26.10.05.01 and 26.10.05.02.B by failing to provide methods of tank release detection for Underground Storage Tanks 39-1, 39-2, 39-3, and 39-4. F. Amend. Compl. ¶ 250. The period of alleged violation is September 30, 1997, to February 23, 2000, and March 24, 2000, to April 28, 2003. *Id.* Respondent stipulates that it conducted inventory control combined with tank tightness testing, and in-tank ATG testing. Stip. 70 (First Set).

In its Amended Answer, Euclid admits that Tanks 39-1, 39-2, 39-3, and 39-4 were installed in 1987. Amend. Ans. ¶ 240. As such, the tanks did not qualify for inventory control to be used as a method to determine tank releases from December 22, 1998, until January 17, 2000, at which time the tanks were upgraded. COMAR § 26.10.05.02.B. *See* CX L-7.

Furthermore, complainant argues that, in any event, “for most of the time after January 17, 2000, the tanks at the Facility were not in compliance with the upgrade performance standards, and were thus ineligible to use inventory control under COMAR § 26.10.05.02.B(2).” Compl. Br. at 71. EPA asserts that respondent was not in compliance with the upgrade performance standards for approximately 2 ½ years after January 17, 2000, because “the impressed current cathodic protection system at the Frederick Avenue Facility was not energized, TR-9 at 71, Complainant’s Ex. Y-21 at 1730, and additionally, at least one tank at the Facility has never been shown to be cathodically protected at any time. TR-9 at 75, Complainant’s Ex. Y-21 at 1730.” Compl. Br. at 71 n.16. Respondent has not offered any evidence to refute this assertion.

EPA notes an additional shortcoming in Euclid’s inventory control claim with respect to Count 30. In that regard, EPA states that two of the USTs at this facility are manifolded together and that they appear to be connected to a third tank by way of a blending dispenser. Moreover, the fourth UST at the Frederick Avenue facility contains diesel fuel (Amend. Ans. ¶ 244; CX L-3 at 0468 & CX L-4 at 0409) and diesel fuel cannot be blended with gasoline. As a result, Euclid was required to reconcile the diesel fuel tank separately from the three gasoline tanks. This respondent did not do. *See* CX Y-18 at 1583, 1589.

With respect to respondent’s in-tank ATG system defense, Euclid admits that it was not installed until January of 2000. Amend. Ans. ¶ 249. Also, the first passing ATG result did not

occur until September 15, 2003. Stip. 71 (First Set). Furthermore, EPA notes that “[o]n that date only two tanks passed an ATG test, while the two manifolded tanks at the facility have to date never been documented to have passed a valid ATG test.” Compl. Br. at 72, citing CX Y-40 at 2003-2004.

Accordingly, based upon the above evidence, it is held that EPA has proven the violations alleged in Count 30. A civil penalty of **\$126,038** is assessed.

With respect to the seriousness of the violations, the total capacity for the four USTs at the Frederick Avenue facility was 32,00 gallons. Amend. Ans. ¶ 240. In addition, the Hennessy Report assigns this facility a “Groundwater Use Rating” “1” and a “Likelihood that Release would Contaminate Groundwater” rating of “4.” In that regard, the Report notes that there are three wells within a quarter-mile of the facility. CX Y-22, Tables 3 & 6. The Rotenberg Report assigns the facility a “population factor” of “5” and an “exposure potential factor” of “5” as well. CX Y-23 at 1794 (Euclid site # 13). The Rotenberg report states that USGS maps confirmed “the urban nature of the location, with significant areas of urban development shown adjacent to the Euclid site.” CX Y-23 at 1790. This Report also explains that the highest exposure potential rating because it was an “urban” site with “utility trenches (with a preferred path of migration) and shallow groundwater with permeable soils (with the potential of both groundwater contamination and vapor intrusion). CX Y-23 at 1792.

This penalty assessment also takes into account the length of the periods of non-compliance, the high degree of respondent’s negligence, and the Delayed Cost Savings and Avoided Costs identified by EPA (*see* Compl. Br. at 297).

### **Count 35**

This count involves respondent’s facility located at 4225 Connecticut Avenue, Washington, D.C. EPA charges that prior to May 4, 1998, Euclid violated 40 C.F.R. 280.40 and 280.41(a), and that beginning on May 4, 1998, it violated 20 DCMR §§ 6000 and 6003, by failing to provide methods of tank release detection for Underground Storage Tanks VN-1, VN-2, VN-3, VN-4, and VN-5. F. Amend. Compl. ¶ 291. The period of alleged violation is September 30, 1997, to June 22, 2001, and July 22, 2001, to April 16, 2003. *Id.*

Four of the USTs (VN-1, VN-2, VN-3 & VN-4) are gasoline tanks. For these tanks, Euclid claims to have conducted inventory control combined with tank tightness testing, and interstitial monitoring. Stip. 79 (First Set). For Tank VN-5, a diesel tank, Euclid claims to have conducted inventory control combined with tank tightness testing and in-tank ATG testing. Stip. 80 (First Set).

In the District of Columbia, inventory control and tank tightness testing could not be used for tank release detection monitoring after December 22, 1995. 20 DCMR §§ 6003.3 & 6003.4.

Accordingly, this defense is not available to respondent from May 4, 1998, to April 16, 2003, the period of time for which the District of Columbia UST violations are alleged. This restriction does not hold true, however, for the period of time (pre-May 4, 1998) for which the Federal UST regulations were allegedly violated.

Insofar as the Federal regulations are concerned, we begin with tank tightness testing. (Tank tightness testing requirements must be satisfied along with inventory control requirements.) Specifically, Euclid was directed to provide its last tank tightness tests for the Connecticut Avenue facility at the time of the District of Columbia Department of Health inspection on May 30, 2001. CX M-5. This directive was repeated by the DCDOH in a letter dated June 8, 2001. CX Y-11 at 1228-1229. Euclid eventually provided tank tightness test results for a test conducted on June 22, 2001, and on April 16, 2003, for Tank VN-5 only. F. Amend. Compl. ¶ 289; TR-4 at 143. There is, however, no indication in the record that any tank tightness testing results were provided for the remaining four USTs. Thus, at least with respect to those four USTs, “prior to June 22, 2002, Euclid could not demonstrate that it had conducted a tank tightness test within 5 years, as required when inventory control is combined with tank tightness testing.” Compl. Br. at 73.

In addition, the manner in which Euclid conducted its inventory control was not without its problems. Here, despite the fact that there were four gasoline tanks connected through manifolding and blending, there was a separate diesel tank. Amend. Ans. ¶ 283; CX M-3 at 0560. Euclid’s use of a combined inventory for all of the USTs could not, therefore, satisfy the inventory control requirements.

Thus, respondent’s defense to the tank release detection charges in Count 35 rest on interstitial monitoring for Tanks VN-1, VN-2, VN-3, and VN-4, and in-tank ATG testing for VN-5. With respect to respondent’s interstitial monitoring assertion, EPA concedes that when the Connecticut Avenue facility was inspected on April 16, 2003, interstitial probes were present in Tanks VN-1, VN-2, VN-3, and VN-4. Compl. Br. at 73. The Agency argues, however, that because respondent’s December 28, 1998, UST Notification did not list interstitial monitoring as a method of release detection (CX 3 at 0561), “[a]n inference can be drawn ... that either (1) no interstitial probes were present or operable at the time of the Notification, or (2) probes were present but Euclid was not aware of this fact, was not monitoring the probes, and would not have known what to do had the probes gone into alarm.” Compl. Br. at 73-74.

As further support for this argument, EPA states that an older “Veeder-Root TLS-250” ATG unit was present at the time of inspection by DCDOH in May of 2001, and that unit was replaced with a newer “TLS-350” ATG unit in February of 2002, and that interstitial probes were installed at that time. Compl. Br. at 74, citing TR-3 at 47 & Amend. Ans. ¶ 290. Given this evidence, and the above-referenced evidence contained in Exhibit CX 3, it is held that EPA has proven the violations charged in Count 35 insofar as Tanks VN-1, VN-2, VN-3, and VN-4 are concerned. The period of violation began on September 30, 1997, and ended in February of 2003, when the TLS-350 ATG system was installed with interstitial probes.

With respect to Tank VN-5, Euclid stipulates that the first passing ATG result that it could produce for this UST was October 7, 2003. This is after the period of alleged violation. Thus, EPA has proven the violation relating to Tank VN-5 as charged in Count 35.

A civil penalty of **\$168,985** is assessed for these violations. With respect to the seriousness of the violations, the involved USTs had a combined total capacity of 44,000 gallons. Amend. Ans. ¶ 278. Also, the Hennessy Report assigns the Connecticut Avenue facility a “Groundwater Use Rating” of “1” and a “Likelihood that Release would Contaminate Groundwater Rating” of “5.” CX Y-22, Tables 1 & 4. The Rotenberg Report assigns this facility a “population factor” of “5” and an “exposure potential factor” of “5” as well. CX Y-23 at 1794 (Euclid site # 14). With respect to the population factor, the Rotenberg Report notes that the demographic map for this site “shows a series of larger buildings, either commercial or residential in nature, that flank the site.” CX Y-23 at 1790. As for the exposure potential factor, the Report explains that the highest rating of “5” is due to the presence of utility trenches (*i.e.*, a preferred path of migration) and shallow groundwater with permeable soils that present both the potential for groundwater contamination and vapor intrusion. CX Y-23 at 1792.

This penalty assessment also includes consideration of the length of the periods of violation, the high degree of respondent’s negligence, and the Delayed Cost Savings and Avoided Cost identified by EPA (*see* Compl. Br. at 297).

### **Count 39**

This count involves respondent’s facility located at 6181 Annapolis Road, Landover Hills, Maryland. EPA charges that Euclid violated COMAR §§ 26.10.05.01 and 26.10.05.02.B by failing to provide methods for tank release detection for Underground Storage Tanks 61-1, 61-2, 61-3, and 61-4. F. Amend. Compl. ¶ 321. The period of alleged violation is September 30, 1997, to February 15, 2002, and March 17, 2002, to April 1, 2003. *Id.*

With respect to these charges, “[r]espondent does not claim that Tanks 61-1, 61-2 or 61-3 were monitored prior to June, 2000, using any method of tank release detection other than inventory control combined with tank tightness testing.” Stip. 87 (First Set). Respondent further stipulates that after June, 2000, Tanks 61-1, 61-2, and 61-3 were monitored through inventory control with tank tightness testing, and in-tank ATG testing. Stip. 88 (First Set). Insofar as Tank 61-4 is concerned, Euclid stipulates to using weekly manual tank gauging prior to the tank’s removal on October 17, 2001. Stip. 92 (First Set). Respondent, however, “has no documentation of manual tank gauging for Tank 61-4.” Stip. 93 (First Set).

Insofar as respondent’s inventory control argument goes, because Tanks 61-1, 61-2, and 61-3 (all gasoline tanks) were installed in 1984 (Amend. Ans. ¶ 308), this method of monthly tank release monitoring could not be used after December 22, 1998. COMAR § 26.10.05.02.B. In addition, at the time of the Maryland Department of the Environment’s June 13, 2001, inspection of the Annapolis Road facility, the ATG system had not been programed to perform in-tank testing. Nor was there ATG system data available during a follow-up inspection on July 27,

2001. TR-2 at 60-61, 66-67; CXs N-8 at 0641 & N-9 at 0645-0647.

This situation did not change until the EPA inspection of the facility on March 27, 2001, when the ATG system was first programmed to run in-tank tests. TR-4 at 144-145; Stip. 89 (First Set). Nonetheless, the test run on that day produced an “invalid” result. *Id.* Also, the EPA inspector testified that Euclid’s General Manager explained that because the ATG system at this facility was programmed to run manually, “somebody had to manually hit the button to make the test happen, and that was not occurring.” TR-4 at 144-145. The EPA inspector further testified that “the manager at the facility, Rajah Khawar, indicated that basically all they did was hit a button to print out an inventory so they knew they needed to call for a delivery.” TR-4 at 145-146. Indeed, the first passing ATG test result that Euclid could produce for Tanks 61-1, 61-2, and 61-3 was August 15, 2003. Stip. 90 (First Set). The testimony of the EPA inspector is credited.

Accordingly, on the basis of the preceding evidence, EPA has proven the violations charged in Count 39 relating to Tanks 61-1, 61-2, and 61-3.

As for Tank 61-4 (a used-oil tank), Euclid claims to have conducted weekly manual tank gauging prior to the tank’s removal on October 17, 2001. Stip. 92 (First Set). Respondent, however, has no documentation to support this claim of weekly manual tank gauging. Stip. 93 (First Set). In that regard, at the time of the June, 2001, MDE inspection, Euclid was directed to provide tank release detection records for the waste-oil tank, but it failed to do so. TR-2 at 66; CX –8 at 0642.

EPA appears to concede that Tank 61-4 was removed from service on October 17, 2001. *See* Compl. Br. at 75. Complainant, however, also notes that respondent has failed to produce the Tank 61-4 records as directed during the June, 2001, inspection of the facility by the Maryland Department of the Environment. Compl. Br. at 75, citing TR-2 at 66 & CX N-8 at 0642. Complainant further notes that “Euclid has to date never produced documentation of even a single instance where manual tank gauging was performed.” Compl. Br. at 76, citing Stip. 93 (First Set). Moreover, Euclid has offered no evidence to support its claim of manual tank gauging.

Accordingly, for the reasons advanced by EPA, it is held that Euclid has committed the violation charged in Count 39 relating to Tank 61-4. That period of violation ended, however, on October 17, 2001, when the tank was removed from service.

A civil penalty of **\$85,964** is assessed for the violations in Count 39. With respect to the seriousness of the violations, it is noted that the four USTs at the Annapolis Road facility had a combined capacity of 31,000 gallons. Amend. Ans. ¶¶ 308 & 309. In addition, the Hennessy Report assigns this facility a “Groundwater Use Rating” of “1” and a “Likelihood that Release would Contaminate Groundwater” rating of “5.” CX Y-22, Tables 3 & 6. The Rotenberg Report assigns the Annapolis Road facility a “population factor” of “3” and an “exposure potential factor” of “5.” CX Y-23 at 1794 (Euclid site # 15). Specifically, the Rotenberg describes the surrounding area as an “urban” area, noting, however, that “[t]he estimated population within a quarter mile radius of [the Annapolis Road site] was more than 1100, but the individual map

shows the site to be surrounded directly by park land, not homes.” CX Y-23 at 1791. The Hennessy Report adds that “there are a number of private homes and a large shopping complex” near the quarter-mile radius of the site. *Id.*

Respondent’s high degree of negligence and the length of the periods of non-compliance (*i.e.*, approximately 51/2 years) were penalty considerations also taken into account, as were the Delayed Cost Savings and the Avoided Cost identified by EPA (*see* Compl. Br. at 299). The penalty requested by EPA was reduced somewhat to reflect the fact that the period of violation for Tank 61-4 was found to be for a shorter period of time than alleged.

### **Count 43**

This count involves respondent’s facility located at 6038 Baltimore Avenue, Hyattsville, Maryland. EPA charges that Euclid violated COMAR §§ 26.10.05.01 and 26.10.05.02.B by failing to provide methods of tank release detection for Underground Storage Tanks HY-1, HY-2, and HY-3. F. Amend. Compl. ¶ 349. The period of alleged violation is September 30, 1997, to February 21, 2001, and March 23, 2001, to April 3, 2003, for Tanks HY-1 and HY-2, and from September 30, 1997, to November 25, 2003 (the date of the filing of the First Amended Complaint) for Tank HY-3. *Id.*

For Tanks HY-1 and HY-2, both gasoline tanks, Euclid claims to have conducted inventory control combined with tank tightness testing, and in-tank ATG testing. Stipulation 98 (First Set). For Tank HY-3, a used-oil tank, it claims to have conducted manual tank gauging. Stip. 100 (First Set).

With respect to Tanks HY-1 and HY-2, EPA correctly points out that inasmuch as the tanks were installed prior to December 22, 1988 (Amend. Ans. ¶ 339), they were not eligible for inventory control to be used as a method of monthly tank release detection after December 22, 1998. Thus, inventory control could not be relied upon by Euclid as an acceptable monitoring method for these two USTs for most of the period of alleged violation.

As for the in-tank ATG testing, during the June 11, 2001, inspection of the Baltimore Avenue facility by the Maryland Department of the Environment, respondent was unable to generate any passing 0.2 gallon per hour ATG test results. Accordingly, Euclid was asked by the MDE to shut down its station and to run the ATG tests. Thereafter, the MDE inspector returned to the facility and obtained the new ATG test results that showed a “passing” result for the super grade tank, but an “invalid test” result for the regular grade tank. TR-2 at 28, 30-31; CX O-6 at 0691. The MDE inspector returned to the facility for a follow-up inspection on August 6, 2001, and again obtained a passing result for the super grade tank, but not for the regular grade tank. In fact, the results showed that at no time did the regular grade tank pass a valid ATG test. TR-2 at 37-38; CX O-8.

In addition, when EPA inspected the Baltimore Avenue facility on March 27, 2003, “the station manager was not familiar with any function of the ATG other than for the generation of an

inventory reading, and did not send ATG test results to Euclid.” Compl. Br. at 77, citing TR-4 at 163. In fact, the first passing ATG test result that Euclid produced for this facility was for July 24, 2003. Stip. 99 (First Set).

Accordingly, for the reasons mentioned above, EPA has proven the violations charged in Count 43 as they relate to Tanks HY-1 and HY-2.

In addition, EPA has also proven the violation charged as it relates to Tank HY-3. This is the used-oil tank that Euclid claims was subject to weekly manual tank gauging. The evidence, however, is to the contrary. First, during its inspection of June 11, 2001, MDE asked Euclid for the release detection records for Tank HY-3. CX O-6 at 0689. Respondent did not provide any such records. TR-2 at 39.

Second, Inspector Marie Owens of EPA testified that during the Agency’s inspection of the facility on March 27, 2003, she was informed by respondent’s compliance contractor, Ted Beck, “that there was no release detection on this tank.” TR-4 at 163.<sup>33</sup> Owens’ testimony is not in dispute and is, therefore, credited. Moreover, Euclid has never produced documentation that manual tank gauging was ever performed. Stip. 101 (First Set). For these reasons, it is held that EPA has established the violation as to Tank HY-3 as charged in Count 43.

A civil penalty of **\$88,619** is assessed for these violations, the penalty sought by EPA. With respect to the seriousness of these violations, the three USTs involved had a total capacity of 16,550 gallons. Amend. Ans. ¶ 339. Also, the Hennessy Report assigns the Baltimore Avenue facility area a “Groundwater Use Rating” of “1” and a “Likelihood that Release would Contaminate Groundwater” rating of “5.” CX Y-22, Tables 3 & 6. Insofar as the “5” rating was concerned, the Report notes that one deep well is one mile South of the Baltimore Avenue site, and one shallow well is two miles Northwest of the site. *Id.* The Rotenberg Report assigns a rating of “5” for the “population factor” and another rating of “5” for the “exposure potential factor.” CX Y-23 at 1794 (Euclid site # 16). The Report notes that because this site is an “urban site,” an exposure potential of “5” was assigned to account for the presence of utility trenches (a preferred path of migration) and shallow groundwater with permeable soils that presented the potential of both groundwater contamination and vapor intrusion. CX Y-23 at 1792.

The respondent’s high degree of negligence, the significant length of the periods of non-compliance, and the Delayed Cost Savings and Avoided Cost identified by EPA (*see* Compl. Br. at 303) are factors also supporting the penalty assessment.

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<sup>33</sup> Mr. Beck is the President and owner of Independent Petroleum Services, Inc. This company services and installs Underground Storage Tanks, including testing the tanks and lines. TR-14 at 48-49. Beck was accepted as an expert in the areas of tank release detection, line release detection, tank overfill, and spill prevention. He was not accepted as an expert in the area of cathodic protection. TR-14 at 98-99, 104.

### **Count 47**

This count involves respondent's facility located at 7887 Barlow Road, Palmer Park, Maryland. EPA charges that Euclid violated COMAR §§ 26.10.05.01 and 26.10.05.02.B by failing to provide methods of tank release detection for Underground Storage Tanks PP-1 and PP-2. F. Amend. Compl. ¶ 374. The period of alleged violation is September 30, 1997, to February 17, 1999, and March 19, 1999, to April 4, 2003. *Id.* Euclid stipulates that it conducted inventory control combined with tank tightness testing, and in-tank ATG testing, as the methods for monitoring tank release detection. Stip. 108 (First Set).

Regarding respondent's in-tank ATG testing claim, Euclid stipulates that it has "no documentation of a passing in-tank testing resulting from the ATG system associated with Tanks PP-1 or PP-2 prior to at least August 15, 2003." Stip. 109 (First Set). Because this lack of documentation covers the entire period of alleged violation, Euclid's reliance upon its ATG system monitoring defense must fail.

A different result obtains, however, with respect to Euclid's inventory control claim.<sup>34</sup> In that regard, it must be remembered that it is EPA who bears the burden of proof on the issue of violation. 40 C.F.R. 22.24. Despite this burden, all that EPA could argue in its brief was that "[a]ny inventory control being conducted by Euclid was subject to all the shortcomings discussed in Section V.A.2.b(ii), above." Compl. Br. at 77.

This offering by EPA simply is not enough to establish the charged violations. In order to establish a prima facie case of violation, complainant must at a minimum articulate more of a legal basis for its position and further, explain how the facts of the case support its legal position. Merely referencing an earlier passage in its brief, without a discussion as to the quality of the evidence is just not enough to carry the traditional burdens of proof and persuasion. 40 C.F.R. 22.24.

Accordingly, it is held that complainant has not established the violations as charged here and Count 47 is, therefore, dismissed.

### **Count 50**

This count involves respondent's facility located at 3800 Rhode Island Avenue, Brentwood, Maryland. EPA charges that Euclid violated COMAR §§ 26.10.05.01 and 26.10.05.02.B by failing to provide methods of tank release detection for Underground Storage Tanks BW-1, BW-2, BW-3, and BW-4. F. Amend. Compl. ¶ 399. The period of alleged violation is September 30, 1997, to April 23, 2003, for Tanks BW-1, BW-2, and BW-3, and

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<sup>34</sup> EPA concedes that the Barlow Road facility is one of the few facilities involved in this case that can rely on inventory control for the entire period of alleged violation. *See* Compl. Br. at 48.



September 30, 1997, to November 25, 2003 (the date of the First Amended Complaint) for Tank BW-4. *Id.*

For the gasoline tanks, BW-1, BW-2, and BW-3, Euclid claims to have conducted inventory control with tank tightness testing, and in-tank testing using an ATG system. Stip. 116 (First Set). For Tank BW-4, a used-oil tank, Euclid claims to have conducted manual tank gauging. Stip. 119 (First Set).

With respect to Tanks BW-1, BW-2, and BW-3, EPA correctly asserts that because the USTs were installed prior to December 22, 1988 (Amend. Ans. ¶ 388), Euclid could not use inventory control for these USTs after December 22, 1998, as a method of monthly tank release detection. Compl. Br. at 78.<sup>35</sup>

With respect to Euclid's ATG system monitoring argument, EPA relies on the MDE inspection conducted by Inspector Jackie Ryan. Inspector Ryan's first inspection occurred on June 12, 2001. She testified that although the ATG system showed numerous leak alarms, none were reported by respondent to the State of Maryland. TR-2 at 53. Inspector Ryan further testified that she returned to the facility on July 23, 2001, and that she generated printouts during that return inspection showing that two of the three gasoline tanks had never passed an in-tank ATG test. In addition, the third tank had passed the in-tank ATG test only twice, on January 21, 2001, and on July 11, 2001. TR-2 at 54-55; CX Q-8 at 0818-0819. *See* Compl. Br. at 78-79.

In addition, when EPA inspected the facility on May 9, 2003, the station operators indicated that the ATG was used only to pull inventory readings. TR-4 at 186-187. Moreover, EPA expert witness John Cignatta, consistent with MDE Inspector Ryan's testimony, testified that when he arrived at the facility "the unit was in alarm, alarm indicated by the red flashing light on the left side of the main panel." TR-7 at 61.<sup>36</sup> Cignatta's inspection notes state that alarms for all three tanks and both detector probes in the two sumps were in alarm. TR-7 at 62, 65; CX Q-10. In that regard, Cignatta testified, "so I literally had three separate tank alarms plus two sump pump alarms continually being displayed, plus a failed leak detection test from the previous night was being displayed." *Id.* Cignatta added that an individual working at this facility did not know anything about the alarm, "other than to press the red button when it was buzzing." TR-7 at 66.

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<sup>35</sup> EPA's brief erroneously refers only to three USTs (BW-1, BW-2, & BW-3). The First Amended Complaint, however, identifies a fourth tank as BW-4. Paragraph 388 of the First Amended Complaint alleges that all four USTs were installed prior to December 22, 1998. As noted above, in its Amended Answer, Euclid admits this allegation.

<sup>36</sup> John Cignatta is an outside (*i.e.*, non-government) expert hired by EPA to evaluate claims made by Ted Beck regarding site surveys that Beck had made for all of Euclid's facilities. Beginning on March 27, 2003, Cignatta accompanied EPA on a number of inspections of the Euclid facilities. TR-4 at 49-52; *see* Compl. Br. at 30-31.

Finally, the first passing test that Euclid could produce for this facility did not occur until November 20, 2003, and that was only for the super grade tank. Stip. 117 (First Set); CX Y-40 at 2007. Euclid has never produced a passing ATG test for the two regular tanks at the facility. CX Y-40 at 2007.

With respect to Tank BW-4, the used-oil tank, the Maryland Department of Environment requested release detection records from respondent, but none were provided. TR-2 at 49-50; CX Q-7 at 0814. Indeed, Euclid stipulates that it “has no documentation of manual tank gauging for Tank BW-4.” Stip. 120 (First Set).

Accordingly, it is held that EPA has proven the violations charged in Count 50. A civil penalty of **\$116,899** is assessed for these violations.

With respect to the seriousness of the violations, the four USTs at issue in this count had a total capacity of 21,000 gallons. Amend. Ans. ¶ 388. The Hennessy Report assigns a “Groundwater Use Rating” of “1” for the Rhode Island Avenue site and a rating of “4” as to the “Likelihood that Release would Contaminate Groundwater.” Regarding this latter evaluation, the Hennessy Report notes that there were two wells within 1.2 and 1.4 miles of the site, and a spill had occurred on the site in 1997, and another spill in 1998. CX Y-22, Tables 3 & 6. The Rotenberg Report assigns this facility a “population factor rating” of “5” and an “exposure potential factor” of “5” as well. CX Y-23 at 1794 (Euclid site # 19). The Rotenberg Report explains that the Rhode Island Avenue facility was in an “urban” area typically containing utility trenches that would serve as a “preferred path of migration,” as well as shallow groundwater with permeable soils that present “the potential of both groundwater contamination and vapor intrusion.” CX Y-23 at 1790-1792.

The penalty assessment also reflects Euclid’s high degree of negligence, the length of the periods of non-compliance (approximately six years), and the Delayed Cost savings and Avoided Cost identified by EPA (*see* Compl. Br. at 307).

#### **Count 54**

This count involves respondent’s facility located at 1576 Wisconsin Avenue, Washington, D.C. EPA charges that prior to May 4, 1998, Euclid violated 40 C.F.R 280.40 and 280.41(a), and beginning on May 4, 1998, it violated 20 DCMR §§ 6000 and 6003, by failing to provide methods of tank release detection for Underground Storage Tanks GT-1, GT-2, GT-3 (gasoline tanks), and GT-4 (a used-oil tank). F. Amend. Compl. ¶ 426. The period of alleged violation is September 30, 1997, to April 15, 2003. *Id.*

With respect to Tanks GT-1, GT-2, and GT-3, Euclid claims to have conducted inventory control with tank tightness testing, and in-tank ATG testing. Stip. 124 (First Set). With respect to Tank GT-4, it claims to have conducted manual tank gauging. Stip. 127 (First Set).

Euclid’s reliance upon inventory control must fail, at least in part, inasmuch as 20 DCMR

§§ 6003.3 and 6003.4 provide that inventory control and tank tightness testing could not be used in lieu of other monthly monitoring methods after December 22, 1995. This cut-off date precedes the dates of violation charged in this count insofar as the District of Columbia Municipal Regulations are concerned.

Nonetheless, Euclid is charged with violating 20 DCMR §§ 6000 and 6003 only as of May 4, 1998. Prior to this date, it is charged with violating 40 C.F.R. 280.40 and 280.41(a), Federal regulations that have a less strict deadline of December 22, 1998. Thus, respondent's inventory control claim must be examined separately with respect to the time period prior to May 4, 1998.

The evidence contained in the record on this issue does not show non-compliance by respondent with 40 C.F.R. 280.40 and 280.41(a), as alleged in the First Amended Complaint. In arguing that a violation of the Federal regulations did in fact occur, EPA cites to the testimony of DCDOH employee Kofi Berko and to Complainant's Exhibit R-7 at 0871 for the proposition that the USTs were installed in 1983. EPA then concludes that "under the federal UST regulations, tanks installed in 1983 would not be eligible for ... use of inventory control as a monthly tank release detection method subsequent to December 22, 1998." Compl. Br. at 80. While that may indeed be the case, the problem for EPA here is that it alleges a violation of the Federal UST regulations for a time period (*i.e.*, prior to May 4, 1998) that predates December 22, 1998. This argument, therefore, is of no help to complainant. Also, EPA's refrain that "any inventory control being conducted by Euclid was subject to all the shortcomings discussed in Section V.A.2.b(ii), above" alone does not satisfy the Agency's burden of proof on this issue.

Next we address respondent's ATG testing defense. Here, Euclid stipulates that it "has no documentation of a passing in-tank testing result from the ATG system associated with Tanks GT-1, GT-2, or GT-3 prior to at least August 14, 2003." Stip. 125 (First Set). Significantly, this passing in-tank testing result occurred after the dates of alleged violation.<sup>37</sup> Therefore, Euclid's ATG defense is rejected.

With respect to Tank GT-4, the used-oil tank, EPA Inspector Marie Owens testified that Ted Beck, Euclid's compliance contractor and expert witness (*see* n.33, *supra*), informed her that tank release detection had not been consistently performed on this tank. TR-4 at 189. Owens' testimony is not in dispute and is, therefore, credited. Moreover, respondent stipulates that it has no documentation of manual tank gauging for Tank GT-4. Stip. 128 (First Set).

Accordingly, with respect to Tanks GT-1, GT-2, and GT-3, it is held that EPA has proven the violations alleged in Count 54, but only insofar as the District of Columbia Municipal Regulations are concerned. Complainant has failed to prove that Euclid violated the Federal UST regulations insofar as these three tanks are concerned. With respect to Tank GT-4, EPA has proven the violation as charged.

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<sup>37</sup> In fact, only one of the USTs passed an ATG test on August 14, 2003. CX Y-40 at 2007.

A civil penalty of **\$100,000** is assessed for the violations found in Count 54. With respect to the seriousness of the violations, this penalty assessment reflects the shorter period of non-compliance than alleged by EPA. (The USTs involved had a total capacity of 26,550 gallons. Amend. Ans. ¶ 415.) It also reflects the fact that the Hennessy Report assigns a “Groundwater Use Rating” of “2” and a “Likelihood that Release would Contaminate Groundwater” rating of “5.” CX Y-22, Tables 1 & 4. The Rotenberg Report assigns a “population factor rating” of “5” and an “exposure potential rating” of “5.” CX Y-23 at 1794 (Euclid site # 20). The Rotenberg Report concludes that the Wisconsin facility is in an “urban” area and as such, presents the usual exposure components of utility trenches and shallow groundwater with permeable soils. As a result, any petroleum release will have a preferred path of migration and present the hazards of groundwater contamination and vapor intrusion. CX Y-23 at 1790 & 1792.

Additional factors considered in the penalty assessment for Count 54 were respondent’s high degree of negligence, and Delayed Cost Savings and Avoided Costs identified by EPA (*see* Compl. Br. At 309).

### **Count 57**

This count involves respondent’s facility located at 22 Florida Avenue, Washington, D.C. EPA charges that prior to May 4, 1998, Euclid violated 40 C.F.R. 280.40 and 280.41(a), and that beginning on May 4, 1998, it violated 20 DCMR §§ 6000 and 6003, by failing to provide methods of release detection for Underground Storage Tanks FL-1, FL-2, and FL-3. F. Amend. Compl. ¶ 446. The period of alleged violation is September 30, 1997, to December 28, 1999, and January 28, 2000, to April 21, 2003. *Id.* Euclid stipulates that for these three USTs it conducted inventory control combined with tank tightness testing, and in-tank ATG testing. Stip. 132 (First Set).

As noted, the First Amended Complaint charges non-compliance with the Federal UST regulations prior to May 4, 1998, and non-compliance with the District of Columbia Municipal Regulations beginning on May 4, 1998. Accordingly, these charges of violation must be viewed separately.

Regarding the alleged violation of 40 C.F.R. 280.40 and 280.41(a), EPA has little to offer by way of evidence. In discussing inventory control, complainant explains that because the tanks were not upgraded until December of 1999, respondent could not use inventory control as a method of monthly tank release detection until that time. Moreover, because of certain cathodic protection problems, EPA asserts that Euclid could not utilize inventory control for the tanks for an additional 7 months. Compl. Br. at 81-82. Yet, EPA’s explanation in this regard has nothing to do with the time line as it relates to the Federal UST charges. After all, it was EPA who asserted in the First Amended Complaint that the Federal UST regulations were violated up until May 4, 1998, and that the District of Columbia regulations were violated thereafter. Thus, EPA essentially has offered no proof that the Federal UST regulations were violated prior to May 4, 1998.

With respect to the District of Columbia Municipal Regulations, inasmuch as inventory control could not be used in lieu of other monthly monitoring methods in the District of Columbia after December 22, 1995, respondent must rely solely upon its ATG testing defense for the period of alleged violation beginning on May 4, 1998. *See* 20 DCMR §§ 6003.3 & 6003.4.

Respondent admits that no ATG system was present at the Florida Avenue facility until December of 1999. Stip. 133 (First Set). In addition, when EPA inspected this facility on April 14, 2003, the ATG history that was pulled showed that the ATG was not programmed to conduct testing automatically, and that there had never been a passing ATG test for any tank at the facility. TR-5 at 6-10; CX S-6 at 0913, 0922a.<sup>38</sup> Moreover, the first passing ATG test result that Euclid could produce for this facility did not occur until August 14, 2003, after the period of alleged violation. Stip. 134 (First Set).

Based upon the preceding evidence, it is held that EPA has proven the violations charged in Count 57 insofar as the District of Columbia's UST regulations are concerned, but it has failed to establish a violation with respect to the Federal UST regulations. A civil penalty of **\$65,000** is assessed for these violations.

This civil penalty is based upon the seriousness of the violations, Euclid's negligence, and certain Delayed Cost Savings and Avoided Costs enjoyed by respondent. Insofar as the seriousness of the violations is concerned, the USTs involved in this count had a total capacity of 32,000 gallons. Amend. Ans. ¶ 437. Also, the Hennessy Report assigns a "Groundwater Use Rating" of "1" for the Florida Avenue facility, and a "Likelihood that Release would Contaminate Groundwater" rating of "5." CX Y-22, Tables 1 & 4. The Rotenberg Report assigns this facility a "population factor" of "5" and an "exposure potential factor" of "5" as well. CX Y-23 at 1794 (Euclid site # 21). The Rotenberg Report considers this site to be an "urban" one and, accordingly, warranting the highest exposure potential rating due to the presence of utility trenches providing a preferred path of migration, and shallow groundwater with permeable soils providing the potential for groundwater contamination and vapor intrusion. CX Y-23 at 1792.

This penalty assessment also takes into account the length of the periods of non-compliance, Euclid's high degree of negligence, and the Delayed Cost Savings and the Avoided Cost identified by EPA (*see* Compl. Br. at 311).

### **Count 62**

This count involves respondent's facility located at 15501 New Hampshire Avenue, Silver Spring, Maryland. EPA charges that Euclid violated COMAR §§ 26.10.05.01 and 26.10.05.02.B by failing to provide methods of tank release detection for Underground Storage Tanks NH-1, NH-2, and NH-3. F. Amend. Compl. ¶ 484. The period of alleged violation is September 30,

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<sup>38</sup> Ted Beck represented Euclid during the inspection. The only ATG test result that he was able to provide EPA Inspector Marie Owens was an "invalid" result. TR-5 at 10-11.

1997, to May 2, 2003. *Id.*

For the three USTs at issue in this count, NH-1, NH-2, and NH-3, Euclid claims to have conducted inventory control combined with tank tightness testing, and in-tank ATG testing. Stip. 144 (First Set). Respondent, however, was unable to produce any tank tightness testing results at its April, 2002, meeting with EPA, and subsequently could produce only one test, dated May 2, 2003. This is the test result that brought Euclid into compliance with the UST tank release detection regulations. TR-5 at 14. Thus, as EPA claims, “Euclid could not demonstrate that it had conducted a tank tightness test within 5 years, as required when inventory control is combined with tank tightness testing.” Compl. Br. at 84.

With respect to its in-tank ATG testing defense, Euclid stipulates that “[p]rior to November 9, 2000, Tanks NH-1, NH-2, and NH-3 were not equipped with an automatic tank gauging system (‘ATG system’) which was capable of performing in-tank testing.” Stip. 145 (First Set).<sup>39</sup> Also, EPA Inspector Owens testified that she spoke with the station manager during the EPA inspection of May 9, 2003, and that the station manager stated that “he only pulls inventory from the ATG.” TR-5 at 17. Because the station manager’s explanation is consistent with that of other station manager’s discussed, *supra* (i.e., ATG systems were used for inventory control purposes only), Inspector Owens’ testimony is credited.

Finally, respondent stipulates that the first passing ATG test for the New Hampshire Avenue facility that it could produce did not occur until October 17, 2003, which is after the period of alleged violation. Stip. 146 (First Set). Thus, Euclid’s in-tank ATG defense is rejected.

Accordingly, it is held that EPA has established the violations charged in Count 62. A civil penalty of **\$66,392** is assessed for these violations.

With respect to the seriousness of these violations, the USTs involved in Count 62 had a total capacity of 30,000 gallons. Amend. Ans. ¶ 475. Also, the Hennessy Report assigns a “Groundwater Use Rating” of “1” for this site and a “Likelihood that Release would Contaminate Groundwater” rating of “5.” CX Y-22, Tables 1 & 4. The Rotenberg Report assigns the New Hampshire facility a “population factor” of “5” and an “exposure potential factor” of “5.” CX Y-23 at 1794 (Euclid site # 22). The Rotenberg Report determined that because this site was in an “urban” area, the exposure potential would include the presence of utility trenches (and hence, a path of migration), and shallow groundwater with permeable soils, presenting the potential of both groundwater contamination and vapor intrusion. CX Y-23 at 1972.

The penalty assessment for Count 62 also included a consideration as to the length of periods of tank release detection non-compliance (approximately 5 1/2 years), the high degree of

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<sup>39</sup> EPA states that this stipulation is inconsistent with respondent’s earlier representations that it had used an ATG at the facility on May 20, 1996, and January 5, 2000. Compl. Br. at 84, citing CXs T-4 at 0941 & T-7 at 0953.

respondent's negligence, and the Delayed Costs Savings and Avoided Costs identified by EPA (*see* Compl. Br. at 313).

### **Count 70**

This count involves respondent's facility located at 5608 Buckeystown Pike, Frederick, Maryland. EPA charges that Euclid violated COMAR §§ 26.10.05.01 and 26.10.05.02.B by failing to provide methods of tank release detection for Underground Storage Tanks FR-1, FR-2, FR-3, and FR-4. F. Amend. Compl. ¶ 544. The period of alleged violation is September 30, 1997, to October 6, 2002.

For Tanks FR-1, FR-2, and FR-3 (gasoline tanks), Euclid claims to have conducted inventory control combined with tank tightness testing, and in-tank ATG testing. Stip. 155 (First Set). For Tank FR-4 (used-oil tank), Euclid claims to have conducted manual tank gauging. Stip. 157 (First Set).

Because Tanks FR-1, FR-2, and FR-3 were installed in 1985 (Amend. Ans. ¶ 534), inventory control may not be used after December 22, 1998, to establish compliance with monthly tank release detection requirements. COMAR § 26.10.05.02.B. Thus, for purposes of Count 70, respondent's claimed inventory control is relevant only for the period September 30, 1997, to December 22, 1998. Because respondent did not identify inventory control on the UST Notification filed with the Maryland Department of the Environment in 1997 (CX W-3 at 1052), the inference may be drawn that inventory control was not a method of tank release detection relied upon by Euclid for the time period in question.<sup>40</sup>

With respect to respondent's reliance on in-tank ATG testing, respondent "has no documentation of a passing in-tank testing result from the ATG system associated with Tanks FR-1, FR-2, and FR-3 prior to October 6, 2002." Stip. 156 (First Set).

Accordingly, it is held that EPA had proven the violations charged in Count 70. A civil penalty of **\$30,000** is assessed.

With respect to the seriousness of the violations, the USTs involved in Count 70 had a total capacity of 30,550 gallons. Amend. Ans. ¶ 534. In addition, the Hennessy report assigns a "Groundwater Use Rating" of "4" for this site and a "Likelihood that Release would Contaminate Groundwater" rating of "3." CX Y-22, Tables 3 & 6. The Rotenberg Report assigns a "population factor" of "2" and an "exposure potential factor" of "2," as well. CX Y-23 at 1794 (Euclid site # 25). The Rotenberg Report also notes that the Buckeystown site rating was based

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<sup>40</sup> EPA notes that its inspection of June 19, 2003, revealed that the operator of the Buckeystown Pike facility did maintain inventory control records, but only going back to August of 2002. *See* TR-5 at 28-30. As noted, inventory control was not an available tank release detection option at this facility after December 22, 1998. *See* Compl. Br. at 85-86.

on “some groundwater use as drinking water, and the location of a trailer park within the quarter mile radius.” CX Y-23 at 1793.

Even though respondent exhibited a high degree of negligence, and the period of non-compliance was from September 30, 1977, to October 6, 2002, the low population rating and the low exposure potential rating as set forth in complainant’s two expert reports warrants the assessment of a lower penalty than requested.

## **2. The Line Release Detection Violations**

### **a. The Regulations**

Underground piping that routinely conveys regulated substances under pressure must be equipped with an “automatic line leak detector.” 40 C.F.R. 280.41(b)(1)(I), 20 DCMR § 6004.2, COMAR § 26.10.05.02.C(2)(a), & 9 VAC 25-580-140.2.a(1).<sup>41</sup> Automatic line leak detection methods may be used “which alert the operator to the presence of a leak by restricting or shutting off the flow of regulated substances through piping or triggering an audible or visual alarm may be used only if they detect leaks of 3 gallons per hour at 10 pounds per square inch line pressure within 1 hour.” 40 C.F.R. 280.44(a), 20 DCMR § 6013.2, COMAR § 26.10.05.05.B & 9 VAC 25-580-170.1. The automatic line leak detector must be tested annually. *Id.*<sup>42</sup>

EPA expert John Cignatta testified that “a line leak detector is designed specifically for pressurized lines.” He explained that line leak detectors are “mechanical devices” that are pressure sensors powered by the pressure of the fuel. TR-7 at 71-72. Cignatta further explained the operation of line leak detectors as follows:

Each time the pump starts, the mechanically operated line leak detector would sense whether or not the line downstream of it is pressurizing. If it does not sense that the line downstream is pressurizing, that mechanical line leak detector will force the flow into what’s called a metering condition in which the flow would be severely restricted, down to the point of a trickle in terms of fraction of a gallon per hour would all that would be able to come out until someone came out and found the problem with the leaking line and then could clear the fault. So a line leak detector is a continuous testing device.

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<sup>41</sup> This regulatory requirement is referred to in this case as “line leak detection.”

<sup>42</sup> EPA does not allege that Euclid failed to provide line leak detectors, “[e]xcept for one facility where the line leak detection system was at least temporarily non-operable.” Compl. Br. at 101-102. Instead, to the extent that EPA charges line leak detector non-compliance, those charges involve respondent’s alleged failure to test the line leak detectors annually.



Every time the pump goes off and the line becomes depressurized, it immediately reactivates. When the pump starts to -- comes back on and tries to again repressurize the line, it will initially restrict the flow until it establishes that the line downstream is becoming pressurized. If it's pressurized it can't be leaking, and at that point it releases the flow.

TR-7 at 72.

Also, in conjunction with the use of an automatic line leak detector, underground piping that conveys regulated substances under pressure must have an "annual line tightness test" or have "monthly monitoring." 40 C.F.R. 280.41.1(b)(1)(ii), 20 DCMR § 6004.3, COMAR § 26.10.05.02.C(2)(b), & 9 VAC 25-580-140.2.a(2).<sup>43</sup> The annual line tightness test requirements are an ability to "detect a 0.1 gallon per hour leak rate at one and one-half times the operating pressure." 40 C.F.R. 280.44(b), 20 DCMR § 6013.3, COMAR § 26.10.05.05.C, & 9 VAC 25-580-170.2. The monthly monitoring requirements allow for several methods of compliance. As noted by EPA, however, "the only option claimed by Respondent at 16 of its 23 facilities, is interstitial monitoring." Compl. Br. at 88. See 40 C.F.R. 280.43(g), 20 DCMR § 6010, COMAR § 26.10.05.04.H, & 9 VAC 25-580-160.7.

#### **b. The Interstitial Monitoring Defense**

With respect to some of the line release detection counts, respondent claims to have complied with the applicable regulations by conducting "interstitial monitoring." Interstitial monitoring requires a double-walled or secondarily contained system. VADEQ Inspector Willis explained:

As far as the interstitial monitoring is concerned, you would have sump pump containment and which is like a plastic bucket that, you know, separates the system from the surrounding environment. You'd have to have double, a double wall or secondarily contained pipe that slopes to the sump. You'd have to have sensors in the sump area that were positioned down at the bottom of the sump and tied into some sort of computerized system such as an automatic tank gauge that would alarm, either visually or audibly, basically immediately to say the cashier, or in some cases we have owners that actually have that information go via to their corporate office.

TR-1 at 116-117.

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<sup>43</sup> This regulatory requirement is referred to in this case as "line release detection."

EPA's Underground Storage Tank expert, John Cignatta, agreed that a sump sensor is a form of interstitial monitoring and that it provides a "very early detection" of a leak. He too explained that a sump pump sensor system must have double-walled piping that is sloped so that any release from the inner pipe into interstitial space would flow into the sump. The sump must be liquid tight so that it will contain the leaking product and will not allow the infiltration of water. Lastly, the sump must contain a sensor to detect releases. TR-7 at 41, 78-80.

Cignatta also identified having a tight sump" as a "very crucial item." (This is critical testimony given the fact that a number of the sumps relied upon by Euclid in this case had water leakage.) Cignatta explained that "a tight sump" is defined as "a sump with all of the pass throughs by conduits, by piping, any plumbing fittings or connections or components pass through the walls or through the floor liquid tight, and at the same time one in which I'm not going to be expecting rain water to be draining off the parking lot into it, that it's going to be covered and it's going to be sealed such that the only thing that is going to be in there is going to be losses from the double wall pipe and that I have a proper and appropriate sensor system that will detect the leakage or release of a liquid into the sump." TR-7 at 80.

Respondent's interstitial monitoring defense is examined below, with respect to the specific counts in which it is raised.

### **c. The Charges of Violation**

#### **Count 2**

This count involves respondent's facility located at 420 Rhode Island Avenue, Washington, D.C. EPA charges that Euclid violated 40 C.F.R. 280.40 and 280.41(b) prior to May 4, 1998, and 20 DCMR §§ 6000 and 6004 beginning on May 4, 1998, by failing to provide line leak detection and line release detection for the underground piping associated with the Tanks RI-1, RI-2, and RI-3. F. Amend. Compl. ¶¶ 23-25. The periods of alleged violation are September 30, 1997, to March 17, 2001, and December 28, 2002, to February 2, 2003. *Id.*

Euclid has no documentation that it performed line leak detection on the underground piping, except for tests performed on March 17, 2001, December 28, 2001, and February 2, 2003. Stip. 25 (First Set). Insofar as line release detection is concerned, Euclid does not claim that it performed any method of detection, other than line tightness testing, from September 30, 1997, to January 8, 2003. Stip. 24 (First Set). Also, respondent has no documentation of line tightness tests having been performed on the underground piping associated with Tanks RI-1, RI-2, and RI-3, except for tests performed on March 17, 2001, December 28, 2001, and February 2, 2003. Stip. 25 (*id.*).

The regulations require that the underground piping be equipped with an automatic line leak detector, tested annually, and that there be either annual line tightness testing or monthly monitoring. Given Euclid's stipulations regarding its limited production of line leak detector and line tightness testing documentation, it is held that EPA has proven the violations as charged in

Count 2. A civil penalty of **\$85,304** is assessed for these violations.

With respect to the seriousness of the violations established in Count 2, the USTs involved had a total capacity of 31,000 gallons. Amend. Ans. ¶ 4. In addition, as noted, the Hennessy Report provides a “Groundwater Use Rating” of “1,” and a rating of “5” for “Likelihood that Release would Contaminate Groundwater.” CX Y-22, Tables 1 & 4. The Rotenberg Report assigns the Rhode Island facility a rating of “5” for both the “population factor” and the “exposure potential factor.” This report also concludes that because this site is an urban one with a large population, “[p]referential pathways of utility lines and trenches, combined with a shallow groundwater table, will allow released petroleum products to move in the environment, and thus allow exposure.” CX Y-23 at 1790, 1794 (Euclid site # 1).

The testimony of EPA expert John Cignatta puts the seriousness of this violation in context. This testimony applies to all of the line release counts at issue in this case. Cignatta explained:

[I]f there is ever going to be a large loss of fuel, it would be involving not gravity leaking out of a tank but a pump pumping fuel out of a pipe. We can have greater volumes being pushed into the environment by a pumping action than we can by a leak through a small hole.

TR-7 at 71. Cignatta added that “*the criticality of a line leak detector cannot be underscored*” and that it is “*a very critical element.*” TR-7 at 72 (emphasis added). Indeed, Cignatta commented that whenever there have been major losses of gasoline into the environment in a very short order, it usually has involved a line leak detector not working. TR-7 at 72-73. In addition, Cignatta testified regarding the importance of annual testing of line leak detectors (as required by the UST regulations). He likened this mechanical device to “an emergency brake on [a] car” and that “it will wear out over time.” Hence, the need for annual testing. TR-7 at 75.<sup>44</sup>

This penalty assessment also takes into account the length of the periods of non-compliance, the high degree of respondent’s negligence, as well as the Avoided Cost for annual line testing (*see* Compl. Br. at 318).

#### **Count 4**

This count involves respondent’s facility located at 1400 W Street, Washington, D.C. EPA charges that Euclid violated 20 DCMR §§ 6000 and 6004 by failing to provide line leak detection and line release detection for the underground piping associated with Tanks 14-1 and

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<sup>44</sup> “All of the piston or diaphragm metering components, needle points, all are continually moving back and forth, so therefore, we expect wear and tear and reliability is just the function of eventually something’s going to wear out.” TR-7 at 76.

14-2. F. Amend. Compl. ¶¶ 37-40. The periods of alleged violation are July 1, 1998, to November 5, 1999, and November 5, 2000, to April 17, 2003. *Id.*

Euclid has no documentation of line leak detection tests having been performed on the underground piping, except for tests performed on November 5, 1999, and April 17, 2003. Stip. 28 (First Set). With respect to piping release detection, respondent claims only that it has performed line tightness testing and, or, interstitial monitoring from July 1, 1998, to January 8, 2003. Stip. 27 (First Set). Also, Euclid has no documentation of line tightness test having been performed on the underground piping associated with Tanks 14-1 and 14-2, except for tests performed on November 5, 1999, and April 17, 2003. Stip. 28 (First Set).

Given the stipulations entered into by respondent, it is held that EPA has proven the violations as alleged. In that regard, Section 6004.2 in part provides that “[u]nderground piping that conveys regulated substances under pressure shall be equipped with an automatic line detector.” 20 DCMR § 6004.2. There is no evidence that respondent had an automatic line leak detector for Tanks FL-1 and FL-2 from September 30, 1997, until line leak detector testing was conducted on February 5, 2002.

In addition, Section 6004.3 provides that underground piping that conveys regulated substances under pressure are to have annual line tightness testing. 20 DCMR § 6004.3. Given respondent’s above stipulations, it is held that Euclid violated Section 6004.3 from September 30, 1997, until November 5, 1999, when it conducted line tightness testing. It is further held that respondent also violated this annual line tightness testing requirement from November 5, 2000 (one year from the earlier testing) until April 17, 2003, when testing again was performed.

To the extent that Euclid argues that it engaged in interstitial monitoring at its “W” Street, Washington, D.C., facility to satisfy the regulations (*see* Stip. 27 (First Set)), that argument is rejected. In that regard, as argued by EPA, photographs taken by the District of Columbia Department of Health inspector at this facility show severe rusting on metal components, as well as dirt and rust stains on the sump floor and walls. This is proof of chronic flooding of the sumps, and it is certainly inconsistent with respondent’s representation that it properly engaged in interstitial monitoring to detect line releases. *See* CX B-4 at 0129-0133; *see also*, TR-5 at 70.

Accordingly, it is held that EPA has proven the violations as charged in Count 4. A civil penalty of **\$35,997** is assessed for the violations proven in this count.

With respect to the seriousness of the violation, the USTs involved here had a total capacity of 24,000 gallons. Amend. Ans. ¶ 31. Also, the Hennessy Report assigns this site a “Groundwater Use Rating” of “2” and a “Likelihood that Release would Contaminate Groundwater” rating of “5.” CX Y-22, Tables 1 & 4. The Rotenberg Report assigns a “population factor” rating of “5,” as well as a “potential exposure” rating of “5.” CX Y-23 at 1794 (Euclid site # 2). Again, because this site is an urban one with large population, the Rotenberg report explains that “[p]referential pathways of utility lines and trenches, combined with a shallow groundwater table, will allow released petroleum products to move in the

environment, and thus allow exposure.” CX Y-23 at 1794.

This violation was also the result of respondent’s high degree of negligence, which factors into the penalty consideration. Also considered in the determining the penalty are the length of the periods of non-compliance, and the Avoided Cost for annual line testing identified by EPA (*see* Compl. Br. at 319).

### **Count 7**

This count involves respondent’s facility located at 42382 John Mosby Highway, Chantilly, Virginia. EPA charges that Euclid violated 40 C.F.R. 280.40 and 280.41(b), as well as 9 VAC 25-580-130 and 140.2, by failing to provide methods of line leak detection and line release detection for the underground piping associated with Tanks 50-1, 50-2, 50-3, and 50-4. F. Amend. Compl. ¶¶ 65-67. The periods of alleged violation for Tanks 50-1, 50-2, and 50-3 are September 30, 1997, to June 20, 2001, and June 20, 2002, to May 5, 2003. The periods of alleged violation for Tank 50-4 are September 30, 1997, to May 18, 1999, and May 18, 2000, to May 5, 2003. *Id.*

With respect to the charges of violation in Count 7, Euclid has no documentation of line leak detection tests having been performed on the underground piping, except for tests performed on May 18, 1999 (Tank 50-4 only), June 20, 2001 (all four USTs), and May 5, 2003 (all four USTs). Euclid does not claim that it has performed any method of piping release detection for the underground piping, other than line tightness testing and, or, interstitial monitoring from September 30, 1997, to January 8, 2003. Stip. 33 (First Set). Also Euclid has no documentation of line tightness tests being performed on the underground piping associated with the USTs, except for tests performed on May 18, 1999 (Tank 50-4 only), June 20, 2001 (all four USTs), and May 5, 2003 (all four USTs). Stip. 34 (First Set.)

Accordingly, given the admissions and stipulations set forth above, it is held that with respect to Tanks 50-1, 50-2, and 50-3, Euclid violated the line leak detector and line tightness testing requirements from September 30, 1997, to June 20, 2001, and from June 20, 2002, to May 5, 2003. As for Tank 50-4, respondent violated the line leak detector and line tightness testing requirements from September 30, 1997, to May 19, 1999, from May 19, 2000, until testing was performed on June 20, 2001, and again from June 20, 2002, until testing was performed on May 5, 2003.

The admissions and stipulations are further supported by the testimony of EPA Inspector George Houghton. Inspector Houghton testified that he inspected respondent’s John Mosby Highway facility on June 5, 2001. TR-2 at 163-164. During the inspection, Inspector Houghton spoke with the operators of the facility, two individuals referred to as the “Desai brothers.”<sup>45</sup>

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<sup>45</sup> Houghton explained that the Desai brothers bought the facility in early 1999. As noted earlier in discussing Count 6, a the tank release detection count, the Underground Storage

Inspector Houghton testified that the facility was equipped with a “Veeder-Root 250” and that this was used by the Desai brothers to monitor the gasoline inventory. TR-2 at 169.<sup>46</sup>

The inspector asked the Desai brothers questions concerning whether they conducted release detection and whether the Veeder-Root 250 was capable of leak detection. The inspector concluded that the Desai brothers did not appear to understand the concept of “leak detection,” explaining that it was “almost like a learning experience for them.” TR-2 at 170. Inspector Houghton concluded that the Desai brothers “were not doing any leak detection, and since there was nobody there from Euclid, we couldn’t go any further.” TR-2 at 171.

To the extent, therefore, that Euclid relies upon interstitial monitoring as a defense to these charges, this defense is rejected. The testimony of Inspector Houghton establishes that the Desai brothers, the station managers, essentially were unaware of any line leak or line release detection being performed at the facility. Also, Inspector Houghton observed during this inspection that “the diesel sump had a small amount of what appeared to be fuel and water in it.” TR-2 at 178. This finding by the inspector, together with his testimony regarding the Desai brothers, establishes that there was no interstitial monitoring being performed at the facility as Euclid claims.

Accordingly, for the violations established in Count 7, a penalty of **\$50,449** is assessed. This penalty reflects the seriousness of the violations. In that regard, the USTs involved here had a total capacity of 29,000 gallons. Amend. Ans. ¶ 45. The Hennessy Report assigns this facility a “Groundwater Use Rating” of “5” and a “Likelihood that Release would Contaminate Groundwater” rating of “3.” CX Y-22, Tables 2 & 5. The Rotenberg Report assigns a “population factor” of “2” and an “exposure potential factor” of “3.” CX Y-23 at 1794 (Euclid site # 3). This penalty takes into account the length of the periods of non-compliance, the high degree of respondent’s negligence, and the Avoided Cost for annual line testing (*see* Compl. Br. at 321).

### **Count 11**

This count involves respondent’s facility located at 13793 Spotswood Trail, Ruckersville, Virginia. EPA charges that Euclid violated 9 VAC 25-580-130 and 140.2, by failing to provide line leak detection and line release detection for the underground piping associated with Tanks 29-1 and 29-2. F. Amend. Compl. ¶¶ 97-98. The periods of alleged violation are April 5, 1999, to June 1, 1999, and June 1, 2000, to May 7, 2003. *Id.*

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Tanks at this facility were owned by Euclid and the Desai brothers sold the gasoline for respondent on a commission basis. TR-2 at 168-169.

<sup>46</sup> A Veeder-Root 250 is an automatic tank gauging piece of equipment that will identify the amount of product in the tank, as well as the tank’s “ullage” (*i.e.*, the space remaining in the tank that is not filled with product). *Id.*

Euclid has no documentation of line leak detector tests having been performed on the underground piping, except for tests performed on June 1, 1999, and May 7, 2003. Stip. 41 (First Set). Also, Euclid does not claim that it has performed any method of piping release detection for the underground piping, other than line tightness testing and, or, interstitial monitoring from April 5, 1999, to January 8, 2003. Stip. 40 (First Set). Euclid likewise has no documentation of line tightness tests having been performed on the underground piping associated with Tanks 29-1 and 29-2, except for tests performed on June 1, 1999, and May 7, 2003. Stip. 41 (First Set). Also, respondent has offered no evidence to support its claim of interstitial monitoring.

On the basis of Euclid's stipulations, and the absence of any contrary evidence, it is held that respondent committed the line leak detection and line release detection violations as alleged. The initial period of violation began on April 5, 1999, and ended on June 1, 1999, when respondent performed the requisite testing. The second period of violation began on June 1, 2000 (at which point the annual requirement to test was exceeded) and it ended with respondent's testing on May 7, 2003. Again, to the extent that Euclid relies upon interstitial monitoring as a defense, there is simply no evidence in the record to support such a claim relative to the operation of its Spotswood Trail facility.

A civil penalty of **\$15,262** is assessed for the violations proven as to Count 11. This assessment takes into account the fact that the USTs involved in this count had a total capacity of 20,000 gallons. Amend. Ans. ¶ 77. In addition, the Hennessy Report assigns a "Groundwater Use Rating" of "3" and a "Likelihood that Release would Contaminate Groundwater" rating of "5." CX Y-22, Tables 2 & 5. The Rotenberg Report assigns this site a "population factor" of "1" and an "exposure potential factor" of "2." CX Y-23 at 1794 (Euclid site # 4). The length of the periods of non-compliance serve to increase the gravity of these violations and is a factor in determining the penalty. Also, respondent's failure to comply with the UST regulations constitutes a high degree of negligence. Finally, the penalty includes Euclid's Avoided Cost for annual line testing (*see* Compl. Br. at 322).

### **Count 12**

This count, like the previous one, involves respondent's facility located at 13793 Spotswood Trail, Ruckersville, Virginia. Here, EPA charges that Euclid violated 40 C.F.R. 280.40 and 280.41(b), as well as 9 VAC 25-580-130 and 140.2, by failing to provide line leak detection and line release detection for the underground piping associated with Tanks 29-3 and 29-4. F. Amend. Compl. ¶¶ 102-103. The period of alleged violation is September 30, 1996, to March 1, 1999. *Id.*

With respect to Tanks 29-3 and 29-4, respondent stipulates that from September 30, 1997, until the tanks were removed from the ground, it did not perform any method of piping release detection for the underground piping associated with these tanks, other than line tightness testing.

Stip. 42 (First Set).<sup>47</sup> Also, except for tests performed on the underground piping associated with Tanks 29-3 and 29-4 on February 22, 1995, respondent has no documentation of line tightness testing. Stip. 43 (First Set).

Respondent's admission that it did not conduct line leak detection tests for Tanks 29-3 and 29-4 establishes a violation of 40 C.F.R. 280.40 and 280.41(b), as well as 9 VAC 25-580-130 and 140.2. In addition, the record is devoid of evidence that Euclid conducted line tightness testing other than on February 22, 1995. Accordingly, EPA likewise has proven the violations as charged insofar as they relate to respondent's failure to conduct line tightness testing.

Here, the USTs involved had a total capacity of 20,000 gallons. Amend. Ans. ¶ 78. Accordingly, for the reasons mentioned in the Count 11 penalty analysis, the civil penalty requested by EPA in the amount of **\$11,495** is assessed.

### **Count 16**

This count involves respondent's facility located at 4123 Ocean Gate Highway, Trappe, Maryland. EPA charges that Euclid violated COMAR §§ 26.10.05.01 and 26.10.05.02.C by failing to provide line leak detection and line release detection for the underground piping associated with Tanks TR-1, TR-2, and TR-3. F. Amend. Compl. ¶¶ 133-134. The period of alleged violation is September 30, 1997, to June 15, 2002. *Id.*

Euclid has no documentation of line leak detector tests having been performed on the underground piping, except for tests performed on June 15, 2002, and May 19, 2003. Stip. 49 (First Set). With respect to line release detection, respondent claims only to have conducted line tightness testing from September 30, 1997, to January 8, 2003. Stip. 48 (First Set). Euclid has no documentation for this line tightness testing, except for tests conducted on June 15, 2002, and May 19, 2003. Stip. 49 (First Set).

The fact that respondent has no documentation that it performed line leak detection testing and line release detection testing, other than on June 15, 2002, establishes the violations of COMAR §§ 26.10.05.01 and 26.10.05.02.C, as charged by EPA.<sup>48</sup>

Accordingly, a civil penalty of **\$73,604** for the violations in Count 16. This assessment takes into account the fact that the USTs involved had a total capacity of 30,000 gallons. Amend. Ans. ¶ 115. It also takes into account the length of the periods of non-compliance (approximately 5 years), as well as findings of the two EPA expert reports. In that regard, the Hennessy Report

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<sup>47</sup> Tanks 29-3 and 29-4 were not removed from the ground until at least April 5 and 6, 1999. Stip. 44 (First Set). This is after the period of the alleged violation.

<sup>48</sup> Respondent's May 19, 2003, testing is not relevant inasmuch as it is beyond the period of alleged violation.



assigns this facility a “Groundwater Use Rating” of “5” and a “Likelihood that Release would Contaminate Groundwater” rating of “4.” CX Y-22, Tables 3 & 6. The Rotenberg Report assigns the Ocean Gate Highway site a “population factor” of “3” and an “exposure potential factor” of “4.” CX Y-23 at 1794 (Euclid site # 5).

This penalty assessment also takes into account the respondent’s high degree of negligence and its Avoided Cost of annual line testing (*see* Compl. Br. at 324).

### **Count 20**

This count involves respondent’s facility located at 4606 68<sup>th</sup> Avenue, Landover Hills, Maryland. EPA charges that Euclid violated COMAR §§ 26.10.05.01 and 26.10.05.02.C by failing to provide line leak detection and line release detection for the underground piping associated with Tanks 67-1 and 67-2. F. Amend. Compl. ¶¶ 165-166. The periods of alleged violation are September 20, 1997, to February 19, 2002, and February 19, 2003, to April 2, 2003. *Id.*

Euclid has no documentation of line leak detection testing having been performed on the underground piping, except for tests performed on February 19, 2002, and April 2, 2003. Stip. 54 (First Set). As for line release detection, Euclid claims only to have conducted line tightness testing and, or, interstitial monitoring from September 30, 1997, to January 8, 2003. Stip. 53 (First Set). Euclid, however, has no documentation of line tightness testing, except for tests performed on February 19, 2002, and April 2, 2003. Stip. 54 (First Set).

The parties’ stipulations establish that Euclid failed to conduct annual testing of its mechanical line leak detectors as charged by EPA. The stipulations also establish Euclid’s failure to conduct line tightness testing for the time periods set forth in the administrative complaint.

In addition, to the extent that respondent seeks to rely on interstitial monitoring as a defense, it is rejected. First, as noted by EPA (Compl. Br. at 113), the UST notification sent by Euclid to the Maryland Department for the Environment for the 68<sup>th</sup> Avenue facility did not list interstitial monitoring as a method of release detection for the underground piping. *See* CX F-6 at 0209. This evidence shows that respondent did not intend to rely upon interstitial monitoring to detect piping releases.

Second, the testimony of the MDE inspector who visited this facility on several occasions provides a significant basis for rejecting Euclid’s interstitial monitoring argument. In that regard, MDE Inspector Jackie Ryan testified that during her June 13, 2001, inspection of the facility she observed water in both of the sumps. TR-2 at 68-70; CX F-7 at 0292. When she returned to the facility on July 27, 2001, the sumps were in the same condition. TR-2 at 71-72; CX F-8.

Also, when EPA inspected the facility in June of 2003, mud, rust, and rust stains were observed in the sumps. TR-7 at 84-86. Moreover, during this EPA inspection the sensor in one of the sumps was mounted six inches above the floor of the sump, and the sensor in the other

sump was lying on the floor out of its bracket. EPA expert witness John Cignatta was of the opinion that the staining patterns that he observed in one of the sumps indicated that the sensor had recently been removed from its positioning in a mounted bracket 12 inches above the sump floor. TR-4 at 116-117, TR-7 at 87-89.

The testimony of Inspector Ryan and John Cignatta clearly establishes that the interstitial monitoring of this facility was so inadequate as not to constitute interstitial monitoring at all. Thus, Euclid's reliance upon interstitial monitoring as a defense to the charges in Count 20 fails completely.

Accordingly, it is held that Euclid violated the UST line leak detector testing and line tightness testing regulations as charged in Count 20. A civil penalty of **\$34,705** is assessed for the violations in this count.

This penalty reflects the length of the periods of non-compliance, as well as the evaluation of the 68<sup>th</sup> Avenue site in the two EPA expert reports. In that regard, the Hennessy report assigns this facility a "Groundwater Use Rating" of "1" and a "Likelihood that Release would Contaminate Groundwater" rating of "5." CX Y-22, Tables 3 & 6. The Rotenberg report assigns this site a "population factor" of "4" and an "exposure potential factor" of "5." CX Y-23 at 1794 (Euclid site # 6).

This penalty also takes into account Euclid's high degree of negligence, the periods of non-compliance, and the Avoided Cost for annual line testing (*see* Compl. Br. at 327).

### **Count 23**

This count involves respondent's facility located at 3507 Enterprise Road, Mitchellville, Maryland. EPA charges that Euclid violated COMAR §§ 26.10.05.01 and 26.10.05.02.C by failing to provide line leak detection and line release detection for the underground piping associated with Tanks DS-1 and DS-2. F. Amend. Compl. ¶¶ 184-185. The periods of alleged violation are October 15, 2000, to November 26, 2001, and November 26, 2002, to April 14, 2003. *Id.*

Respondent has no documentation of line leak detection testing having been performed on the underground piping, except for tests performed on October 15, 1999, November 26, 2001, and April 14, 2003. Stip. 59 (First Set). With respect to line release detection, Euclid claims only to have performed line tightness testing from September 30, 1997, to January 8, 2003. Stip. 58 (First Set). As was the case with respect to line leak detection, Euclid has documentation for line release detection only for October 15, 1999, November 26, 2001, and April 14, 2003. Stip. 59 (First Set).

Accordingly, the parties' stipulations establish that Euclid violated the UST regulations as alleged in Count 23 of the First Amended Complaint. A civil penalty of **\$15,152** is assessed for these violations.

With respect to the seriousness of these violations, it is noteworthy that the USTs involved had a total capacity of 23,000 gallons. Amend. Ans. ¶ 172. The length of the periods of non-compliance are also considered under this penalty criterion. In addition, for the Enterprise Road facility, the Hennessy Report assigns a “Groundwater Use Rating” of “2” and a “Likelihood that Release would Contaminate Groundwater” rating of “5.” CX Y-22, Tables 3 & 6. The Rotenberg Report assigns this facility a “population factor” of “2” and an “exposure potential factor” of “2.” CX Y-23 at 1794 (Euclid site # 8).

Also considered for penalty purposes were Euclid’s high degree of negligence and the Avoided Cost for annual line testing (*see* Compl. Br. at 328).

#### **Count 24**

This count involves respondent’s facility located at 8249 Ritchie Highway, Pasadena, Maryland. EPA charges that Euclid violated COMAR §§ 26.10.05.01 and 26.10.05.02.C by failing to provide line leak detection and line release detection for the underground piping associated with Tanks 82-1, 82-2, and 82-3. F. Amend. Compl. ¶¶ 196-197. The periods of alleged violation are September 30, 1997, to June 26, 2000, and June 26, 2001, to April 10, 2002. *Id.*

Euclid has no documentation of line leak detection testing on the underground piping, except for tests performed on June 26, 2000, and April 10, 2003. Stip. 61 (First Set). With respect to line release detection, it claims to have performed line tightness testing and, or, interstitial monitoring from September 30, 1997, to January 8, 2003. Stip. 60 (First Set). Again, respondent’s only documentation for line tightness testing is for June 26, 2000, and April 10, 2003. Stip. 61 (First Set).

The parties’ stipulations establish that respondent failed to conduct line leak detection testing and line release detection testing as charged in Count 24. The violations first occurred on September 30, 1997, and continued until the initial testing on June 26, 2000, the first date that respondent can document testing for both line leak and line release detection. The period of violation resumed on June 20, 2001, and continued only to October 1, 2002, a date that EPA states, “Euclid reportedly ceased ownership of the Facility.” Compl. Br. at 117.

With respect to respondent’s interstitial monitoring claim, EPA merely cites its own brief (Section V.B.2.a) in maintaining that “Euclid neither relied on, nor maintained, nor responded to any of its sump sensor systems, and thus did not and could not rely on the system at the Facility to provide monthly line release detection.” Compl. Br. at 116. For its part, other than offering interstitial monitoring as a method of line release detection in Stipulation 60, respondent does not address this issue in its post hearing brief.

While there may be little evidence in the record to go on here, EPA does highlight the one key piece of evidence shedding light on the interstitial monitoring claim. That evidence consists of the UST notifications sent to MDE for this facility which “did not list interstitial monitoring as

a method of release detection” for the underground piping. Compl. Br. at 116-117, citing CXs H-2 at 0346 & H-3 at 0351. Thus, as argued by EPA, these UST notifications show that respondent did not intend to rely upon interstitial monitoring as a method of line release detection.

Accordingly, it is held that complainant has established the violations as alleged in Count 24. For the violations in this count a civil penalty of **\$27,527** is assessed.

The penalty amount includes consideration as to the seriousness of the violations. In that regard, the length of the periods of non-compliance with the UST regulations are taken into account and the fact that the USTs involved had a total capacity of 32,000 gallons. Amend. Ans. ¶ 187. Also, the two EPA expert reports shed light on this penalty factor. The Hennessy Report assigns the Ritchie Highway facility a “Groundwater Use Rating” of “2” and a “Likelihood that Release would Contaminate Groundwater” rating of “5.” CX Y-22, Tables 3 & 6. The Rotenberg Report assigns this site a “population factor” of “2” and an “exposure potential factor” of “2.” CX Y-23 at 1794 (Euclid site # 9).

This penalty assessment includes a consideration of respondent’s high degree of negligence, as well as the Avoided Cost for annual line testing (*see* Compl. Br. at 330).

### **Count 25**

This count involves respondent’s facility located at 5342 Sheriff Road, District Heights, Maryland. EPA charges that Euclid violated COMAR §§ 26.10.05.01 and 26.10.05.02.C by failing to provide line leak detection and line release detection for the underground piping associated with Tanks 53-1 and 53-2. F. Amend. Compl. ¶¶ 207-208. The periods of alleged violation are September 30, 1997, to March 11, 2002, and March 11, 2003, to April 10, 2003. *Id.*

Respondent has no documentation of line leak detection tests having been performed on the underground piping, except for tests performed on March 11, 2002, and April 10, 2003. Stip. 63 (First Set). With respect to line release detection, Euclid does not claim that it performed any method of line release detection for the underground piping, other than line tightness testing and, or, interstitial monitoring from September 30, 1997, to January 8, 2003. Stip. 62 (First Set). In that regard, respondent has documentation for the line release detection testing for March 11, 2002, and April 10, 2003, only.

Pursuant to the above stipulations, it is held that Euclid violated the UST regulations as charged beginning on September 30, 1997, and ending on March 11, 2002, when the line leak detector and line tightness tests were performed. This period of violation continued from March 11, 2003 (one year after the testing) until testing again was performed approximately one month later on April 10, 2003.

Also, Euclid’s defense that it had performed interstitial monitoring is rejected. First, as argued by EPA, “[s]everal UST notifications sent to MDE for this Facility did not list interstitial

monitoring as a method of release detection for piping, I-4 at 0377, I-5 at 0382, I-6 at 0388, confirming that Euclid was not aware of and/or not relying on such monitoring.” Compl. Br. at 118.

Second, even if respondent did intend to rely upon interstitial monitoring for line release detection, EPA’s June 17, 2003, inspection of the Sheriff Road facility showed that any such monitoring was completely inadequate. Specifically, the EPA inspection revealed that the sensors in both sumps were raised off the floor of the sumps, that the premium grade sump was flooded and had been in alarm since June 6, 2003, and that the regular grade sump also contained a liquid. TR-4 at 124-125, TR-7 at 96-98,101-105, & TR-9 at 180. In addition, the sensor for the regular grade sump was raised and angled above the liquid level so that it could not put the system into alarm, in any event. TR-7 at 101-102, 104. Clearly, there was no effective interstitial monitoring at the Sheriff Road facility as claimed by Euclid.

Respondent raises several general arguments relative to the positioning of the sensors that are simply disingenuous. First, it states that there is no specific regulatory requirement for the height of a sump sensor. Resp. Br. at 24. This argument ignores the fact that, as shown here, a sensor can be positioned at such a height that it no longer serves its intended purpose to provide an alarm in the event of a petroleum leak. Second, Euclid states that “[e]ven if, hypothetically, a sump chronically floods with water, if the sensor is raised above the chronic flood point, that sensor will detect a leak in the line because the line leak will increase the liquid level in the sump and so trigger the sump sensor.” *Id.* Given the fact that the primary purpose of the sensor is to detect a petroleum leak, respondent’s logic of raising the sensor in this hypothetical seems to be contrary to the mission of this device and to the intent of the UST regulations.

For the violations at issue in Count 25, a civil penalty of **\$42,680** is assessed. With respect to the seriousness of these violations, the length of the periods of non-compliance is taken into account. Also taken into account is the fact that the involved USTs had a total capacity of 24,000 gallons. Amend. Ans. ¶ 199. In addition, the Hennessy Report assigns the Sheriff Road facility a “Groundwater Use Rating” of “1” and a “Likelihood that Release would Contaminate Groundwater” rating of “5.” CX Y-22, Tables 3 & 6. The Rotenberg Report assigns a “population factor” of “5,” as well as an “exposure potential factor” of “5.” CX Y-23 at 1794 (Euclid site # 10). As noted, urban sites with a large population, such as this site, present “[p]referential pathways of utility lines and trenches, combined with a shallow ground table, will allow released petroleum products to move in the environment, and thus allow exposure.” CX Y-23 at 1794.

Additionally, Euclid’s high degree of negligence and its Avoided Cost for annual line testing also figure into the penalty assessment (*see* Compl. Br. at 331).

### **Count 27**

This count involves respondent’s facility located at 7713 Allentown Road, Camp Spring, Maryland. EPA charges that Euclid violated COMAR §§ 26.10.05.01 and 26.10.05.02.C by

failing to provide line leak detection and line release detection for the underground piping associated with Tanks 77-1 and 77-2. F. Amend. Compl. ¶¶ 223-224. The period of alleged violation is September 30, 1997, to April 8, 2003. *Id.*

Euclid has no documentation of line leak detection testing on the underground piping, except for tests performed on April 8, 2003. Stip. 66 (First Set). With respect to line release detection testing, respondent claims to have conducted line tightness testing and, or, interstitial monitoring from September 30, 1997, to January 8, 2003. Stip. 65 (First Set). As with the line leak detection documentation, respondent's line release detection documentation is limited to April 8, 2003. Stip. 66 (First Set).

The stipulations entered into by the parties establish the violations charged in Count 27 of the First Amended Complaint. Also, there is no evidence establishing Euclid's claim that it engaged in interstitial monitoring. What little evidence there is on this issue is to the contrary. That evidence, as summarized by complainant, is that "the UST notifications sent to MDE for this Facility did not list interstitial monitoring as a method of release detection for piping, J-3 at 0418, J-4 at 0423, confirming that Euclid was not aware of and/or not relying on such monitoring." Compl. Br. at 119-120.

Accordingly, it is held that EPA has proven the violations as charged in Count 27. A civil penalty of **\$46,371** is assessed for these violations.

The penalty assessment takes into account the seriousness of the violations proven in Count 27. One consideration here is the fact that the involved USTs had a total capacity of 24,000 gallons. Amend. Ans. ¶ 215. Another consideration is the length of time that respondent was in non-compliance with the UST regulations (approximately 5 1/2 years). Also, the two expert reports submitted by EPA cast significant light on this issue. The Hennessy Report assigns the Allentown Road facility a "Groundwater Use Rating" of "2" and a "Likelihood that Release would Contaminate Groundwater" rating of "3," noting in part that there were 10 USGS wells from 0.9 miles to 3.5 miles from this site. CX Y-22, Tables 3 & 6. The Rotenberg Report assigns a "population factor" of "3" and an "exposure potential" factor of "3," as well. CX Y-23 at 1794 (Euclid site # 11).

This penalty assessment includes consideration of respondent's high degree of negligence and its Avoided Cost for annual line testing (*see* Compl. Br. at 332).

### **Count 28**

This count involves respondent's facility located at 2301 University Boulevard, Langley Park, Maryland. EPA charges that Euclid violated COMAR §§ 26.10.05.01 and 26.10.05.02.C by failing to provide line leak detection and line release detection for the underground piping associated with Tank UN-1. F. Amend. Compl. ¶¶ 233-234. The period of alleged violation is August 15, 1998, to April 24, 2003. *Id.*

Euclid has no documentation of line leak detection tests having been performed on the underground piping, except for tests performed on April 24, 2003. Stip. 68 (First Set). With respect to line release detection testing, respondent claims to have conducted line tightness testing and, or, interstitial monitoring from September 30, 1997, to January 8, 2003. Stip. 67 (First Set). As was the case with the mechanical line leak detector testing, however, respondent has no testing results for line release detection other than for tests performed on April 24, 2003. Stip. 68 (First Set).

Based upon the parties' stipulations, it is held that respondent violated the cited UST regulations beginning on August 15, 1998, and concluding on April 24, 2003, the date of the line leak detector and line tightness testing. Respondent's failure to provide documentation to show that it did, in fact, conduct the required line leak detection and line release detection once again is fatal to its defense.

Also, Euclid's defense of interstitial monitoring is rejected. First, respondent did not list interstitial monitoring on the UST notifications sent to the MDE as a method of release detection for the piping at this facility. CX K-2 at 0444. Second, the observations of MDE Inspector Jackie Ryan and EPA expert John Cignatta show that Euclid did not properly engage in interstitial monitoring. Inspector Ryan conducted an MDE inspection on June 14, 2001, at which time she found fuel in the regular grade sump. TR-2 at 75. EPA subsequently conducted a follow-up inspection during which Cignatta used "indicator paste" to determine the presence of fuel in the regular grade sump. He calculated that the sump contained 48 gallons of fuel. TR-4 at 128, TR-7 at 106-107; CXs K-7 at 0459 & Y-21 at 1728. In addition, the sensor in the sump had been raised to a point above the level of the fuel. *Id.* Cignatta testified that the premium grade sump also showed indications of chronic flooding, including heavy rust buildup, and marks from the deposit of muck and rock. TR 108-109; CX Y-21 at 1729.

Accordingly, it is held that EPA has proven the violations alleged in Count 28. A civil penalty of **\$45,540** is assessed for these violations.

With respect to the seriousness of the violations, it has been established that the UST at the University Boulevard site had a capacity of 20,000 gallons. Amend. Ans. ¶ 226. Another consideration here is the length of time that respondent was in non-compliance with the regulations. Also, the Hennessy Report assigns this facility a "Groundwater Use Rating" of "1" and a "Likelihood that Release would Contaminate Groundwater" rating of "5," noting, in part, that there was a USGS well within 0.9 miles of the site. CX Y-22, Tables 3 & 6. The Rotenberg Report assigns a "population factor" of "5" and an "exposure potential factor" of "5." CX Y-23 at 1794 (Euclid site # 12). Because this site is in an urban area with a large population, the Rotenberg report concludes that "[p]referential pathways of utility lines and trenches, combined with a shallow groundwater table, will allow released petroleum products to move in the environment, and thus allow exposure." CX Y-23 at 1794.

In the assessment of this penalty, respondent's high degree of negligence and its Avoided Coast for annual line testing (*see* Compl. Br. at 334) also were considered.

### **Count 31**

This count involves respondent's facility located at 3900 Frederick Avenue, Baltimore, Maryland. EPA charges that Euclid violated COMAR §§ 26.10.05.01 and 26.10.05.02.C by failing to provide line leak detection and line release detection for the underground piping associated with Tanks 39-1, 39-2, 39-3 and 39-4. F. Amend. Compl. ¶¶ 255-256. The periods of alleged violation are September 30, 1997, to February 23, 2000, and February 23, 2001, to April 28, 2003. *Id.*

Euclid has no documentation of line leak detector tests for the underground piping, except for tests performed on February 23, 2000, and April 28, 2003. Stip. 74 (First Set). Also, respondent does not claim that it has performed any method of line release detection, other than line tightness testing and, or, interstitial monitoring from September 30, 1997, to January 8, 2003. Stip. 73 (First Set). Again, respondent's documentation for the line release detection consists only of the testing conducted on February 23, 2000, and April 28, 2003. Stip. 74 (First Set).

Based upon the parties' stipulations, it is held that Euclid has violated the UST regulations as charged in Count 31 of the First Amended Complaint.

To the extent that respondent is relying upon interstitial monitoring as a defense to the line release detection charge, that defense is rejected. First, Euclid did not list interstitial monitoring as a method of release detection for piping in the UST notifications sent to the MDE for this facility. CX L-3 at 0485 & L-4 at 0491. Second, the EPA inspectors who visited the Frederick Avenue facility on June 19, 2003, did not find any sensors in the sumps. TR-4 at 129-133; CX L-10 at 0507. Third, even if there were sensors present, the system would not have worked in any event because the "boots" used to test the double-wall lines were too tight and thus did not allow for an interstitial space. TR-4 at 129-133.

With respect to these boots, respondent states that it utilized outside contractors to perform "all maintenance and testing during the periods at issue." Resp. Br. at 22. Thus, it concludes that "even if the boots on a piping system are tight while the service station is in operation, the Respondent cannot be shown to be at fault." *Id.* Euclid's legal conclusion is wrong. It cannot avoid the consequences of non-compliance with the UST regulations simply by "contracting out" its regulatory and statutory obligations. As the owner and, or, operator of the facility, Euclid is a responsible party for any such non-compliance. Indeed, respondent seems to agree with this proposition (despite its earlier comments) in subsequently stating that its reliance upon operators to maintain the integrity of waste oil tanks "does not absolve Respondent of responsibility." *See* Resp. Br. at 28.

A civil penalty of **\$129,910** is assessed for these violations. This penalty takes into account the seriousness of the violations and that includes the length of the periods of non-compliance with the regulations. The seriousness penalty criterion also includes consideration of the fact that the total UST capacity at the Frederick Avenue facility was 32,000 gallons. Amend. Ans. ¶ 240. In addition, also taken account are the two expert reports submitted by EPA. The



Hennessy Report assigns a “Groundwater Use Rating” of “1” for this facility and a “Likelihood that Release would Contaminate Groundwater” rating of “4.” CX Y-22, Tables 3 & 6. The Rotenberg Report assigns a “population factor” of “5” and an “exposure potential factor” of “5,” as well. CX Y-23 at 1794 (Euclid site # 13). As continually noted, the Rotenberg Report concludes that with respect to urban sites in areas of large population, such as this site, “[p]referential pathways of utility lines and trenches, combined with a shallow groundwater table, will allow released petroleum products to move in the environment, and thus allow exposure.” CX Y-23 at 1794.

In determining the penalty for Count 31, the respondent’s high degree of negligence was taken into account as was the Avoided Cost for annual line testing (*see* Compl. Br. at 336).

### **Count 36**

This count involves respondent’s facility located at 4225 Connecticut Avenue, Washington, D.C. EPA charges that Euclid violated 40 C.F.R. 280.40 and 280.41(b) prior to May 4, 1998, and 20 DCMR §§ 6000 and 6004 beginning on May 4, 1998, by failing to provide line leak detection and line release detection for the underground piping associated with Tanks VN-1, VN-2, VN-3, VN-4, and VN-5. F. Amend. Compl. ¶¶ 295-296. The periods of alleged violation are September 30, 1997, to June 22, 2001, and June 22, 2002, to April 16, 2003. *Id.*

With respect to line leak detection, respondent has no documentation of line leak detection tests having been performed on the underground piping, except for tests performed on June 22, 2001, and April 16, 2003. Stip. 84 (First Set); *see* Compl. Br. at 124. With respect to line release detection, Euclid does not claim that it has performed any method of piping release detection, other than line tightness testing, from September 30, 1997, to January 8, 2003. Stip. 83 (First Set). Again, respondent’s line release detection documentation is limited to the testing conducted on June 22, 2001, and April 16, 2003. Stip. 84 (First Set); *see* Compl. Br. at 124.

The parties’ stipulations establish that Euclid violated the UST regulations as alleged in Count 36 of the First Amended Complaint. A civil penalty of **\$162,387** is assessed for these violations.

With respect to the seriousness of the violations, the total capacity for the USTs at the Connecticut Avenue facility was 44,000 gallons. Amend. Ans. ¶ 278. Also taken into account here are the length of the periods of non-compliance with the UST regulations. In addition, the two EPA expert reports addressing the seriousness of the violations was considered. In that regard, the Hennessy Report assigns a “Groundwater Use Rating” of “1” and a “Likelihood that Release would Contaminate Groundwater” rating of “5.” CX Y-22, Tables 1 & 4. The Rotenberg Report assigns a “population factor: of “5” and an “exposure potential factor” of “5.” CX Y-23 at 1794 (Euclid site # 14). Again, given the fact that this site is located in an urban area with a large population, the Rotenberg Report concludes, “[p]referential pathways of utility lines and trenches, combined with a shallow groundwater table, will allow released petroleum products to move in the environment, and thus allow exposure.” CX Y-23 at 1794.

This penalty assessment also takes into account the respondent's high degree of negligence and the Avoided Cost for annual line testing (*see* Compl. Br. at 337).

#### **Count 40**

This count involves respondent's facility located at 6181 Annapolis Road, Landover Hills, Maryland. EPA charges that Euclid violated COMAR §§ 26.10.05.01 and 26.10.05.02.C by failing to provide line leak detection and line release detection for the underground piping associated with Tanks 61-1, 61-2, and 61-3. F. Amend. Compl. ¶¶ 325-326. The periods of alleged violation are September 30, 1997, to February 15, 2002, and February 15, 2003, to April 1, 2003. *Id.*

Euclid has no documentation of line leak detector tests having been performed on the underground piping, except for tests performed on February 15, 2002, and April 1, 2003. Stip. 95 (First Set). With respect to line release detection, respondent does not claim that it has performed any method of release detection, other than line tightness testing, from September 30, 1997, to January 8, 2003. Stip. 94 (First Set). As was the case with line leak detection, respondent's line release detection documentation is limited to the testing performed on February 15, 2002, and April 1, 2003. Stip. 95 (First Set).

The parties' stipulations establish that Euclid violated the UST regulations as alleged in Count 40 of the First Amended Complaint. A civil penalty of **\$68,035** is assessed for these violations.

With respect to the seriousness of these violations, the USTs involved here had a total capacity of 30,000 gallons. Amend. Ans. ¶ 308. The seriousness of the violations also includes consideration of the length of the periods of non-compliance. In addition, the Hennessy Report assigns a "Groundwater Use Rating" of "1" and a "Likelihood that Release would Contaminate Groundwater" rating of "5." CX Y-22, Tables 3 & 6. The Rotenberg Report assigns a "population factor" of "3" and an "exposure potential factor" of "5." CX Y-23 at 1794 (Euclid site # 15).

This penalty assessment also took into account the high degree of respondent's negligence, as well as the Avoided Cost for annual line testing (*see* Compl. Br. at 339).

#### **Count 44**

This count involves respondent's facility located at 6038 Baltimore Avenue, Hyattsville, Maryland. EPA charges that Euclid violated COMAR §§ 26.10.05.01 and 26.10.05.02.C by failing to provide line leak detection and line release detection for the underground piping associated with Tanks HY-1 and HY-2. F. Amend. Compl. ¶¶ 354-355. The periods of alleged violation are September 30, 1997, to April 18, 1998, April 19, 1999, to February 21, 2002, and February 21, 2003, to April 3, 2003. *Id.*

Respondent has no documentation of line leak detector tests having been performed on the underground piping associated with Tanks HY-1 and HY-2, except for the tests performed on March 18, 1998, February 21, 2002, and April 3, 2003. Stip. 103 (First Set). With respect to line release detection, Euclid does not claim that it has performed any method of release detection, other than line tightness testing and, or, interstitial monitoring from September 30, 1997, to January 8, 2003. Stip. 102 (First Set). Respondent's documentation of line tightness tests is limited to tests performed on February 21, 2002, and April 3, 2003. Stip. 104 (First Set). Thus, the parties' stipulations establish that Euclid violated the UST regulations as charged in the First Amended Complaint.

Also, respondent's reliance upon interstitial monitoring as a line release detection defense is rejected. First, The UST notifications that Euclid sent to the MDE for this facility did not list interstitial monitoring as a method piping release detection. CXs O-4 at 0681 & O-5 at 0683.

Second, MDE Inspector Jackie Ryan testified that during her June 11, 2001, inspection of the Baltimore Avenue facility, she observed that both sumps contained water with a sheen of fuel. This is an indicator that the pump sensor system was either inoperable or was being ignored. TR-2 at 32; CX 0-6 at 0690. Other adverse conditions were observed during the EPA inspection of this facility on March 27, 2003. TR-4 at 149; CX O-11. This included the fact that the sensor for the premium grade was completely submerged and in alarm, and had been in alarm continuously for the 5½ months preceding the EPA inspection. In addition, the sensor for the regular grade sump was tested and found to be inoperable. TR-4 at 149, 154-157, TR-7 at 109-111, 113-114; CX O-11 at 0715-0717.

Finally, even if the sump sensors did work properly, it is unlikely that any interstitial monitoring would have done any good. EPA expert John Cignatta testified that he was informed by the facility attendant that in the event of an alarm, "[a]ll we do is press the red button when it buzzes." TR-7 at 117. The "red button" silences the alarm. TR-7 at 115-117.<sup>49</sup>

Accordingly, it is held that Euclid committed the violations charged in Count 44. A civil penalty of **\$32,807** is assessed for the violations.

With respect to the seriousness of these violations, the total capacity of the USTs at the Baltimore Avenue facility was 16,550 gallons. Amend. Ans. ¶ 339. The periods of non-compliance with the UST regulations also were taken into account under this penalty criterion. In addition, the Hennessy Report assigns a "Groundwater Use Rating" of "1" and a "Likelihood that Release would Contaminate Groundwater" rating of "5." CX Y-22, Tables 3 & 6. As to the likelihood of contamination, the report noted that there was one deep USGS well 1 mile from the site and one shallow USGS well 2 miles from the site. *Id.*, Table 6. The Rotenberg Report assigns a "population factor" of "5" and an "exposure factor" of "5" for this facility. CX Y-23 at 1794 (Euclid site # 16). Because this site is an urban one with a large population, the Rotenberg

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<sup>49</sup> Cignatta also found design flaws with the sump sensor system for the regular grade. TR-7 at 117-118, 122-125.

report further concludes that “[p]referential pathways of utility lines and trenches, combined with a shallow groundwater table, will allow released petroleum products to move in the environment, and thus allow exposure.” CX Y-23 at 1794.

The penalty assessment here includes a consideration of respondent’s high degree of negligence and the Avoided Cost for annual line testing (*see* Compl. Br. at 340).

### **Count 48**

This count involves respondent’s facility located at 7887 Barlow Road, Palmer Park, Maryland. EPA alleges that Euclid violated COMAR §§ 26.10.05.01 and 26.10.05.02.C by failing to provide line leak detection and line release detection for the underground piping associated with Tanks PP-1 and PP-2. F. Amend. Compl. ¶¶ 379-381. The period of alleged violation is September 30, 1997, to April 4, 2003. *Id.*

There is no evidence that Euclid performed any line leak detector tests, *i.e.*, prior to the violation cut-off date of April 4, 2003. *See* Stip. 112 (First Set). Also, Euclid has no documentation of line tightness tests having been performed on the underground piping, except for tests performed on April 25, 1997, February 17, 1999, and April 4, 2003. Stip. 111 (First Set). Euclid does not claim that it has performed any method of piping release detection, other than line tightness testing and, or, interstitial monitoring from September 30, 1997, to January 8, 2003. Stip. 110 (First Set).

The stipulations of the parties establish that respondent has violated the UST regulations as alleged in Count 48 of the First Amended Complaint, except for the period of time covered by Euclid’s line tightness test of February 17, 1999.<sup>50</sup>

In addition, Euclid’s reliance upon interstitial monitoring as a defense to the line release detection charge is rejected. First, the UST notification sent to the MDE for this facility did not list interstitial monitoring as a method of release detection for piping. CX P-3 at 0754. Second, an EPA inspection of the facility on June 17, 2003, showed that the premium grade sump was in a flooded condition and that the system was in alarm. TR-4 at 166, 171-172, TR-7 at 129-132; CXs P-4 at 0755, P-8, & Y-21 at 1740. Third, the alarm history for this sump shows that it had continuously been in alarm since March 26, 2003. TR-7 at 130; CXs P-4 at 0760 & Y-21 at 1740. Fourth, the premium grade sump showed signs of chronic flooding, including rust and mud staining. TR-7 at 129-130; CX P-8. Finally, the facility attendant informed EPA contractor John Cignatta (the government’s expert witness) that he did not know what the alarm was for and that all the attendant does is to press a button to silence it. TR-7 at 133-134.<sup>51</sup>

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<sup>50</sup> This partial compliance was taken into account by EPA in its penalty proposal calculation. *See* Compl. Br. at 340-342.

<sup>51</sup> The regular grade sump also showed problems with a fuel release and a “test boot” too tight to allow any release to drain into the sump. TR-4 at 166-167; CX P-4 at 0755.

For the violations established in Count 48, a civil penalty of **\$42,680** is assessed. This penalty assessment is based in part on the seriousness of the violations. The seriousness penalty criterion includes the fact that the USTs at the Barlow Road facility had a total capacity of 24,000 gallons. Amend. Ans. ¶ 366. It also includes consideration of the length of the periods of non-compliance with the UST regulations. In addition, the Hennessy Report assigns a “Groundwater Use Rating” of “2” and a “Likelihood that Release would Contaminate Groundwater” rating of “4.” CX Y-22, Tables 3 & 6. The Rotenberg Report assigns a “population factor” of “5” and an “exposure potential factor” of “5.” CX Y-23 at 1794 (Euclid site # 17). The Rotenberg report concludes that as for urban sites with a large population, such as the Barlow Road facility, “[p]referential pathways of utility lines and trenches, combined with a shallow groundwater table, will allow released petroleum products to move in the environment, and thus allow exposure.” CX Y-23 at 1794.

The penalty calculation also included consideration of respondent’s high degree of negligence and the Avoided Cost for annual line testing (*see* Compl. Br. at 342).

### **Count 51**

This count involves respondent’s facility located at 3800 Rhode Island Avenue, Brentwood, Maryland. EPA alleges that Euclid violated COMAR §§ 26.10.05.01 and 26.10.05.02.C by failing to provide line leak detection and line release detection for the underground piping associated with Tanks BW-1, BW-2, and BW-3. F. Amend. Compl. ¶¶ 404-405. The period of alleged violation is September 30, 1997, to April 23, 2003. *Id.*

Euclid has no documentation of line leak detector tests having been performed on the underground piping, except for tests performed on April 23, 2003. Stip. 122 (First Set). With respect to line release detection, respondent claims to have undertaken line tightness testing and, or, interstitial monitoring, from September 30, 1997, to January 8, 2003. Stip. 121 (First Set). Respondent’s documentation of line release detection testing is limited to testing performed on April 23, 2003. Stip. 122 (First Set).

The stipulations of the parties establish that Euclid violated the UST regulations as charged in Count 51 of the First Amended Complaint.

In addition, respondent’s reliance upon interstitial monitoring as a defense to the line release detection charge is rejected. First, the UST notifications sent to MDE for this facility did not list interstitial monitoring as a method of release detection for piping. CXs Q-1 at 0837 & Q-12 at 0842. Second, this facility was inspected by EPA on May 9, 2003, at which time a number of monitoring problems were discovered. For example, both sumps at the facility were flooded, and even though the ATG console was showing alarms, the attendants were unaware of them (and did not understand the alarms’ significance in any event). TR-4 at 182-185, TR-7 at 61-62, 66, 138-144; CXs Q-8, Q-9 at 0821, 0825, Q-15, & Y-21 at 1742. In fact, the alarm history for the two sumps showed that one sump had been in alarm since April 1, 2003, and the other sump had

been in alarm since March 20, 2003. TR-4 at 184-185, TR-7 at 143-144; CXs Q-9 at 0823 & Y-21 at 1743.

A civil penalty of **\$73,287** is assessed for the violations in Count 51. This assessment includes consideration as to the seriousness of the violations. In that regard, the USTs at the 3800 Rhode Island Avenue facility had a total capacity of 21,000 gallons. Amend. Ans. ¶ 388. The length of the periods of non-compliance with the regulations also was taken into account (approximately 5 1/2 years). In addition, the two expert reports submitted by EPA aided in determining the seriousness of these violations.

For example, the Hennessy Report assigns a “Groundwater Use Rating” of “1” and a “Likelihood that Release would Contaminate Groundwater” rating of “4.” CX Y-23, Tables 3 & 6. Insofar as the likelihood of contamination is concerned, the Report noted, in part, that there were two USGS wells 1.2 to 1.4 miles from this facility. *Id.*, Table 6. In addition, the Rotenberg Report assigns a “population factor” of “5” and an “exposure potential factor” of “5.” CX Y-23 at 1794 (Euclid site # 19). Because this site is an urban site in an area with a large population, the Rotenberg report further concludes that “[p]referential pathways of utility lines and trenches, combined with a shallow groundwater table, will allow released petroleum products to move in the environment, and thus allow exposure. CX Y-23 at 1794.

This penalty assessment also takes into account the high degree of respondent’s negligence and the Avoided Cost for annual line testing (*see* Compl. Br. at 343).

### **Count 55**

This count involves respondent’s facility located at 1576 Wisconsin Avenue, Washington, D.C. EPA charges that Euclid violated 40 C.F.R. 280.40 and 280.41(b) prior to May 4, 1998, and 20 DCMR §§ 6000 and 6004 beginning on May 4, 1998, by failing to provide line leak detection and line release detection for the underground piping associated with Tanks GT-1, GT-2, and GT-3. F. Amend. Compl. ¶¶ 431-432. The period of alleged violation is September 30, 1997, to April 15, 2003. *Id.*

Euclid has no documentation of line leak detector tests for the underground piping associated with these USTs, except for a test performed on April 15, 2003. Stip. 130 (First Set). With respect to line release detection, respondent claims to have engaged in line tightness testing and, or, interstitial monitoring from September 30, 1997, to January 8, 2003 (the date of the First Set of Stipulations). Stip. 129 (First Set). Euclid’s documentation for line release detection consists of the testing performed on April 15, 2003. Stip. 130 (First Set).

The stipulations of the parties establish that Euclid violated the cited UST regulations as charged in the First Amended Complaint. In addition, respondent’s reliance upon its interstitial monitoring defense to the line release detection charge must fail. In that regard, what little evidence there is on this issue supports EPA’s position. That evidence is a UST notification sent to the District of Columbia Department of Health by respondent for this facility that does not list

interstitial monitoring as a method of release detection for piping. CX R-7 at 0871. Respondent, for its part, does not specifically address the interstitial monitoring defense in either its brief, or reply brief.

For the violations proven in Count 55, a civil penalty of **\$73,287** is assessed. With respect to the seriousness of these violations, the length of the periods of non-compliance, as well as the fact that the USTs at the facility had a total capacity of 26,550 gallons (Amend. Ans. ¶ 415), are taken into account. Two expert reports submitted by EPA were also considered. One report was the Hennessy Report that assigns a “Groundwater Use Rating” of “2” and a “likelihood that Release would Contaminate Groundwater” rating of “5.” CX Y-22, Tables 1 & 4. The other report, the Rotenberg Report, assigns a “population factor” of “5” to this facility and an “exposure factor” of “5” as well. CX Y-23 at 1794 (Euclid site # 20). As noted, because this site is an urban one in an area of large population, the Rotenberg Report further concludes that “[p]referential pathways of utility lines and trenches, combined with a shallow groundwater table, will allow released petroleum products to move in the environment, and thus allow exposure.” CX Y-23 at 1794.

The high degree of respondent’s negligence and the Avoided Cost for annual line testing (*see* Compl. Br. at 344) are also factored into this penalty assessment.

### **Count 58**

This count involves respondent’s facility located at 22 Florida Avenue, Washington, D.C. EPA charges that respondent violated 40 C.F.R. 280.40 and 280.41(b) prior to May 4, 1998, and 20 DCMR §§ 6000 and 6004 beginning on May 4, 1998, by failing to provide line leak detection and line release detection for the underground piping associated with Tanks FL-1, FL-2, and FL-3. F. Amend. Compl. ¶¶ 451-454. The period of alleged violation is September 30, 1997, to February 6, 2003. *Id.* As explained below, EPA has established the violations as charged.

Euclid has no documentation of line leak detector tests having been performed on the underground piping, except for tests performed on February 6, 2003. Stip. 137 (First Set). With respect to line release detection, respondent relies upon line tightness testing and, or, interstitial monitoring for the periods of September 30, 1997, to January 8, 2003. Stip. 136 (First Set). Respondent’s line release detection documentation consists of tests performed on the underground piping associated with Tanks FL-1 on June 23, 1997, December 28, 1999, and February 6, 2003 (Stip. 138 (First Set)), and tests on underground piping associated with Tanks FL-2 and FL-3 on December 28, 1999, and February 6, 2003. Stip. 139 (First Set).

Based upon the parties’ stipulations, with respect to line leak detection testing, it is held that Euclid violated the UST regulations as charged. Respondent came into compliance with the line leak detection requirement on February 6, 2003.

As for the line release detection violation, with respect to Tank FL-1, the violation occurred from June 23, 1998 (one year after testing on June 23, 1997), and continued until

December 28, 1999. The period of violation began anew on December 28, 2000 (one year after the earlier testing), and continued until testing was performed on February 6, 2003. For Tanks FL-2 and FL-3, the period of the line release detection violation began on September 30, 1997, and continued until December 28, 1999. This period of violation began again on December 28, 2000, and it continued until February 6, 2003.

To the extent that Euclid relies on interstitial monitoring as a defense to the line release detection charge, that defense is rejected. In that regard, the UST notification sent to the DCDOH for this facility did not list interstitial monitoring as a method of release detection for the underground piping. CX S-3 at 0907. Moreover, during the EPA inspection, Inspector Owens observed that the test boots were too tight for all of the sumps, thus preventing releases into the interstitial space from draining to the sump. TR-5, 12-13; CX S-6 at 0912, 0924-0926.

A civil penalty of **\$68,200** is assessed for these violations. With respect to the seriousness of the violations, the total capacity of the USTs at this facility was 32,000 gallons. Amend. Ans. ¶ 437. The length of the periods of violation are also taken into account under this penalty criterion. In addition, the Hennessy Report assigns a “Groundwater Use Rating” of “1” to the Florida Avenue facility and a “Likelihood that Release would Contaminate Groundwater” rating of “5.” CX Y-22, Tables 1 & 4. The Rotenberg Report assigns a “population factor” of “5” and an “exposure potential factor” of “5.” CX Y-23 at 1794 (Euclid site # 21). As noted earlier, with respect to sites such as the Florida Avenue site that are located in an urban area with a large population, the Rotenberg Report concludes that “[p]referential pathways of utility lines and trenches, combined with a shallow groundwater table, will allow released petroleum products to move in the environment, and thus allow exposure.” CX Y-23 at 1794.

Respondent’s high degree of negligence and Avoided Cost for annual line testing (*see* Compl. Br. at 346) also were considered in assessing this penalty.

### **Count 63**

This count involves respondent’s facility located at 15501 New Hampshire Avenue, Silver Spring, Maryland. EPA charges that Euclid violated COMAR §§ 26.10.05.01 and 26.10.05.02.C by failing to provide line leak detection and line release detection for the underground piping associated with Tanks NH-1, NH-2, and NH-3. F. Amend. Compl. ¶¶ 488-489. The period of alleged violation is September 30, 1997, to May 3, 2003. *Id.*

Euclid has no documentation of line leak detection tests having been performed on the underground piping, except for tests performed on May 2, 2003. Stip. 148 (First Set). With respect to line release detection, respondent’s relies on line tightness testing, from September 30, 1997, to January 8, 2003. Stip. 147 (First Set). However, as was the case with line leak detector documentation, respondent has testing data only for May 2, 2003. Stip. 148 (First Set).

Accordingly, the stipulations of the parties establish that Euclid violated the UST regulations as charged in Count 63 of the First Amended Complaint. The only documentation



that Euclid could produce to show compliance with the UST regulations is the testing for May 2, 2003, and that is the documentation that brought it into compliance. A civil penalty of **\$71,121** is assessed for the violations in this count.

With respect to the seriousness of the violations, the USTs at the 15501 New Hampshire Avenue facility had a total capacity of 30,000 gallons. Amend. Ans. ¶ 475. Also considered were the length of the periods of non-compliance (approximately 5 1/2 years). In addition, two expert reports submitted by EPA were taken into account to determine the seriousness of the violations. In that regard, the Hennessy Report assigns a “Groundwater Use Rating” of “5” for this facility and a “Likelihood that Release would Contaminate Groundwater” rating of “4” (noting the presence of four USGS wells 0.5 to 1.0 miles from the facility). CX Y-22, Tables 3 & 6. The Rotenberg Report assigns a “population factor” of “2” and an “exposure potential factor” of “3.” CX Y-23 at 1794 (Euclid site # 22).

In assessing the penalty for Count 63, respondent’s high degree of negligence and Avoided Cost for annual line testing (*see* Compl. Br. at 347) also were taken into account.

### **Count 66**

This count involves respondent’s facility located at 5001 Georgia Avenue, Washington, D.C. EPA charges that Euclid violated 20 DCMR §§ 6000 and 6004 by failing to provide line leak detection and line release detection for the underground piping associated with Tanks GA-3 and GA-4. F. Amend. Compl. ¶¶ 514-515. The period of alleged violation is March 1, 2002, to April 18, 2003. *Id.*

Euclid has no documentation of line leak detection tests having been performed on the underground piping, except for tests performed on March 1, 2001, and April 18, 2003. Stip. 150 (First Set). With respect to line release detection, Euclid claims to have engaged in line tightness testing and, or, interstitial monitoring from March 1, 2001, to January 3, 2003. Stip. 149 (First Set). Again, however, the only line release documentation produced by respondent involves the testing performed on March 1, 2001, and April 18, 2003. Stip. 150 (First Set).

The stipulations of the parties establish that Euclid violated the UST regulations as charged in Count 66 of the First Amended Complaint. Also, respondent’s interstitial monitoring defense is rejected. In that regard, the EPA inspection of April 15, 2003, showed that the test boots on all the sumps were too tight to allow releases in the interstitial space from draining into the sump. TR-5 at 22-23; CX U-5 at 0990, 1001-1002. As a result, interstitial monitoring could not, under these circumstances, be used to satisfy the involved line release detection requirements.

A civil penalty of **\$19,442** is assessed for these violations. With respect to the seriousness of the violations, the USTs involved in this count had a total capacity of 24,000 gallons. Amend. Ans. ¶ 504. The length of the periods of non-compliance are also considered under this penalty criterion. In addition, the Hennessy Report assigns this facility a “Groundwater Use rating” of

“1” and a “Likelihood that Release would Contaminate Groundwater” rating of “5.” CX Y-22, Tables 1 & 4. The Rotenberg Report assigns a “population factor” of “5” and an “exposure potential factor” of “5.” CX Y-23 at 1794 (Euclid site # 23). Because this site is an urban one located in an area with a large population, the Rotenberg Report further concludes that “[p]referential pathways of utility lines and trenches, combined with a shallow groundwater table, will allow released petroleum products to move in the environment, and thus allow exposure.” CX Y-23 at 1794.

Other considerations in this penalty assessment include the respondent’s high degree of negligence and its Avoided Cost of annual line testing (*see* Compl. Br. at 348).

### **Count 68**

This count involves respondent’s facility located at 5420 New Hampshire Avenue, Washington, D.C. EPA charges that Euclid violated 20 DCMR §§ 6000 and 6004 by failing to provide line leak detection and line release detection for the underground piping associated with Tanks 5420-1 and 5420-2. F. Amend. Compl. ¶¶ 528-529. The period of alleged violation is September 17, 2002, to April 22, 2003. *Id.*

Euclid has no documentation of line leak detection tests, except for tests performed on September 17, 2001, and April 22, 2003. Stip. 153 (First Set). With respect to line release detection, Euclid claims to have engaged in line tightness testing and, or, interstitial monitoring from November 1, 2001, to January 8, 2003. Stip. 152 (First Set). Respondent’s documentation for line release detection is also limited to the testing dates of September 17, 2001, and April 22, 2003. Stip. 153 (First Set).

Given respondent’s stipulations, it is held Euclid violated the UST regulations as charged in the First Amended Complaint. In addition, respondent’s interstitial monitoring claim is rejected as a defense to the line release detection charge. As summarized by EPA, “[o]f particular note at this facility is the fact that the test boots in all sumps were tight at the time of the EPA inspection on April 14, 2003, ... which would prevent releases into the interstitial space from draining to the sump.” Compl. Br. at 142, citing TR-3 at 72-73, TR-5 at 25; CXs V-1 at 1006 & V-2 at 1011, 1017. In such conditions, interstitial monitoring could not take place.

For the violations in Count 68, a civil penalty of **\$12,760** is assessed. With respect to the seriousness of these violations, the USTs at the 5420 New Hampshire Avenue facility had a total capacity of 24,000 gallons. Amend. Ans. ¶ 520. Also included in this consideration is the length of the periods of non-compliance with the regulations. In addition, the Hennessy Report assigns this site a “Groundwater Use Rating” of “1” and a “Likelihood that Release would Contaminate Groundwater” rating of “5.” CX Y-22, Tables 1 & 4. The Rotenberg Report assigns this site a “population factor” of “5” and an “exposure potential factor” of “5.” CX Y-23 at 1794 (Euclid site # 24). The Rotenberg Report concludes that the 5420 New Hampshire Avenue facility is an urban site in an area of a large population. As such, “[p]referential pathways of utility lines and trenches, combined with a shallow groundwater table, will allow released petroleum products to

move in the environment, and thus allow exposure.” CX Y-23 at 1794.

Also considered in the assessment of the penalty were respondent’s high degree of negligence and the Avoided Cost for annual line testing (*see* Compl. Br. at 349).

### **Count 71**

This count involves respondent’s facility located at 5608 Buckeystown Pike, Frederick, Maryland. EPA charges that Euclid violated COMAR §§ 26.10.05.01 and 26.10.05.02.C by failing to provide line leak detection and line release detection for the underground piping associated with Tanks FR-1, FR-2, and FR-3. ¶¶ 548-549. The periods of alleged violation are September 30, 1997, to September 19, 2001, and January 30, 2003, to May 2, 2003. *Id.*

Euclid has no documentation of line leak detection tests, except for tests performed on September 19, 2001, January 30, 2002, and May 2, 2003. Stip. 160 (First Set). With respect to line release detection, respondent relies solely upon line tightness testing. Stip. 159 (First Set). The only documentation to support the tank tightness testing defense consists of the testing performed on September 19, 2001, January 30, 2002, and May 2, 2003.

Given these stipulations, it is held that EPA has proven the UST violations as charged in Count 71 of the First Amended Complaint. A civil penalty of **\$45,760** is assessed for these violations.

With respect to the seriousness of these violations, the USTs involved in Count 71 had a total capacity of 30,550 gallons. Amend. Ans. ¶ 534. This penalty criterion also includes consideration of the length of the periods of non-compliance with the UST regulations. In addition, the Hennessy Report assigns a “Groundwater Use Rating” of “4” and a “Likelihood that Release would Contaminate Groundwater” rating of “3” for this facility. CX Y-22, Tables 3 & 6. The Rotenberg Report assigns a “population factor” of “2” and an “exposure potential factor” of “2.” CX Y-23 at 1794 (Euclid site # 25). In assigning the exposure potential factor, the Report notes that there was “some groundwater use as drinking water” and that a trailer park was located within a quarter-mile radius. *Id.*, at 1793.

The assessment of this penalty includes consideration of respondent’s high degree of negligence and its Avoided Cost for annual line testing (*see* Compl. Br. at 351).

### **3. The Corrosion Protection Violations**

#### **a. General Principles of Cathodic Protection**

Here, EPA claims that Euclid did not conduct required testing of its cathodic protection systems. Cathodic protection is concerned with the prevention of corrosive damage to a buried metallic structure such as a steel UST. “Cathodically protected” means that the structure is not corroding. TR-9 at 22. EPA’s expert witness, John Cignatta, offers the following overview of

corrosion protection insofar as it relates to Underground Storage Tanks.

Cignatta stated that steel structures are prone to becoming part of an electrochemical cell. Electrochemical cells consists of a particular location where electrons are lost through oxidation, known as the “anode,” and a location where electrons are gained, known as the “cathode.” Cignatta explained:

An electrochemical cell has to have four components. The four components would always be an anode, a site on a piece of metal where oxidation was occurring. Oxidation is the losing of electrons into an electrolyte, most commonly called rusting. That’s what the anodic areas are on a electrochemical cell. The cathode, the cathode is the site of reduction, any place that is receiving electrons onto its surface. The flow of current keep it from oxidizing, keep it from corroding.... Conductive path, we have to have wires, wires to conduct electrons and we have to have an electrolyte which is water, water in the form of liquid water, water in the form of moisture, dampness of soil, sand, gravel, but all of these elements, *the anode, the cathode, conductive path and electrolyte* have to be present in every corrosion cell and also with every cathodic protection system.

TR-9 at 4-5 (emphasis added); *see* CX Y-037 at 1979.

Thus, as explained by Cignatta, the basic elements necessary for the creation of a corrosion cell are (1) a difference in electrical potential between two different metals or two sites with different stresses on one piece of metal, (2) an electrolyte, usually water, that can convey the electrons from the anodic site to the cathodic site, and (3) a conductive path to complete and allow the return flow of electrons. Any structure will have hundreds of sites with differences in electrical potential, and thus will be subject to corrosion. *See* Compl. Br. at 156-157, citing TR-9 at 5-9; CX Y-37 at 1980-1982.<sup>52</sup>

A strategy to protect underground steel structures is cathodic protection. Cignatta stated:

Cathodic protection is where we actually add something that we want to corrode. We add an anode in the ground and that is going to corrode and keep the tank from corroding. Cathodic protection is nothing new. Every hot water heater in America has a anode in it to keep the tank from corroding.

TR-9 at 10. *See* CX Y-37 at 1983. Cignatta added that there are two types of cathodic protection

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<sup>52</sup> EPA has filed a post hearing motion to allow minor corrections to its brief on the cathodic protection issue. The motion is granted.

systems. One type is a sacrificial anode system that uses an ingot of metal which corrodes and gives up its electrons to provide a protective current. The other type is an impressed current system where the protective current is generated by an outside power supply. TR-9 at 10-11; CX Y-37 at 1984-1986.

Citing to Complainant's Exhibit Y-37 at 1987, Cignatta identified the basic elements of testing a cathodic protection system. He stated:

[W]hat we have here is we keep talking about voltage, voltage shifting on the tank as a result of the addition of anodes. The way we can test this is with a very simple voltage test. We start with, this is a copper, copper sulfate half cell.... A copper, copper sulfate cell is nothing more than a rod of high purity copper surrounded by a saturated solution of copper sulfate crystals.

This, if we go into a chemistry textbook, I can tell you exactly what voltage should come off of high purity copper when it's in contact with a solution of copper sulfate solution -- crystals. If we take this known voltage and put it in contact with dirt and then we connect it to a ... digital multimeter for measuring voltage differences and we measure the difference between this referenced cell in contact with the ground, we can then since, we know what the voltage is between copper and copper sulfate solution, what we're interested in is the steel of the tank to the soil of the tank.

*So I can take readings overtop of a tank, a pipe, any buried structure, and from knowing this reference and what the relative difference is to the tank or steel of the tank to the soil, I can describe what the voltage is between the steel and the surrounding soil. So that, this is the way that we're able to test buried structures to see what their voltages are on the basis of what the voltages are in contact with the soil. We can say whether they're cathodically protected, or not.*

TR-9 at 14-15 (emphasis added).

Having generally described cathodic protection, Cignatta next identified the necessary elements for having a valid test of the cathodic protection system. He listed a copper sulfate half cell, a high impedance voltmeter, and a good connection to the tank (*i.e.*, very low resistance drop). The connection to the tank is typically made with what is referred to as a "striker rod." A striker rod "is nothing more than a plastic pole with a couple little screws on the end." Cignatta continued, "that assures us, by slipping it down into the tank, that we can connect onto the inside

surface of the tank, down there. We can get in contact with the floor of that tank.”<sup>53</sup> The last item is “to be connected to the electrolyte, so back to the reference cell, the reference cell has to be in contact with the soils for all but certain types of readings.” TR-9 at 15-16.

Lastly, Cignatta discusses the three types of voltage readings required to be taken in measuring cathodic protection.<sup>54</sup> A “V<sub>ON</sub>” reading measures the voltage with the cathodic protection system operating. When the cathodic protection system is disconnected, there is an almost instantaneous drop in voltage to a second voltage called the “V<sub>INSTANT OFF</sub>” reading. At this point, the voltage continues to drop, until it finally stabilizes at a flat level where it can be measured as what is known as a “V<sub>OFF</sub>” reading. The voltage difference, or voltage shift, between the V<sub>INSTANT OFF</sub> and the V<sub>OFF</sub> is “actual polarization.” Cignatta explained, “[t]hat’s where we literally changed the chemistry of the surface of the cathode.” TR 20-22 (Vol 9); CX Y-37 at 1989.

## **b. The Virginia Violations**

### **Count 8**

This count involves respondent’s facility at 42382 John Mosby Highway, Chantilly, Virginia. EPA charges that from September 8, 1999, to February 25, 2002, respondent violated 9 VAC 25-580-60.1 and 9 VAC 25-580-90 by failing either to properly maintain and test corrosion protection for Tanks 50-1, 50-2, 50-3, and 50-4, pursuant to 9 VAC 25-580-90.2, or to comply with the closure requirements of 9 VAC 25-580, Part VII. F. Amend. Compl. ¶ 75. Euclid stipulates that it has no documentation as to the testing of the cathodic protection systems

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<sup>53</sup> An alternative way of connecting to the tank with a striker rod involves tanks that have wires that come to the surface. The drawback with this alternative is that with the tank being buried, it is difficult to know whether there is a good connection. This problem is not present when a striker rod strikes the bottom of the tank. TR-9 at 16-17; CX Y-37 at 1988. Cignatta explained:

High resistance connection, the problem there is how much of resistance is it. It’s another unknown. It will affect every reading you’ve got, and unfortunately, you won’t have any reliable data if you relied upon a high resistance connection. So with the inability to see and inspect a structure lead, that’s why the norm is just strike the tank with a tank striker rod and you’ll get a good connection that way regardless of how someone installed the structure lead years before.

TR-9 at 18.

<sup>54</sup> “When we’re doing readings on a tank and we literally put our reference over top of the portion of the tank and we have a stable voltage with the current applied, so in other words, the anodes are attached and we’re just reading a very steady voltage.” TR-9 at 20.

for Tanks 50-1, 50-2, 50-3, and 50-4, except for testing conducted on September 8, 1996 [*sic*], and February 25, 2002. Stip. 36 (First Set); RX D-10 at 3122 & CX C-4.

The UST regulation, 9 VAC 25-580-90.2, requires that cathodic protection systems be tested every three years. Here, Euclid stipulates that it has no such testing documentation. Accordingly, it is held that respondent violated the corrosion protection regulations as charged by EPA in Count 8 of the First Amended Complaint.

A civil penalty of **\$21,934** is assessed for this violation. The violation is a serious one that lasted for approximately 2 years and 5 months. The USTs involved had a total capacity of 29,000 gallons (Amend. Ans. ¶ 45), and the facility received a “Groundwater Use Rating” of “5” and a “Likelihood that Release would Contaminate Groundwater” rating of “3,” with 6 USGS wells located within 3 miles of the facility, from the Hennessy Report. CX Y-22, Tables 2 & 4. The Rotenberg Report assigns the facility a “population factor” of “2” and an “exposure potential factor” of “3.” CX Y-23 at 1794 (Euclid site # 3). In addition, the facts show that the violation was the result of respondent’s high degree of negligence and that it sustained an Avoided Cost for failing to conduct cathodic protection testing (*see* Compl. Br. 356).

### **Count 13**

This count involves respondent’s facility at 12793 Spotswood Trail, Ruckersville, Virginia. EPA charges that from December 22, 1998, to March 1, 1999, respondent violated 9 VAC 25-580-60.1 by failing either to provide corrosion protection for Tanks 29-3 and 29-4, pursuant to 9 VAC 25-580-50.1 or 25-580-60.2, or to close the tanks pursuant to 9 VAC 25-580, Part VII. F. Amend. Compl. ¶ 108. Euclid admits that Tanks 29-3 and 29-4 were steel tanks. Amend. Ans. ¶ 105. Also, the parties stipulate that the tanks “were not removed from the ground until at least April 5 and 6, 1999.” Stip. 44 (First Set).

Complainant’s Exhibit D-3 is a Notification for Underground Storage Tanks submitted by Euclid for the USTs at its Ruckersville, Virginia, facility. As cited by EPA, page 0190 of this exhibit indicates that the two steel tanks were not cathodically protected. *See* Compl. Br. at 176-177. The blocks pertaining to the two tanks on this UST notification form appear to have once been checked, but the check marks have been scribbled over, with the initials “KDG” appearing next to this scribbling.

These facts establish that respondent, as charged in Count 13 of the First Amended Complaint, failed either to provide cathodic protection to the tanks, or to take them out of service. The period of violation began on December 22, 1998, at which time the tanks were required to be upgraded to have cathodic protection, and it ended on April 5, 1999, when the tanks in fact were removed from service.

A civil penalty of **\$3,000** is assessed for this violation. While failure to provide cathodic

protection to Underground Storage Tanks is serious by its very nature, the violation in this instance lasted only approximately 3 months. Also, although the involved USTs had a total capacity of 20,000 gallons (Amend. Ans. ¶ 77), and although groundwater is used as a drinking source in the area (*see* Hennessy Report, CX Y-22, Table 2), EPA concedes that “the population near the facility is very low.” Compl. Br. at 357. *See* Rotenberg Report, CX Y-23 at 1791 (Euclid site # 4) (“mostly rural area with only 8 homes in a quarter-mile radius). Accordingly, a lower penalty is warranted here.

#### **Count 14**

This count also involves respondent’s Spotswood Trail facility in Ruckersville, Virginia. EPA charges that respondent violated 9 VAC 25-580-60.1 by failing either to provide corrosion protection for the underground metal piping associated with Tanks 92-3 and 92-4 pursuant to 9 VAC 25-580-50.2 or 25-580-60.3, or to close the tanks associated with such piping pursuant to 9 VAC 25-580, Part VII. F. Amend. Compl. ¶ 113. The period of alleged violation is December 22, 1998, to March 1, 1999. *Id.*

The piping at issue in this count was required to be upgraded to provide cathodic protection no later than December 22, 1998. The UST notification form for Tanks 92-3 and 92-4 shows that the piping was made of galvanized steel and it also indicates that the piping was not cathodically protected. CX D-3 at 0190. As was the case with the USTs in Count 13, here the blocks indicating that the piping was cathodically protected initially were checked, but the checks subsequently were scribbled over.

The preponderance of the evidence supports a finding that Euclid violated the UST regulation with respect to the underground metal piping as charged in Count 14 of the First Amended Complaint.

With respect to this count, the involved USTs had a total capacity of 20,000 gallons. Amend. Amend. Ans. ¶ 78. The period of non-compliance for Count 14 was a little more than 2 months, and slightly less than the period of non-compliance at issue in Count 13. Based on these facts, and for the reasons mentioned in the penalty analysis for Count 13, a civil penalty of **\$2,500** is assessed for the present violation.

#### **c. The Maryland Violations**

Insofar as the cathodic protection violations are concerned, Euclid makes several admissions applicable to all of its Maryland facilities. First, it admits that pursuant to COMAR § 26.10.03.02.A, owners and operators of existing UST systems must, no later than December 28, 1998, comply with either (1) the upgrade requirements set forth in COMAR § 26.10.03.02, (2) the new UST system performance standards set forth in COMAR § 26.10.03.01, or (3) close the UST pursuant to COMAR §§ 26.10.09 and 26.10.10. In addition, owners and operators of new petroleum UST systems must comply with the new UST system performance standards in COMAR § 26.10.03.01.B immediately upon installation of the new UST system and at all times



thereafter. Amend. Ans. ¶ 136.

Second, Euclid admits that pursuant to COMAR § 26.10.03.01.B, new tanks must be protected from corrosion, in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory, using one of the options specified in that section, namely, tanks may be constructed of fiberglass-reinforced plastic, COMAR § 26.10.03.01.B(1); constructed of steel and cathodically protected, COMAR § 26.10.03.01.B(2); constructed of a steel-fiberglass-reinforced composite, COMAR § 26.10.03.01.B(3); installed at a site which is not corrosive enough to cause a release, COMAR § 26.10.03.01.B(4); or constructed and protected in a manner determined by MDE to be no less protective as COMAR § 26.10.03.01.B(1) through (4), COMAR § 26.10.03.01.B(5). In addition, pursuant to COMAR § 26.10.03.02.B, existing tanks may be upgraded by cathodic protection, COMAR § 26.10.03.02.B(2), or by internal lining combined with cathodic protection. COMAR § 26.10.03.02.B(3). Amend. Ans. ¶ 137.

Third, respondent admits that pursuant to COMAR § 26.10.03.01.B, a steel tank which is protected from corrosion using cathodic protection must be cathodically protected in accordance with the requirements of COMAR § 26.10.03.01.B(2)(a) through (d). COMAR § 26.10.03.01.B(2)(d) requires that cathodic protection systems be operated and maintained in accordance with COMAR § 26.10.04.02. COMAR § 26.10.04.02.B requires that cathodic protection systems shall be operated and maintained to continuously provide corrosion protection to the metal components of that portion of the tank and piping that are in contact with the ground. COMAR § 26.10.04.02.D(1) requires that cathodic protection systems be inspected for proper operation by a qualified cathodic protection tester within six months of installation and at least every year thereafter. Amend. Ans. ¶ 138.

### **Count 17**

This count involves the Euclid facility located at 4123 Ocean Gate Highway, Trappe, Maryland. EPA charges that respondent violated COMAR § 26.10.03.01.B and, or, § 26.10.04.02.D, by failing to provide corrosion protection and, or, maintain and test corrosion protection for Tanks TR-1, TR-2, and TR-3. F. Amend. Compl. ¶ 145. The period of alleged violation is September 30, 1997, to November 25, 2003 (the date of the First Amended Complaint). *Id.*

Euclid admits that Tanks TR-1, TR-2, and TR-3 are “new tank systems” and were required to be in compliance with the new tank standards found at COMAR § 26.10.03.01.B. Amend. Ans. ¶ 140. Also, these tanks are steel USTs known as “STI-P3 tanks” (CX Y-21 at 1756) and respondent was able to provide documentation of cathodic protection testing only for testing conducted on February 5, 2003. Stip. 50 (First Set) & CX Y-21 at 1756. The February 5, 2003, testing was conducted by Guy Denney of Piping & Corrosion Specialities.

The evidence in this case supports a finding that Euclid violated the UST regulations as charged in the First Amended Complaint. As asserted by EPA, “[t]he three USTs at the Ocean

Gate Highway Facility are new USTs, which were required to meet corrosion protection standards for new tanks upon their installation in April, 1991.” Compl. Br. at 177 (citations omitted).

First, the record shows that Euclid failed to properly test the three USTs for corrosion protection. The Maryland UST regulations require that cathodic protection systems be inspected by a qualified cathodic protection tester “within 6 months of installation and at least every year thereafter.” COMAR § 26.10.04.02.D. The regulations further require that records of at least the last two such inspections must be maintained. COMAR § 26.10.04.02.G(2). Despite these regulatory requirements, Euclid was able to produce evidence of corrosion protection testing for one date only, *i.e.*, February 5, 2003. *See* Stip. 50 (First Set). Respondent, therefore, was in non-compliance with the UST corrosion protection testing regulations.

Furthermore, EPA takes issue with respondent’s methodology regarding its February 5, 2003, testing. EPA argues that the tests performed by Piping & Corrosion Specialties “were not conducted in accordance with accepted industry codes of practice, as required by COMAR § 26.10.04.02.D(2).” Compl. Br. at 178. According to EPA, the test results are invalid.

Complainant bases its challenge to respondent’s corrosion protection testing on the testimony of John Cignatta, EPA’s corrosion protection expert. Cignatta testified that the USTs at respondent’s Ocean Gate facility were not cathodically protected. TR-9 at 50. He determined that while one of the tanks was partially protected (“more of it was protected than any of the others”), the other two tanks were “almost completely unprotected.” TR-9 at 51. He further stated, “whenever any spot on the tank is found to be unprotected, the tank is unprotected from corrosion control.” *Id.*

Insofar as the earlier Piping and Corrosion Specialties’ readings are concerned, Cignatta considered them to be “some sort of mistake.” TR-9 at 52. In that regard, he noted that Guy Denny, the individual who had conducted that testing, “did say that he did not strike the tank” and thus “didn’t get a good connection to the tank.” *Id.*<sup>55</sup> Cignatta concluded that Denny’s readings should be discarded as they are “nowhere close” to the readings that Cignatta obtained when he “connected to the tanks properly.” TR-9 at 52. The testimony of expert witness Cignatta is credited.

A civil penalty of **\$47,962** is assessed for the violation in this count. With respect to the seriousness of the violation, the USTs involved here had a total storage capacity of 30,000 gallons. Amend. Ans. ¶ 115. Also, as argued by EPA (Compl. Br. at 359), the period of non-compliance began on September 30, 1997, and ended on November 26, 2003 (the First Amended Complaint had alleged a violation until November 25, 2003), when Piping & Corrosion Specialties installed additional anodes into the ground at this facility.<sup>56</sup>

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<sup>55</sup> Denny used tank structure wires. TR-9 at 41.

<sup>56</sup> Regarding the addition of the anodes, EPA states, “Although Complainant is not computing a penalty for the period after the installation of the anodes, Respondent has never

In addition, the Hennessy Report assigns a “Groundwater Use Rating” of “5” to the Ocean Gate Highway site because there are 2 community water supply wells for the Town of Trappe, between one-quarter and one-half mile from the facility, serving a population of 1,200. CX Y-22, Table 3. This Report also assigns the site a “Likelihood that Release would Contaminate Groundwater” rating of “4.” *Id.*, Table 6. The Rotenberg Report assigns a “population factor” of “3” and an “exposure potential factor” of “4.” CX Y-23 at 1794 (Euclid site # 5).

Although its compliance attempts were not sufficient, the record shows that Euclid was only moderately negligent. Also, the penalty assessment includes respondent’s Avoided Cost for cathodic protection testing (*see* Compl. Br. at 362).

### **Count 18**

This count also involves the Ocean Gate Highway facility in Trappe, Maryland, that was the subject of Count 17. EPA charges that respondent violated COMAR § 26.10.03.01.C by failing to provide corrosion protection for the underground piping associated with tanks TR-1, TR-2, and TR-3. F. Amend. Compl. ¶ 150.<sup>57</sup> The period of alleged violation also is from September 30, 1997, to November 25, 2003 (the date of the First Amended Complaint). *Id.* The involved piping enters the ground at the USTs and at the point at which it emerges at the dispensers. *See* CX E-10; *see also*, TR-9 at 59-62.

It is undisputed that pursuant to COMAR § 26.10.03.01.C, piping associated with new UST systems in contact with the ground must comply with one of the options set forth in that section. *See* F. Amend. Complaint ¶ 147 & Amend. Ans. ¶ 147. Such piping may be constructed of fiberglass-reinforced plastic in compliance with the requirements of COMAR § 26.10.03.01.C(1), may be constructed of steel and cathodically protected in accordance with COMAR § 26.10.03.01.C(2), may be constructed of metal without additional corrosion protection in compliance with the requirements of COMAR § 26.10.03.01.C(3), or, pursuant to COMAR § 26.10.03.01.C(4), may be constructed and protected in a manner determined by the implementing State agency to be not less protective of human health and the environment than the requirements of COMAR § 26.10.03.01(C)(1) through (3).

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conducted a proper test to demonstrate that the tanks are currently under cathodic protection, and therefore Complainant seeks injunctive relief requiring a proper test and additional measures if such tests indicate that the tanks are not protected.” Compl. Br. at 359 n.64). EPA’s request for injunctive relief is discussed, *infra*.

<sup>57</sup> At the hearing, counsel for EPA stated that with respect to Count 18, complainant was alleging a violation only as to a portion of the underground piping. That portion of Count 18 of the First Amended Complaint “which applied to the full runs of piping between the metal piping entering and exiting the soil at the Ocean Gate Highway facility” was dismissed. EPA now alleges a violation only with respect to the metal piping at the point at which such piping enters and exits the soil. TR-1 at 37-40; *see* Compl. Br. at 184 n.39.

In its Amended Answer to the First Amended Complaint, Euclid denies that the piping was metal, stating instead, that it “is fiberglass piping which is fully compliant.” Amend. Ans. ¶ 148. Respondent stipulates, however, that “[t]he underground piping associated with Tanks TR-1, TR-2 and TR-3 is metal piping at the point at which such piping enters the ground at the USTs and at the point at which such piping emerges at the dispensers.” Stip. 51 (First Set). In addition, while Euclid also stipulates that the underground piping associated with the USTs has never been cathodically protected, its stipulation does not extend to an admission that cathodic protection is required in the first place. Stip. 52 (First Set).

Respondent’s witness, Ted Beck, testified that the metal piping, at the point where it enters the soil, was coated with a “mastic” material. He described the mastic coating as being applied between “the nipple and the fitting,” as well as to a “flex connector that was buried and attached to fiberglass piping.” TR-14 at 207. According to Beck, when this system was installed, “coating and wrapping was an alternative method for corrosion protection.” *Id.* See Resp. Br. at 28-30.

Anticipating respondent’s “coating and wrapping” argument, EPA extensively addresses this matter in its opening brief. In that regard, EPA submits that Beck was *not* accepted as a corrosion protection expert at the hearing in this matter. It also discounted Beck’s testimony because he relied, in part, on a Maryland Department of the Environment fact sheet that was not admitted into evidence. Compl. Br. at 175.

Instead, complainant argues that this Tribunal should be guided by the testimony of its expert witness, John Cignatta. As noted by EPA, Cignatta testified that there is an MDE guidance document regarding coating and wrapping of metal flex connectors, “but this guidance does not apply to straight steel piping.” Compl. Br. at 175. Cignatta testified that he was unaware of any MDE guidance document that allows steel piping to be coated and wrapped as a means of isolating flex connectors from the soil. TR-15 at 118. He stated that “[o]ther than a riser, any other fuel pipe has to be either coated or wrapped and cathodically protected.” *Id.*

In addition, as noted by EPA, Cignatta went on to describe a three-layer process for the use of this option to isolate flex connectors from the ground. This includes the use of a primer layer, a layer of thick, “conformal” or “gummy” wrapping, and a layer of rigid, hard plastic tape, with each layer being specifically designed for direct burial application and exposure to hydrocarbons. Cignatta added, however, that this alternative is available only when approved by the flex connector manufacturer. TR-15 at 119-120.

On balance, the more detailed testimony of cathodic protection expert John Cignatta as to the “coating and wrapping” of pipes and connectors is credited over the testimony of Ted Beck. On the basis of this testimony, it is held that respondent committed the violation charged in Count 18.

A civil penalty of **\$7,177** is assessed for this violation, the amount proposed by EPA. In that regard, complainant sought to calculate its proposed penalty “only from August 7, 2003,

when discovered by EPA, until September 11, 2003, when Mr. Beck excavated at least some of the length of the piping.” Compl. Br. at 362. Complainant added that the violation applied only to a portion of the underground piping at the facility. Accordingly, the penalty in Count 18 is based on these facts, as well as the reasons set forth in the penalty discussion of Count 17,

### **Count 32**

This count involves the Euclid facility located at 3900 Frederick Avenue, Baltimore, Maryland. EPA charges that respondent violated COMAR §§ 26.10.03.01.B, 26.10.03.02.A and, or, 26.10.04.02.D and F by failing to provide, maintain and, or, test corrosion protection for Tanks 39-1, 39-2, 39-3, and 39-4, or to close these tanks pursuant to COMAR §§ 26.10.09 and 26.10.10. F. Amend. Compl. ¶ 267. The period of alleged violation is from January, 2000, to August 8, 2003. *Id.*<sup>58</sup>

With respect to this count, on January 17, 2000, after the conclusion of the enforcement action initiated against respondent by the MDE (*see* n.57, *supra*), Euclid installed an impressed current cathodic protection system at the facility. CX L-7. Respondent admits that pursuant to COMAR § 26.10.04.02.F, UST systems with impressed current cathodic protection systems shall also be inspected every 60 days to ensure that the equipment is running properly. In addition, pursuant to COMAR § 26.10.04.02.C, impressed current systems must be designed so that their impressed current source cannot be de-energized at any time, including during closure of the facility, except to perform service work on the storage system or on the impressed current system. Amend. Ans. ¶ 259.

Respondent also admits that Tanks 39-1, 39-2, 39-3, and 39-4 are steel tanks and that in January, 2000, an impressed current cathodic protection system was installed to cathodically protect these steel tanks. *Id.*, ¶ 260. In addition, Euclid admits that at no time relevant to the charges of violation set forth in this count have Tanks 39-1, 39-2, 39-3, and 39-4 been closed or been in compliance with COMAR §§ 26.10.03.01.B(1) and (3) through (5) or 26.10.03.02.B(3). *Id.*, ¶ 261.

Finally, Euclid admits that from the time of installation in January, 2000, until at least August 8, 2003, the cathodic protection system for Tanks 39-1, 39-2, 39-2, and 39-4 was not in compliance with COMAR § 26.10.03.01.B(2)(d) because it had not been inspected for proper operation by a qualified cathodic protection tester, and had not been inspected to ensure that the equipment was running properly, as required by COMAR § 26.10.04.02.D and F. *Id.*, ¶ 262.

Despite the preceding admissions, Euclid avers “that the cathodic protection system is fully compliant and the operation of this system has met all requirements.” Amend. Ans. ¶¶ 258-

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<sup>58</sup> In its post hearing brief, complainant lists the dates of violation as being “from January 17, 2000, to the present.” Compl. Br. at 194. EPA states that it did not seek an earlier date for the period of violation because the Maryland Department of the Environment had already obtained a penalty for that time period. Compl. Br. at 186.

262. It further avers that “[t]he cathodic protection system was installed by a qualified contractor and inspected by the State periodically, and monitored by the owner as required.” *Id.* Moreover, respondent submits that “[t]he system was at all times compliant.” Amend. Ans. ¶¶ 263-266. As explained below, the evidence produced by EPA at the hearing shows otherwise.<sup>59</sup>

Euclid stipulates that the earliest date for which it has cathodic protection testing documentation for Tanks 39-1, 39-2, 39-3, and 39-4 is May 1, 2003. Stip. 75 (First Set). As noted, that testing was conducted by Guy Denney of Piping & Corrosion Specialities, Inc. *Id.* Complainant, however, does not stipulate that this testing was done in compliance with COMAR § 26.10.04.02.D(1). In fact, EPA contends otherwise arguing that this testing was “not conducted in accordance with accepted industry codes of practice.” Compl. Br. at 187.

First, Cignatta disputes the report prepared by Denny. Comparing the Denny report to his own observations and measurements taken during his June 19, 2003, and August 8, 2003, inspections of the Frederick Avenue facility, Cignatta prepared a drawing summarizing his findings as to the “areas of influence” covered by Denny’s testing. TR-9 at 67-68; CX Y-44 at 2023-2024.

In that regard, Cignatta calculated the length of the tanks at the facility, using the known diameter and volume, and determined that the tanks ranged from 21.2 feet to 26.5 feet in length. TR-9 at 42; CX Y-44 at 2023-2024.<sup>60</sup> Cignatta, however, was unable to determine from Denny’s report where Denny took his readings. Cignatta stated, “He could have taken them here at a variety of locations even through the concrete, but the problem is that -- at issue is the length of the field of influence of each of the readings to be able to use two readings for tanks that are over- - all of the tanks are over 20 feet long.” TR 68-69 (Vol 9); CX Y-44 at 2023-2024.

Cignatta concluded that given the data provided by Denny, the maximum portion of the tank that could have been covered was 16 feet. He explained, “it would be impossible to be wading [*sic*] more than 16 feet with again having two feet of cover ovetop of the area between the tank and the reference cells, so it’s just not possible to do that.” TR-9 at 70. Thus, the two readings per tank (CX L-11 at 0510b) taken by Denny to determine cathodic protection clearly were not sufficient to give a cathodic protection picture of the entire structure.

In addition, Cignatta also testified as to problems he found when using a Hobbs meter at

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<sup>59</sup> Euclid attempts to clarify its defense regarding Count 32 in its post hearing brief, but its arguments are unclear and fragmented. *See* Resp. Br. at 31-32. Still, a fair reading of this argument shows that respondent believes that there is “considerable disagreement regarding the proper method of testing the tanks,” that the report of EPA expert John Cignatta contains “fundamental errors,” and that, in any event, Cignatta is not (in its view) a credible witness. *Id.* Euclid, however, offers no record citation to support these assertions.

<sup>60</sup> Cignatta explained, “[t]he length is the critical parameter that we have for concern to make sure that enough readings are taken over it.” TR-9 at 68.

the Frederick Avenue facility.<sup>61</sup> Despite the fact that Cignatta was conducting this inspection on June 19, 2003, the Hobbs meter showed only 365 days of operation since its installation in January of 2000. TR-9 at 67, 71. Moreover, when the Hobbs meter was not in operation, “no cathodic protection whatsoever would be occurring.” TR-9 at 71. Thus, according to Cignatta, “this site sat without corrosion protection control for all the hours that this unit was not logging them.” *Id.*

Ultimately, testifying with respect to Complainant’s Exhibits L-12 and L-13, Cignatta concluded that at the Frederic Road facility, Tank 1 did not have cathodic protection and that Tanks 2, 3, and 4 were “slightly overprotected.” TR-9 at 72.<sup>62</sup> Cignatta clarified his statement

that the three tanks were cathodically overprotected, testifying that they were exposed to “slightly excessive voltages to the point that they were in the range of beginning to have their coatings damaged from hydrogen over voltage potential areas.” TR-9 at 73.<sup>63</sup>

Cignatta considered his testing on June 19, 2003, to be somewhat preliminary.<sup>64</sup> He followed this testing up with a more detailed cathodic protection survey on August 8, 2003, “because something was seriously wrong at this site.” TR-9 at 74. On reviewing the data collected during the August 8, 2003, inspection, Cignatta stated, “So this is a good classic evaluation of  $V_{ON}$ , seeing a clear drop to the instant off and then seeing the continue decay to  $V_{OFF}$ ; so therefore, *it’s a valid test.*” TR-9 at 77-79 (emphasis added). Thus, EPA concludes, “[b]ecause Mr. Denny’s testing did not comport with accepted industry codes, Euclid continued to be in violation of the testing requirement until Mr. Cignatta conducted detailed testing at the Facility on August 8, 2003.” Compl. Br. at 189. Given Cignatta’s testimony, it is the finding of this Tribunal that Denny’s testing did not, as argued by complainant, comport with accepted industry codes of practice.

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<sup>61</sup> Cignatta likened a Hobbs meter to an odometer. A Hobbs meter is placed on the “rectifier” and it determines how many hours the unit has been operating. TR-9 at 70-71.

<sup>62</sup> Cignatta stated that with cathodic protection, “little is good, a bunch is better and a whole lot more is not a good idea.” This is because increasing the voltage and current causes hydrogen bubbles to form on the surface of the steel, thus taking the paint off the tank. TR-9 at 72.

<sup>63</sup> Respondent’s witness Mollica, however, took an opposing view. He testified that two readings were sufficient to characterize the entire tank. TR-12 at 91. As noted by EPA, though, Mollica was not qualified as an expert in the area of cathodic protection. Nor did he offer any rationale for his conclusion, relying instead on the opinion of Guy Denny that two readings were sufficient. *See* Compl. Br. at 188. Accordingly, it is the testimony of Cignatta that is credited.

<sup>64</sup> “[O]n June 19<sup>th</sup> I just did a smattering of a few readings without occurring interrupters and without data loggers just to see what the voltage profiles were across the site because there were such significant variations as shown in my notes of June 19<sup>th</sup> regarding the  $V_{ON}$  readings.” TR-9 at 73.

Having established that Euclid violated COMAR in failing to test its impressed cathodic protection system, EPA next shows that respondent also violated COMAR by failing to provide corrosion protection in the first place. That evidence begins with Cignatta's inspection of June 19, 2003, and the readings that he collected from the Hobbs meter (discussed, *supra*) showing that as of June 19, 2003, cathodic protection had been provided for only 356 days since June 17, 2000. In other words, the impressed current system had been turned off for approximately 883 days. Also, as noted, while on June 19, 2003, Cignatta took only preliminary cathodic protection readings, he returned on August 8, 2003, to take more detailed readings. TR-9 at 73-75.

Subsequent to Cignatta's second inspection, on November 21, 2003, additional testing was conducted at the Frederick Avenue facility for respondent by Denny and an individual by the name of Antonio Ristaino. TR-12 at 28; RX X-12 at 3580-3582. Complainant's Exhibit Y-45 contains a letter from Ristaino to Ted Beck of Independent Petroleum Services concluding that all the tanks at the Frederick Avenue facility were cathodically protected. TR-9 at 79-80. Based on the data presented, as explained below, Cignatta showed just why that conclusion is not reliable.

First, while the results showed five test points, no indication was given as to the location of the test points, or whether the testing was with direct contact to the soil or through steel-reinforced concrete. TR-9 at 81; RX X-12 at 3581. Second, in Exhibit Y-45, there are only two areas out of five where the  $V_{\text{OFF}}$  readings are provided. TR-9 at 81-82. With respect to these readings, Cignatta stated that "what comes across here is that the data does not support, without any interpretation, the review that the site has passed." TR-9 at 82. He noted that the data relative to all of the tanks has these problems. *Id.* Third, in referencing Complainant's Exhibit L-11, Cignatta concluded that because certain data (*i.e.*, static readings) taken by Ristaino were substantially similar to those taken by Denny months earlier, they appear "to be brought forward and there were no  $V_{\text{OFF}}$  readings taken when Mr. Ristaino was at the site." TR-9 at 83-84.

Accordingly, for the foregoing reasons, it is held that EPA has proven the violations charged in Count 32. A civil penalty of **\$101,689** is assessed for these violations.

As noted by EPA, there are overlapping periods of non-compliance for the violations. In that regard, "(1) 60-day inspections were not conducted, for all four tanks, with the violation running from March 17, 2000 (60 days after the impressed current was installed) to November 21, 2003; (2) cathodic protection testing was not done for all the tanks, the violation running from July 17, 2000 (six month[s] after the system was installed) until August 8, 2003, when Mr. Cignatta conducted his testing; (3) the impressed current system was not operated to provide continuous cathodic protection because it was turned off for 883 days (a bit less than 2 1/2 years) between the time of installation and June 17, 2003, and (4) Tank 39-1 has not been provided continuous cathodic protection from at least August 2, 2003 (when tested by Mr. Cignatta) to the present (December 31, 2003 is used in the penalty calculation). Compl. Br. at 363-364.

In addition to these periods of non-compliance, the penalty assessment took into account the fact that the four USTs involved in this count have a total capacity of 32,000 gallons. Amend. Ans. ¶ 240. Also, the Hennessy Report assigns a "Groundwater Use Rating" for the Frederick



Avenue facility of “1” and a “Likelihood that Release would contaminate Groundwater” rating of “4,” noting that there were 3 USGS wells within one-quarter mile of the site. CX Y-22, Tables 3 & 6. The Rotenberg Report assigns a both a “population factor” and an “exposure potential factor” of “5” to this facility. CX Y-23 at 1794 (Euclid site # 13). Because this site is in an urban area with a large population, the Rotenberg Report further concludes that “[p]referential pathways of utility lines and trenches, combined with a shallow groundwater table, will allow released petroleum products to move in the environment, and thus allow exposure.” CX Y-23 at 1794.

Lastly, the penalty assessed also was based upon respondent’s moderate degree of negligence and its Avoided Cost for cathodic protection testing (*see* Compl. Br. at 366).

#### **Count 41**

This count involves the Euclid facility located at 6181 Annapolis Road, Landover Hills, Maryland. EPA charges that respondent violated COMAR § 26.10.03.02.A by failing to either to provide corrosion protection for the metal pump and connector components of the underground piping associated with Tanks 61-1, 61-2, and 61-3, pursuant to COMAR §§ 26.10.03.01.C or 26.10.03.02.C, or to close such tanks pursuant to COMAR §§ 26.10.09 and 26.10.10. F. Amend. Compl. ¶ 332. The period of alleged violation is June 13, 2001, March 27, 2003, and August 22, 2003. *Id.*

Respondent has stipulated that metal connections on the piping associated with all three tanks at the Annapolis Road facility were in contact with pea gravel below grade level during three inspections by EPA and the MDE. The dates of inspection were June 13, 2001, March 27, 2003, and August 22, 2003, the dates identified in the First Amended Complaint. Stip. 96 (First Set). *See* CX N-15. In addition, according to respondent’s expert, Ted Beck, the metal piping components at this facility were “coated and wrapped to prevent the pipe from being in direct contact with the ground.” RX X-7 at 9009.

It is held that the fact that the underground piping was in contact with pea gravel, and the fact that it had some type of “coating and wrapping” does not equate with having corrosion protection. Accordingly, it is further held that respondent violated the COMAR corrosion protection requirements on June 13, 2001, March 27, 2003, and August 22, 2003, as charged.

A civil penalty of **\$3,000** is assessed for this violation. (EPA is seeking a penalty only for three dates, *i.e.*, June 11, 2001, March 27, 2003, and August 22, 2003. Compl. Br. at 368.) The USTs at the Annapolis Road facility had a total capacity of 30,000 gallons. Amend. Ans. ¶ 308. Also, this facility received a “Groundwater Use Rating” of “1 and a “Likelihood that Release would Contaminate Groundwater” of “5” from the Hennessy Report. CX Y-22, Tables 3 & 6. It also received a “population factor” of “3” and an “exposure potential factor” of “5” from the Rotenberg Report. CX Y-23 at 1794 (Euclid site # 15).

Nonetheless, the driving force in this penalty determination is the rather short period of non-compliance, as well as the respondent’s ordinary degree of negligence. Accordingly, a low penalty is warranted.

### **Count 45**

This count involves the Euclid facility located at 6038 Baltimore Avenue, Hyattsville, Maryland. EPA charges that respondent violated COMAR §§ 26.10.03.02.A and, or, 26.10.04.02.D by failing either to maintain and test corrosion protection for Tank HY-3 pursuant to COMAR §§ 26.10.03.01.B, 26.10.03.02.B and, or, 26.10.04.02.D, or to close the tank pursuant to COMAR §§ 26.10.09 and 26.10.10. F. Amend. Compl. ¶ 360. The period of alleged violation is from December 22, 1998, to August 8, 2003. *Id.*

Tank HY-3 is a steel STI-P3 tank used to store waste-oil. Stip. 105 (First Set). It qualifies as an “existing” tank system and it was required to meet the applicable corrosion protection standards no later than December 22, 1998. Amend. Ans. ¶ 339. At the time of its April, 2002, meeting with EPA, Euclid was unable to produce documentation showing that the cathodic protection system for this tank was tested. It was able to provide documentation of such testing only for April 28, 2003. Stip. 106 (First Set); CX O-13.

EPA argues, however, that respondent’s testing of April 28, 2003, “was not conducted in accordance with accepted industry codes of practice.” Compl. Br. at 197. In that regard, EPA notes that in conducting the testing Guy Denny (*i.e.*, Piping and Corrosion Specialties) had connected to the existing test wire at the facility. EPA argues that this procedure is faulty inasmuch as “the use of a test lead does not ensure the required contact with the tank unless the test lead is independently verified to have a low-resistance connection to the tank at the time of the test.” Compl. Br. at 197-198.

To support its argument, EPA cites to the testimony of its expert, John Cignatta. Cignatta conducted cathodic protection testing of Tank HY-3 on August 8, 2003. In criticizing Denny’s earlier testing, Cignatta stated:

There was a wire that came up to grade. I think it was around the fill stack into the tank that Mr. Denney identified that was the wire he used. At that point we struck the tank using a dual probe brass tipped striker rod connected to the tank, made sure that indeed we had connection from both leads to the tank, and at that point checked to see what that wire was in terms of its connection to the tank.

We measured the resistance between the tank striker probe which was a very good connection, a positive connection to the tank and the wire, and we found 270 ohm difference, *so anyone using that wire for anything would have had a 270 ohm resistor in the circuit for which they could not address, or mathematically correct, so there was two unknowns in all of his readings.*

TR-9 at 103 (emphasis added).<sup>65</sup>

Cignatta concluded that the resistance referenced above could have caused Denny's readings to be either too high, too low, or it could have had a relatively insignificant effect. TR-9 at 104. "It can go in either direction and that's the problem with having another -- an additional unknown in the circuit." *Id.*<sup>66</sup>

Accordingly, given Cignatta's testimony, it is held Euclid failed to properly conduct cathodic protection testing on Tank HY-3 as alleged in Count 45 of the First Amended Complaint.

A civil penalty of **\$8,744** is assessed for this violation. The sole UST involved here, Tank HY-3, has a capacity of 550 gallons. Amend. Ans. ¶ 339. The Hennessy Report assigns a "Groundwater Use Rating" of "1" to this facility and a "Likelihood that Release would Contaminate Groundwater" rating of "5," noting that 1 deep USGS well was located within 1 mile of the facility and 1 shallow USGS well within 2 miles. CX Y-22, Tables 3 & 6. The Rotenberg Report assigns a "population factor" of "5" and an "exposure potential factor" of "5." CX Y-23 at 1794 (Euclid site # 16). In addition, the period on non-compliance was from December 22, 1998, and continued on to April 28, 2003, and the violation was the result of respondent's ordinary degree of negligence. Lastly, this penalty assessment includes the Avoided Cost for cathodic protection testing (*see* Compl. Br. at 371).

### **Count 52**

This count involves Euclid's 3800 Rhode Island Avenue facility in Brentwood, Maryland. EPA alleges that respondent violated COMAR § 26.10.03.02.A by failing to provide corrosion protection for Tank BW-4 pursuant to COMAR §§ 26.10.03.01.B or 26.10.03.02.B, or to close the tank pursuant to COMAR §§ 26.10.09 and 26.10.10. F. Amend. Compl. ¶ 409. The period of alleged violation is from December 22, 1998, to November 25, 2003, the date of the First Amended Complaint. *Id.*

Paragraph 407 of the First Amended Complaint alleges that "Tank BW-4 is a steel tank." Paragraph 408 goes on to allege that "[a]t no time relevant to the violations set forth in this Count has Tank BW-4 been cathodically protected or been in compliance with any other of the compliance options in COMAR §§ 26.10.03.01.B or 26.10.03.02.B, or been closed pursuant to

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<sup>65</sup> Curiously, citing TR-12 at 33, Euclid states that "John Cignatta, Complainant's expert, agreed that the tank was protected." Resp. Br. at 28. Obviously, that is not the case.

<sup>66</sup> The August 8, 2003, testing by Cignatta showed that Tank HY-3 was cathodically protected. TR-9 at 105. EPA appears to concede that such was the case even at the time of Denny's earlier April testing, noting that "luckily" for respondent that Denny's readings were "substantially lower" than the readings obtained by Cignatta "using a proper connection to the tank." Compl. Br. at 198.

COMAR §§ 26.10.09 and 26.10.10.” In its Amended Answer, with one caveat, respondent admits the allegations contained in Paragraphs 407 and 408. That caveat reads, “[h]owever, this tank and its cathodic protection system were installed by a qualified installer and monitored periodically by the State, and so no penalty is appropriate.” Amend. Ans. ¶¶ 407-409. Thus, respondent has admitted to the violation charged in Count 52 and merely contests the size of the civil penalty sought by EPA. *See* Resp. Br. at 27 (“Respondent stipulated that this tank is a steel tank without cathodic protection.”)<sup>67</sup>

Thus, EPA has established that Tank BW-4 was not cathodically protected. In its Amended Answer to the allegations of Paragraph 388, Euclid admits that the tank is an “existing” UST system that was required to meet the corrosion protection standards no later than December 22, 1998. Amend. Ans. ¶ 388. Thus, the period of violation began on December 22, 1998, and there has been no showing that respondent has ever come into compliance with the cathodic protection regulations or has removed the tank from service.

A civil penalty of **\$20,264** is assessed for this violation. The UST involved, Tank BW-4, has a capacity of 1,000 gallons. Amend. Ans. ¶ 388. The period of non-compliance here is from December 22, 1998, to December 31, 2003. In addition, the Hennessy Report assigns a “Groundwater Use Rating” of “1” and a “Likelihood that Release would Contaminate Groundwater” rating of “4,” noting that 2 USGS wells are located 1.2 to 1.4 miles from the site. CX Y-22, Tables 3 & 6. The Rotenberg Report assigns the 3800 Rhode Island Avenue facility a rating of “5” for both the “population factor” and the “exposure potential factor.” CX Y-23 at 1794 (Euclid site #19). Because the 3800 Rhode Island Avenue facility is in an urban area with a large population, the Rotenberg report further concludes that [p]referential pathways of utility lines and trenches, combined with a shallow groundwater table, will allow released petroleum products to move in the environment, and thus allow exposure.” CX Y-23 at 1794.

This penalty assessment also takes into account respondent’s high degree of negligence, as well as the Delayed Savings Cost associated with the impressed current installation, and the Avoided Cost associated with cathodic protection testing (*see* Compl. Br. at 373).

### **Count 73**

This count involves the Euclid facility located at 5608 Buckeystown Pike, Frederick, Maryland. EPA charges that respondent violated COMAR § 26.10.03.02.A by failing to either

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<sup>67</sup> Despite the clarity of respondent’s Amended Answer, the parties subsequently stipulated on the record that “the tank was in fact a steel tank with no cathodic protection or other form of corrosion protection.” *See* Compl. Br. at 198. Because of a recording error by the court reporter, this stipulation was inadvertently left out of the transcript. It was, however, included in the parties’ Joint Motion to Conform the Transcript that was granted by this Tribunal. *See* Compl. Br. at 199 n.42. Accordingly, respondent’s subsequent reversal of position in its post-hearing brief where it argues that Tank BW-4 is a fiber glass tank is rejected. *See* Resp. Br. at 27.

provide corrosion protection for the metal portion of the underground piping associated with Tanks FR-1, FR-2, and FR-3, pursuant to COMAR §§ 26.10.03.01.C or 26.10.03.02.C, or to close such tanks pursuant to COMAR §§ 26.10.09 and 26.10.10. F. Amend. Compl. ¶ 557. The period of alleged violation listed in the First Amended Complaint refers only to a single date, June 17, 2003. *Id.*

EPA Inspector Marie Owens testified that the underground piping for Tanks FR-1, FR-2, and FR-3 “was in contact with the backfill.” TR-5 at 30. EPA expert John Cignatta testified that “all three of these tanks have pressurized product runs made from steel piping that is unprotected from corrosion where it is in contact with the soil.” TR-9 at 124-125; CX Y-21 at 1750. Indeed, the report of respondent’s expert, Ted Beck, also shows that this piping is in contact with the ground. RX X-7 at 9015 & 9055.

This testimonial and documentary evidence establishes that EPA has proven the violation as charged in Count 73. A civil penalty of **\$3,000** is assessed for this violation.

With respect to the seriousness of this violation, the USTs involved in this count had a total capacity of 30,000 gallons. Amend. Ans. ¶ 534. The period of non-compliance for which EPA requests a penalty, however, is only for one day, *i.e.*, June 17, 2003. The fact that complainant claims only a one-day violation is the driving force for keeping this penalty low, even considering the Hennessy and Rotenberg Reports (CXs 22 & 23), as well as the respondent’s negligence.

#### **d. The District of Colombia Violations**

##### **Count 37**

This count involves respondent’s facility at 4225 Connecticut Avenue, Washington, D.C. EPA charges that respondent violated 20 DCMR § 5700.1(c) by failing to provide either corrosion protection for part of the underground metal piping associated with Tank VN-5 in accordance with 40 C.F.R. 280.20(b), incorporated by reference into 20 DCMR § 5700.1(c), or to close the tank pursuant to 20 DCMR Chapter 61. F. Amend Compl. ¶ 303. The period of violation in the First Amended Complaint is April 16, 2003. *Id.*

Specifically, the cathodic protection issue in Count 37 involves a pump comptrroller that is part of the underground piping associated with Tank VN-5, a diesel tank. With respect to this count, respondent has stipulated that at least as of April 16, 2003, this unit contained regulated substances and was in contact with pea gravel and other backfill. Stip. 85 (First Set). Thus, Euclid effectively has conceded that it violated the cathodic protection regulations as charged.

Moreover, while Euclid also stipulated that the pump comptrroller was “galvanized” (*id.*), to the extent that it seeks to rely on this fact as a defense, its reliance must fail. In that regard, galvanizing metal surfaces is not considered a cathodic protection system for buried underground piping. TR-9 at 126-127. *See* TR-11 at 84 & TR-14 at 112.

Accordingly, it is held that Euclid committed the violation as charged in Count 37. A civil penalty of **\$859**, the amount requested by EPA, is assessed for this violation.

Justifying an \$859 penalty under the circumstances of Count 37 is not difficult. In that regard, the UST involved, Tank VN-5, has a capacity of 4,000 gallons. Amend. Ans. ¶ 278. The Hennessy Report assigns a “Groundwater Use Rating” of “1” and a “Likelihood that Release would Contaminate Groundwater” rating of “5.” CX Y-22, Tables 1 & 4. Also, the Rotenberg Report assigns the Connecticut Avenue facility a “population factor” of “5” and an “exposure potential factor” of “5.” CX Y-23 at 1794 (Euclid site # 14). Thus, even assuming only ordinary negligence by respondent, the penalty sought by EPA in this count is easily sustainable.

### **Count 59**

This count involves Euclid’s facility at 22 Florida Avenue, Washington, D.C. EPA charges that respondent violated 20 DCMR §§ 5800.1 and, or, 5901.1 through .6 by failing to provide, maintain and, or, test corrosion protection for Tanks FL-1, FL-2 and FL-3 pursuant to 20 DCMR §§ 5701.1, 5801.1 and, or, 5901.1 through .6 and 40 C.F.R. 280.20(a) or (b) and, or, 280.31, or to close such tanks pursuant to 20 DCMR Chapter 61. F. Amend. Compl. ¶ 464. The period of alleged violation is from December 22, 1998, to November 25, 2003, (the date of the First Amended Complaint). *Id.*

As noted, this count involves several charges of violation. The first charge involves the requirement that the tanks be cathodically protected. Tanks FL-1, FL-2, and FL-3 are steel tanks. Amend. Ans. ¶ 437. Because these steel tanks are “existing tanks,” as defined in both the Federal and the District of Columbia regulations, corrosion protection was required by December 22, 1998. *Id.* Despite this requirement, however, an impressed current was not applied to the tanks until approximately January 3, 2000. RX S-5 at 3301.

Moreover, the record shows that this impressed current system was not without problems. For example, when Guy Denny of Piping & Corrosion Specialties arrived at the facility for testing on April 28, 2003, he discovered that the impressed current system was not energized. CX S-12 at 0926gg. Also, when EPA expert John Cignatta examined the Hobbs meter at the facility on August 22, 2003, it showed that the impressed current unit had been in operation for only 26,693 hours since being energized on January 3, 2000. CX Y-21 at 1745. According to EPA, “[t]his calculates to approximately 1,112 days of operation in the 1,327 days since January 3, 2000, or approximately 215 days - seven months - when the unit was *not* operating and thus not providing cathodic protection.” Compl. Br. at 199-200, citing TR-9 at 116-117 (emphasis in original). Thus, as complainant argues, Euclid was in violation of the requirement for corrosion protection for all three USTs at the Florida Avenue facility for 215 days between January 3, 2000 and August 22, 2003. Compl. Br. at 200.

The second charge of violation alleged in this count involves the requirement that cathodic systems be tested. In that regard, 20 DCMR § 5901.6 requires that impressed current cathodic protection systems be inspected every 60 days. Records of at least the last three inspections must be maintained. 20 DCMR § 5901.7(b). Here, Euclid has stipulated that it has documentation of

cathodic protection testing for Tanks FL-1, FL-2, and FL-3 only for January 3, 2000, and April 28, 2003. Stip. 140 (First Set). Thus, respondent is shown to be in violation of 20 DCMR § 5901.6.

The third charge of violation involves 20 DCMR §§ 5901.4, 5901.5 and 5901.7(a). These regulations require that cathodic protection systems be inspected by a qualified cathodic protection tester, in accordance with a code of practice developed by a nationally recognized association, within 6 months of installation and at least every three years thereafter, and that records of at least the last two such inspections be maintained. Pursuant to Stipulation 140 (First Set), Euclid has documentation showing only that the cathodic protection for Tanks FL-1, FL-2, and FL-3 was tested on January 3, 2000, and April 28, 2003.<sup>68</sup>

Moreover, as earlier noted, EPA has shown that the April 28, 2003, cathodic protection testing conducted by Denny was “not conducted in accordance with accepted industry codes of practice.” Compl. Br. at 201. By way of summary, Cignatta calculated the length of the tanks to be 26 feet, six inches, to 31 feet, 8 inches, covered by approximately two feet of soil, and up to three feet of cover if Denny had taken his readings through the concrete. TR-9 at 111. These calculations by Cignatta raise serious doubt that Denny’s testing could have covered the entire tank.

In addition, when Cignatta tested each of the tanks on August 22, 2003, he recorded his readings on a data logger. TR-9 at 118-124; CXs S-8 at 0926d & S-13. For the premium grade tank, Cignatta tested eight different locations. Two of the test points show failing results for each criteria for which a valid result could be obtained. TR-9 at 118-120; CX S-8 at 0926d. For the diesel tank, only three of the six locations tested by Cignatta yielded results that could be validly interpreted. CX S-8 at 0926d.

A civil penalty of **\$86,973** is assessed for these violations. With respect to the seriousness of the violations, the three USTs involved, Tanks FL-1, FL-2, and FL-3 had a total capacity of 42,000 gallons. Amend. Ans. ¶ 437. Also, as set forth above, the periods of non-compliance with the UST regulations are significant. In terms of potential human health and environmental hazards, the Hennessy Report assigns a “Groundwater Use Rating” of “1” for the Florida Avenue facility and a “Likelihood that Release would Contaminate Groundwater” rating of “.” CX Y-22, Tables 1 & 4. The Rotenberg Report assigns a “population factor” of “5” and an “exposure potential factor” of “5” to this facility as well. CX Y-23 at 1794 (Euclid site # 21). As has been consistently noted, the Rotenberg Report has concluded that urban sites with large populations, such as the Florida Avenue facility, offer “[p]referential pathways of utility lines and trenches, combined with a shallow groundwater table, will allow released petroleum products to move in the environment, and thus allow exposure.” CX Y-23 at 1794.

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<sup>68</sup> In fact, EPA expert John Cignatta testified that the January 3, 2000, test was merely a start-up test that recorded only a single test point. Because this test could not have characterized cathodic protection over the entire length of the tank, it was not a valid test pursuant to 20 DCMR §§ 5901.4 and 5901.5. TR-9 at 115-116.

This penalty assessment takes into account the respondent's moderate degree of negligence, and its Avoided Cost for cathodic protection testing (*see* Compl. Br. at 375).

#### **4. The Overfill Prevention Violations**

##### **Count 21**

This count involves the Euclid facility located at 4606 68<sup>th</sup> Avenue, Landover Hills, Maryland. EPA charges that respondent violated COMAR § 26.10.03.01.D(1)(b) by failing to provide overfill protection for Tanks 67-1 and 67-2. F. Amend Compl. ¶ 170. The period of alleged violation is from November 17, 1998, to November 25, 2003 (the date of the First Amended Complaint). *Id.*

Euclid admits that Tanks 67-1 and 67-2 are “new tanks.” Amend. Ans. ¶ 157. Accordingly, overfill protection was required at the time of the installation of the tanks. Also, respondent stipulates that “[n]either Tank 67-1 nor Tank 67-2 has ever been equipped with a float activated drop tube overfill valve.” Stip. 55 (First Set). Euclid claims, however, that ball float check valves were used to provide overfill protection. *See* RX 7 at 9005.

Respondent's 68<sup>th</sup> Avenue facility has two 120-inch diameter tanks. TR-8 at 6-7, 11; CX Y-21 (Cignatta's expert report) at 1756-1757. EPA expert John Cignatta testified that during his December 30, 2003, inspection of the facility he did not find drop tube overfill valves. TR-8 at 8, 10. Cignatta also testified that during the inspection he was able to check the ball float vent checks at the extractors over the top of the two tanks, *i.e.*, the premium and regular grade gasoline tanks. The length of each of the ball float tubes was approximately 5-1/2 to 6 inches. TR-8 at 10; CX F-12. However, given the diameter of the USTs, Cignatta stated that the length of the pipe of the ball float vent check would have to be a minimum of one foot in order to extend down to the 95 percent full by volume mark in the tank. TR-8 at 11. Accordingly, EPA has established the UST violations as charged in Count 21.<sup>69</sup>

A civil penalty of **\$15,000** is assessed for this violation. In that regard, the record supports EPA's claim that the violation was the result of Euclid's moderate degree of negligence and that the gravity of the violation also was of a moderate degree. *See* Compl. Br. at 378-379. For example, the two USTs involved had a total capacity of 24,000 gallons. Amend. Ans. ¶ 157.

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<sup>69</sup> A common defense that appears to surface with respect to the various types of violations at issue in this case centers on respondent's purported reliance upon a third party contractor to perform the work that ultimately results in the charge of violation. For instance, regarding the overfill protection charges, respondent maintains that it “reasonably relied a state-certified contractors to ensure that the pollution control equipment was working properly.” Resp. Br. at 22-23. It is the holding of this Tribunal that a party may not avoid liability for non-compliance with a UST regulations simply by hiring a contractor to perform the work required by these regulations. In other words, a party cannot “contract out” its responsibility to comply with the UST regulations.



Also, the Hennessy Report assigns a “Groundwater Use Rating” of “1” for this facility and a “Likelihood that Release would Contaminate Groundwater” rating of “5.” CX Y-22, Tables 3 & 6. The Rotenberg Report assigns a “population factor” of “4” and an “exposure potential factor” of “5.” CX Y-23 at 1794 (Euclid site #6). Another penalty consideration is the period of non-compliance. That period began on November 17, 1998, and continued to November 25, 2003, as asserted in the First Amended Complaint.

Finally, Euclid has been charged with failing to provide overflow prevention and not with a failure to install drop tube valves. Thus, to the extent that EPA seeks to base its proposed penalty on costs associated with the installation and use of drop tube valves, that argument is rejected here and elsewhere where it is raised in the overflow prevention counts.

### **Count 26**

This count involves the Euclid facility located at 5342 Sheriff Road, District Heights, Maryland. EPA charges that respondent violated COMAR § 26.10.03.01.D(1)(b) by failing to provide overflow protection for Tank 53-1. F. Amend. Compl. ¶ 213. The period of alleged violation is from November 17, 1998, to November 25, 2003 (the date of the First Amended Complaint). *Id.*<sup>70</sup>

Euclid stipulates that Tank 53-1 has never been equipped with a ball float vent check overflow valve. Stip. 64 (First Set). It does claim, however, to have a float activated drop tube overflow valve for the UST. RX X-7 at 9006.<sup>71</sup>

EPA’s expert, John Cignatta, inspected the Sheriff Road facility on June 17, 2003. TR-8 at 11. During this inspection, he observed a drop tube overflow valve in the regular unleaded tank, Tank 53-1, as claimed by Euclid. Cignatta also, however, measured the diameter of the regular grade tank and the level of overflow valve in the tank’s drop tube. The tank measured 96 inches in diameter. TR-8 at 16; CX Y-21 at 1756-1757. In addition, the height of the overflow valve was measured to be 89-1/2 inches from the floor of the tank. This calculation was made using field measurements that required making an adjustment to the measurement from the riser to the valve

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<sup>70</sup> The First Amended Complaint also charged respondent with a failure to provide overflow detection for Tank 53-2. Tank 53-2 contains premium grade gasoline. F. Amend. Compl. ¶ 206. Initially, EPA did not believe that Tank 53-2 was equipped with an overflow valve. After determining that the UST was so equipped, EPA discovered that the overflow valve was in a damaged condition. *See* TR-8 at 11-12, 14. Nonetheless, in its post-hearing brief, EPA is assuming that respondent “promptly replaced the damaged valve with a new valve” and is, therefore, “declining to pursue an overflow violation with regard to the premium grade tank.” Compl. Br. at 223.

<sup>71</sup> Despite Euclid’s stipulation that ball float valves were not present (Stip. 64), during his December 30, 2003, inspection, Cignatta observed that they in fact were present. Nonetheless, the valves could not be removed to determine if they were operable. TR-8 at 24.

seat, which is approximately 1-1/2 inches above the valve activation point at the junction between the upper drop tube and the valve assembly. TR-8 at 17-19. In performing this calculation, Cignatta used a three-inch adjustment in order to be “conservative” in determining the position of the valve. TR-8 at 19.

Cignatta testified that for a 96-inch tank, like Tank 53-1, the proper activation point for the overfill valve is 86.4 inches above the floor of the tank. TR-8 at 20. The valve for the regular grade tank as measured by Cignatta, however, was 89-1/2 inches above the tank floor. Accordingly, on the basis of Cignatta’s testimony, EPA has proven the overfill prevention violation as alleged in Count 26.

For this violation, a civil penalty of **\$6,930** is assessed. This assessment takes into account the fact that Tank 53-1 has a capacity of 12,000 gallons. Amend. Ans. ¶ 199. It also takes into account the period of non-compliance, beginning on November 17, 1998, and ending on November 25, 2003, as alleged in the First Amended Complaint. In addition, the Hennessy Report assigns a “Groundwater Use Rating” of “1” for this facility and a “Likelihood that Release would Contaminate Groundwater” rating of “5.” CX Y-22, Tables 3 & 6. The Rotenberg Report assigns a “population factor” of “5” and an “exposure potential factor” of “5.” CX Y-23 at 1794 (Euclid site # 10). Because this site is in an urban area with a large population, the Rotenberg report further concludes that “[p]referential pathways of utility lines and trenches, combined with a shallow groundwater table, will allow released petroleum products to move in the environment, and thus allow exposure.” CX Y-23 at 1794. Lastly, this penalty assessment takes into account respondent’s moderate degree of negligence.

### **Count 29**

This count involves the Euclid facility located at 2301 University Boulevard, Langley Park, Maryland. EPA charges that respondent violated COMAR § 26.10.03.01.D(1)(b) by failing to provide overfill protection for Tank UN-1. F. Amend. Compl. ¶ 238. The period of alleged violation is from November 17, 1998, to November 25, 2003 (the date of the First Amended Complaint). *Id.*<sup>72</sup> Respondent admits that because Tank UN-1 is a “new tank,” overfill prevention was required at the time of its installation. *See* Amend. Ans. ¶ 226.

Respondent stipulates that it “does not claim that either compartment of Tank UN-1 has been equipped with any method of overfill protection other than (1) ball float vent check overfill valves and (2) an overfill alarm which sounds inside the attendant’s booth at the facility.” Stip. 69 (First Set). It also stipulates that “[n] either compartment of Tank UN-1 has ever been equipped with a float activated drop tube overfill valve.” *Id.*

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<sup>72</sup> In its post hearing brief, however, EPA claims, without explanation, that the violation continued until June 17, 2003. Compl. Br. at 225. In the penalty portion of its brief, complainant again changes the end date, claiming that the violation existed until December 31, 2003. *See* Compl. Br. at 381. Thus, for purposes of Count 29, it is the finding of this Tribunal that the violation existed only until June 17, 2003.

Tank UN-1 is a 120-inch tank with two compartments. Each compartment has a separate fill. TR-8 at 27; CX Y-21 at 1756-1757. EPA's expert, Cignatta, testified that based on the diameter of the tank, in order to achieve shutoff at the 95 percent full mark, the ball support piping would have to be 12 inches in length. TR-8 at 32.

Upon reviewing a photograph of Tank UN-1 (RX X-7 at 9081), Cignatta testified that the ball float vent check valve in this tank would not close off the flow into the tank at the 95 percent flow mark. Again noting that while the pipe would have had to have been 12 inches long, Cignatta stated that the pipe in the photograph was approximately only 4 to 5 inches long. TR-8 at 32-33. Accordingly, EPA has proven the overfill prevention violation as charged in Count 29.

A civil penalty of **\$15,000** is assessed for this violation. The penalty reflects the fact that Tank UN-1 has a capacity of 20,000 gallons. Amend. Ans. ¶ 226. It also reflects that the period of non-compliance began on November 17, 1998, and concluded on June 17, 2003. In addition, the Hennessy Report assigns a "Groundwater Use rating" of "1" and a "Likelihood that Release would Contaminate Groundwater" rating of "5" to this facility, noting that there was 1 USGS well within 0.9 miles of the site. CX Y-22, Tables 3 & 6. The Rotenberg Report assigns a "population factor rating" of "5" and an "exposure potential rating" of "5." CX Y-23 at 1794 (Euclid site # 12). Because this site is in an urban area with a large population, the Rotenberg Report further concludes that "[p]referential pathways of utility lines and trenches, combined with a shallow groundwater table, will allow released petroleum products to move in the environment, and thus allow exposure." CX Y-23 at 1794.

Lastly, the penalty assessed for Count 29 also includes consideration of respondent's moderate degree of negligence. It does not include, however, any economic benefit that EPA believes was achieved by Euclid's use of ball float check valves as opposed to drop tube valves.

### **Count 33**

This count involves Euclid's facility located at 3900 Frederick Avenue, Baltimore, Maryland. EPA charges that respondent violated COMAR § 26.10.03.01.D(1)(b) by failing to provide overfill protection for Tank 39-1. F. Amend. Compl. ¶ 272. The period of alleged violation is from December 22, 1998, to June 19, 2003, the date of John Cignatta's inspection.<sup>73</sup>

Euclid stipulates that from September 30, 1997, Tank 39-1 was not equipped with any method of overfill protection other than "float activated drop tube overfill valves and/or an overfill alarm which sounds inside the attendants' booth at the facility." Stip. 78 (First Set).

Tank 39-1 is a 96-inch diameter tank used to store super grade gasoline. TR-8 at 37-39; CX Y-21 at 1756-1757. John Cignatta testified that for a 96-inch tank, the proper activation point for the overfill valve is 86.4 inches above the tank floor. TR-8 at 20. During Cignatta's visit to

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<sup>73</sup> The First Amended Complaint had charged an ending date of November 25, 2003 (the date of the complaint). F. Amend. Compl. ¶ 272.

the Frederick Avenue facility on June 19, 2003, he opened the fill tube cap for this tank and observed that “the overfill valve was so extremely close to the surface it could not even be inside the tank.” TR-8 at 36. In reviewing his inspection notes (CX L-12), Cignatta explained his calculations and stated that the valves would be positioned into the ceiling of the tank “so that therefore the float would be stuck against the sidewall, and this valve could never possibly close.” TR-8 at 37.

Accordingly, it is held that EPA has proven the overfill prevention violation charged in Count 33. A civil penalty of **\$4,455** is assessed for this violation.

The record supports the \$4,455 penalty requested by EPA. The UST involved, Tank 39-1, has a capacity of 10,000 gallons. Amend. Ans. ¶ 240. The period of non-compliance was from November 17, 1998, until June 19, 2003. The Hennessy Report assigns a “Groundwater Use Rating” of “1” for this site and a “Likelihood that Release would Contaminate Groundwater” rating of “4,” noting that there are 3 USGS wells within a quarter-mile of the facility. CX Y-22, Tables 3 & 6. The Rotenberg Report assigns a “population factor” of “5” an “exposure potential factor” of “5.” CX Y-23 at 1794 (Euclid site #13). As has been noted, with respect to sites in urban areas with a large population, such as the Frederick Avenue facility, the Rotenberg Report further concludes that “[p]referential pathways of utility lines and trenches, combined with a shallow groundwater table, will allow released petroleum products to move in the environment, and thus allow exposure.” CX Y-23 at 1794. In addition, this violation was the result of respondent’s moderate degree of negligence.

#### **Count 42**

This count involves Euclid’s facility located at 6181 Annapolis Road, Landover Hills, Maryland. EPA charges that respondent violated COMAR § 26.10.03.01.D(1)(b) by failing to provide overfill prevention for Tanks 61-1, 61-2, and 61-3. F. Amend. Compl. ¶ 337. The period of alleged violation is from December 22, 1998, to November 25, 2003 (the date of the First Amended Complaint). *Id.*

Euclid stipulates that it is not claiming that “Tanks 61-1, 61-2 and 61-3 have been equipped with any method of overfill protection other than float activated drop tube overfill valves, ball float vent check overfill valves, and/or an overfill alarm which sounds inside the attendants’ booth at the facility.” Stip. 97 (First Set).

EPA concedes that “Euclid does in fact have drop tube overfill valves at this Facility.” Compl. Br. at 227. Nonetheless, based upon Cignatta’s March 27, 2003, inspection of the Annapolis Road facility, complainant argues that respondent failed to comply with the overfill prevention UST regulations.

Cignatta determined that all three tanks at this facility were approximately 90 inches in diameter. TR-8 at 44, 48, 50. He calculated the proper height of the valve activation point for each of the tanks at 81 inches, which in this instance is 9 inches below the roof of the tanks. TR-8

at 46-47. For the super premium grade tank, Gignatta determined that the valve was set at 82-1/2 inches, and that for the two regular grade tanks the valves were set at 84 inches. TR-8 at 46-49. Thus, proper overfill prevention could not be achieved for any of the there USTs, *i.e.*, the overfill valves would not have shut off flow at the 95% full level.

Accordingly, on the basis of Cignatta's testimony, EPA has established the overfill protection violation charged in Count 42. A civil penalty of **\$7,276** is assessed for this violation.

With respect to the serousness of the violation, the USTs involved had a total capacity of 30,000 gallons. Amend. Ans. ¶ 308. The period of non-compliance was approximately 5 years. In addition, the Hennessy Report assigns a "Groundwater Use Rating" of "1" and a "Likelihood that Release would Contaminate Groundwater" rating of "5." CX Y-22, Tables 3 & 6. The Rotenberg Report assigns a "population factor" of "3" and an "exposure potential factor" of "5." CX Y-23 at 1794 (Euclid site # 15). Lastly, the violation was the result of respondent's moderate degree of negligence.

#### **Count 46**

This count involves Euclid's facility located at 6038 Baltimore Avenue, Hyattsville, Maryland. EPA charges that respondent violated COMAR § 26.10.03.01.D(1)(b) by failing to provide overfill protection for Tanks HY-1 and HY-2. F. Amend. Compl. ¶ 364. The period of alleged violation is December 22, 1998, to November 25, 2003 (the date of the First Amended Complaint). *Id.*

Euclid admits that the two USTs are "existing" tanks and thus overfill prevention was required at the time of their installation. Amend. Ans. ¶ 339. Also, Euclid stipulates that from September 30, 1997, it "does not claim that Tanks HY-1 or HY-2 have been equipped with any method of overfill protection other than (1) an overfill alarm which sounds inside the attendants' booth at the facility and (2) ball float vent check overfill valves." Stip. 107 (First Set).

Cignatta testified that Tanks HY-1 and HY-2 have a 90-inch diameter. TR-8 at 51; CX Y-21 at 1756-1757. Cignatta further testified that in order to prevent overfill of these USTs beyond 95%, the ball float support piping would have to be at least 9 inches long. TR-8 at 52. The ball float support piping for one of the tanks, however, was only approximately three inches and it was three to four inches long for the other tank. TR-8 at 52-53, 55; RX 7 at 9024-9025. Accordingly, because the ball float valves for Tanks HY-1 and HY-2 would not have shut off flow at the 95% full level, EPA has established the violations charged in Count 46.

A civil penalty of **\$19,500** is assessed for this violation. With respect to the seriousness of the violation, the USTs involved had a total capacity of 16,000 gallons. Amend. Ans. ¶ 339. Also, the period of non-compliance was approximately 5 years. The Hennessy Report assigns a "Groundwater Use Rating" of "1" and a "Likelihood that Release would Contaminate Groundwater" rating of "'5," noting that there was 1 USGS deep well 1 mile from the site and 1 USGS shallow well 2 miles from the site. CX Y-22, Tables 3 & 6. The Rotenberg report assigns

a “population factor” of “5” to this facility and an “exposure potential factor” of “5.” CX Y-23 at 1794 (Euclid site # 16). Because this facility is in an urban area with a large population, the Rotenberg Report further concludes that “[p]referential pathways of utility lines and trenches, combined with a shallow groundwater table, will allow released petroleum products to move in the environment, and thus allow exposure.” CX Y-23 at 1794. This penalty assessment also took into account respondent’s moderate degree of negligence, but not the Delayed Cost savings for drop tube valves, as proposed by EPA (*see* Compl. Br. at 386).

#### **Count 49**

This count involves Euclid’s facility located at 7887 Barlow Road, Palmer Park, Maryland. EPA charges that respondent violated COMAR § 26.10.03.01.D(1)(b) by failing to provide overfill protection for Tanks PP-1 and PP-2. F. Amend. Compl. ¶ 386. The period of alleged violation is November 17, 1998, to June 17, 2003. *Id.*

Euclid admits that Tanks PP-1 and PP-2 are “new” tanks and thus overfill prevention was required at the time of their installation. Amend. Ans. ¶ 366. Also, respondent does not claim that the USTs were equipped with any method of overfill protection other than “(1) float activated drop tube overfill valves and/or (2) an overfill alarm which sounds inside the attendants’ booth at the facility.” Stip. 114 (First Set).

Cignatta inspected this facility on June 17, 2003. He testified that both drop tube valves for Tanks PP-1 and PP-2 had been installed upside down and were completely inoperable. TR-8 at 56-58; *see* TR-14 135-137 (corroborating testimony of respondent’s witness Beck). In fact, consistent with Cignatta’s observations, respondent stipulates that “[p]rior to at least June 17, 2003, the float activated drop tube overfill valves associated with Tanks PP-1 and PP-2 were installed upside down and were thus inoperable.” Stip. 115 (First Set).

Accordingly, for the reasons mentioned above, EPA has established the overfill prevention violations charged in Count 49. The civil penalty assessed for this violation is **\$12,870**, the amount requested by EPA.

This penalty assessment is based upon the following considerations. The USTs involved here had a total capacity of 24,000 gallons. Amend. Ans. ¶ 366. Because the drop tube valves had been installed upside down and, therefore, were completely inoperative the gravity of this violation was significant. The period of non-compliance was approximately 4½ years. In addition, the Hennessy Report assigns a “Groundwater Use Rating” of “2” and a “Likelihood that Release would Contaminate Groundwater” rating of “4.” C X Y-22, Tables 3 & 6. Also, the Rotenberg Report assigns a “population factor” of “5” and an “exposure potential factor” of “5.” CX Y-23 at 1794 (Euclid site # 17). Because this site is in an urban area with a large population, the Rotenberg Report further concludes that “[p]referential pathways of utility lines and trenches, combined with a shallow groundwater table, will allow released petroleum products to move in the environment, and thus allow exposure.” CX Y-23 at 1794. Lastly, respondent was at least moderately negligent in committing this violation.

### **Count 53**

This count involves Euclid's facility located at 3800 Rhode Island Avenue, Brentwood, Maryland. EPA charges that respondent violated COMAR § 26.10.03.01.D(1)(b) by failing to provide overflow protection for Tanks BW-1, BW-2, and BW-3. F. Amend. Compl. ¶ 413. The period of alleged violation is December 22, 1998, to November 25, 2003 (the date of the First Amended Complaint). *Id.*

Euclid admits that Tanks BW-1, BW-2, and BW-3 are "existing" tanks, thus requiring overflow prevention at the time of their installation. Amend. Ans. ¶ 388. Also, respondent once again stipulates that it employed ball float check valves and an ATG alarm to provide overflow protection at its Rhode Island Avenue facility. Stip. 123 (First Set).

Cignatta testified that the diameter of the tanks at this facility was 90 inches. TR- 8 at 59; CX Y-21 at 1756. He further testified that in order to prevent overflow of these tanks beyond the 95% full level, the ball float support piping would have to be 9 inches long. *Id.* Upon reviewing a photograph contained in Ted Beck's expert report prepared for respondent, however, Cignatta determined that the ball float support piping was approximately only four to five inches in length for one of the tanks and five to six inches for the other. TR-8 at 59-62; RX X-7 at 9095-9096.

Accordingly, EPA has proven the overflow protection charges for two of the three tanks cited in Count 53. A civil penalty of **\$28,387** is assessed for this violation.

With respect to the seriousness of the violation, the USTs involved had a total capacity of 20,000 gallons. Amend. Ans. ¶ 388. The period of non-compliance was approximately 5 years. Also, the Hennessy Report assigns a "Groundwater Use rating" of "1" and a "Likelihood that Release would Contaminate Groundwater" rating of "4," noting that there are 2 USGS wells within 1.2 to 1.4 miles of the site. CX Y-22, Tables 3 & 6. The Rotenberg report assigns a "population factor" of "5" and an "exposure potential factor" of "5." CX Y-23 at 1794 (Euclid site # 19). Because this facility is in an urban area with a large population, the Rotenberg Report further concludes that "[p]referential pathways of utility lines and trenches, combined with a shallow groundwater table, will allow released petroleum products to move in the environment, and thus allow exposure." CX Y-23 at 1794. Lastly, respondent is found to have been moderately negligent.

### **Count 60**

This count involves Euclid's facility located at 22 Florida Avenue, Washington, D.C. EPA charges that respondent violated 20 DCMR § 5705.2 by failing to provide overflow protection for Tanks FL-1, FL-2, and FL-3. F. Amend. Compl. ¶ 470. The period of alleged violation is from December 22, 1998, to November 25, 2003 (the date of the First Amended Complaint). *Id.*

Euclid admits that Tanks FL-1, FL-2, and FL-3 are "existing" tanks. Amend. Ans. ¶ 437.

Accordingly, overflow protection was required at the time of their installation. Also, for the regular and premium grade USTs (Tanks FL-1 & FL-2), respondent claims to have float activated drop tube overflow valves and an ATG alarm to provide overflow protection. Stip. 141 (First Set). For the diesel UST (Tank FL-3), it claims to have a ball float vent check valve in addition to the ATG alarm. Stip. 142 (First Set).

Cignatta testified that Tanks FL-1 and FL-2 are 96-inch diameter tanks with drop tube overflow valves. TR-8 at 64; CX Y-21 at 1756. For a 96-inch tank, the activation point for the overflow valve is 86.4 inches above the floor of the tank. TR 20, 66 (Vol 8). He calculated the valve activation point for the premium grade tank to be 88.5 inches above the floor of the tank, or 2.1 inches higher than the 95% mark. TR-8 at 66. For the regular grade, Cignatta calculated that the valve activates at 90 inches, or about 3.6 inches above the 95% mark. TR-8 at 67-68. Thus, neither tank satisfies the UST overflow prevention regulations.

As noted, the diesel tank ( FL-3) is equipped with a ball float valve. Cignatta testified that in order to prevent an overflow of the tank, the ball float support piping would have to be at least 9.6 inches long. TR-8 at 59. The ball float support piping for Tank FL-3, however, was only approximately 6 inches in length. TR-8 at 64-65; RX X-7 at 9028. Thus, this tank also failed to meet the overflow prevention regulations.

Accordingly, based upon Cignatta's testimony, EPA has proven the violations charged in Count 60. A civil penalty of **\$18,089** is assessed for this violation.

This penalty assessment is based upon the following considerations. The USTs involved in this count had a total capacity of 32,000 gallons. Amend. Ans. ¶ 437. The period of non-compliance was approximately 5 years. In addition, the Hennessy Report assigns a "Groundwater Use Rating" of "1" for this facility and a "Likelihood that Release would Contaminate Groundwater" rating of "5." CX Y-22, Tables 1 & 4. The Rotenberg Report assigns a "population factor" of "5" and an "exposure potential factor" of "5." CX Y-23 at 1794 (Euclid site # 21). Because this facility is located in an urban area with a large population, the Rotenberg report further concludes that "[p]referential pathways of utility lines and trenches, combined with a shallow groundwater table, will allow released petroleum products to move in the environment, and thus allow exposure." CX Y-23 at 1794. Lastly, this violation was the result of respondent's moderate negligence.

#### **Count 74**

This count involves Euclid's facility located at 5608 Buckeystown Pike, Frederick, Maryland. EPA charges that respondent violated COMAR § 26.10.03.01.D(1)(b) by failing to provide overflow protection for Tanks FR-1, FR-2, and FR-3. F. Amend. Compl. ¶ 562. The period of alleged violation is December 22, 1998, to November 25, 2003 (the date of the First Amended Complaint). *Id.*

Euclid admits that the USTs at this facility are "existing" tanks. Amend. Ans. ¶ 534.



Accordingly, overfill prevention was required at the time of the tanks' installation. Also, respondent "does not claim that Tanks FR-1, FR-2 or FR-3 have been equipped with any method of overfill protection other than (1) ball float vent check valves, (2) float activated drop tube overfill valves and/or (3) an overfill alarm which sounds inside the attendants' booth at the facility." Stip. 162 (First Set).<sup>74</sup>

With respect to this count, Cignatta testified that all three USTs measure 90 inches in diameter. Based upon the tanks' 90-inch diameter, Cignatta stated that the valve activation point is 81 inches. TR-8 at 76-77. According to Cignatta, the valve on the mid-grade tank was set at 84 inches, or 3 inches above the 95% mark, and the valve for the super grade was set at 82-1/2 inches, or 1-1/2 inches higher than the 95% mark. The valve for the regular grade tank was set at 83 inches, or 2 inches above the 95% mark. TR-8 at 77-78.

Accordingly, based upon the testimony of Cignatta, it is held that EPA has established the overfill prevention violations as alleged in Count 74. A civil penalty of **\$1,930** is assessed for this violation.

The penalty assessment is based upon the following. The USTs involved in this count had a total capacity of 30,000 gallons. Amend. Ans. ¶ 534. The period of non-compliance was approximately 5 years. The Hennessy Report assigns a "Groundwater Use Rating" of "4" and a "Likelihood that Release would Contaminate Groundwater" rating of "3." CX Y-22, Tables 3 & 6. The Rotenberg Report assigns a "population factor" of "2" and an "exposure potential factor" of "2," as well. CX Y-23 at 1794 (Euclid site # 25). Lastly, this violation was the result of respondent's moderate negligence.

## **5. The Spill Prevention Violation**

### **Count 34**

This count involves Euclid's facility located at 3900 Frederick Avenue, Baltimore, Maryland. EPA charges that respondent violated COMAR § 26.10.03.01.D(1)(a) by failing to provide spill protection for Tanks 39-1, 39-2, 39-3, and 39-4. F. Amend. Compl. ¶ 276. The period of alleged violation is from August 8, 2003, to November 25, 2003 (the date of the First Amended Complaint). *Id.*

Pursuant to COMAR § 26.10.03.01.D(1)(a), new UST systems must be equipped with spill prevention equipment consisting of a spill catchment basin to prevent release of "product" into the environment when the transfer hose is detached from the fill pipe. Existing UST systems must be upgraded to comply with these spill prevention requirements by December 22, 1998. COMAR § 26.10.03.02.D. Euclid admits that the USTs and UST systems at the Frederick

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<sup>74</sup> As noted by EPA, despite these claims, the report of respondent's expert, Beck, stated that "[o]nly overfill drop tube valves are used at this facility for overfill protection." Compl. Br. at 233-234, citing RX X-7 at 9015.

Avenue facility were installed in 1987, and are “existing tank systems” as that term is defined at COMAR § 26.10.02.04.B(19). Amend. Ans. ¶ 240.

This count concerns catchment basins (also called “spill buckets”) installed by Euclid around each of the fill tubes at the Frederick Avenue facility.<sup>75</sup> In its First Amended Complaint, EPA charges:

At the time of the August 8, 2003 inspection of the Frederick Road Facility, the spill catchment basins for Tanks 39-1, 39-2, 39-3 and 39-4 were not liquid-tight and would not prevent the release of product into the environment. An examination of the basins indicated that the gap in each basin between the basin and the fill pipe had existed for a substantial period of time prior to the inspection.

F. Amend. Compl. ¶ 275.

Cignatta testified that the photograph of the diesel tank (CX Y-21 at 1731 (Fig. 17)), *i.e.*, Tank 4, showed that a gap existed “between the edge of the fill stack and the side of the membrane material for the floor of the Catchm[ent] Basin.” TR-7 at 151, 153. Cignatta described the gap as being a quarter-inch in width, with the rubber-like membrane material being “distorted and twisted.” TR-8 at 152. He observed that if a spill occurred here and if it reached that gap, the liquid (*i.e.*, the petroleum product) would leak into the soil. *Id.*

In addition, Cignatta also observed that the same type of “gap between the riser and the slip on fitting” existed with respect to Tank 2 (regular grade) and Tank 3 (master regular grade). TR-7 at 153-154. Tank 1 (premium grade) had “warping,” but unlike the other tanks it did not have a visible gap. *Id.*

Citing to the testimony of Ted Beck (TR-14 at 184-186), respondent states that “the most likely cause of the gap between the fill tube and the spill bucket was improper conduct by one of the delivery drivers.” Resp. Br. at 35. Respondent goes on to characterize this condition as a “maintenance issue” and it offers the explanation that every service station “is subject to deterioration and needs to be repaired occasionally.” *Id.* Euclid’s argument, however, lacks record support. It rests purely on speculation that the damage was caused by someone else at some unknown point in time. Still, respondent’s attempt to assign the blame to another must fail, in any event, given the unalterable fact that as owner and, or, operator of the Frederick Avenue

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<sup>75</sup> EPA expert Cignatta testified that there are two basic types of catchment basins. The most common one is called a “mechanical connector” catchment basin. This is a fill stack pipe. This pipe “extends up from the tank where the normal filling operation is done is cut down and threaded at a point where the Catchm[ent] Basin can be screwed on it, so it’s literally integral in a mechanical fashion with the fill pipe.” TR-7 at 148. The other type of catchment basin is a “slip on.” The slip on connects to the top of the fill pipe. *Id.*

facility, it is the party responsible under Maryland law to prevent petroleum spills. It is Euclid who is liable for non-compliance in this instance.

Accordingly, on the basis of Cignatta's testimony, EPA has proven the spill prevention violation charged in Count 34. A civil penalty of **\$4,840** is assessed for this violation.

With respect to the seriousness of this violation, the USTs involved in this count had a total capacity of 32,000 gallons. Amend. Ans. ¶ 240. The period of non-compliance was from August 8, 2003, to November 25, 2003. Also, the Hennessy Report assigns a "Groundwater Use Rating" of "1" and a "Likelihood that Release would Contaminate Groundwater" rating of "4." CX Y-22, Tables 3 & 6. The Rotenberg Report assigns a "population factor" of "5" and an "exposure potential factor" of "5," thus presenting exposure pathways of utility lines and trenches where released petroleum products can reach a large population. CX Y-23 at 1794 (Euclid site # 13). In addition, this violation was the result of respondent's ordinary negligence.

## **6. The Financial Responsibility Violations**

All of the counts involving Euclid's alleged failure to demonstrate financial responsibility for its USTs involve facilities located in the District of Columbia. The financial responsibility regulations require that owners and operators of petroleum UST systems demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs. As explained by EPA financial assurance expert, Joan Meyer, these regulations are designed to ensure that "owner-operators maintain a safety net so that adequate funding is available for reclamation work and also that the regulator has instant and immediate access to these funds as soon as a leak is detected." TR-6 at 31, 34.

### **a. The Regulations**

Pursuant to 40 C.F.R. 280.90 and 280.93, and 20 DCMR §§ 6700.1 and 6700.10 through 6700.17, an owner or operator may demonstrate financial responsibility using any of the financial assurance mechanisms set forth in 40 C.F.R. 280.95 through 280.103 and 20 DCMR §§ 6703 through 6711. These mechanisms include (1) self-insurance, (2) guarantee, (3) insurance and risk retention group coverage, (4) surety bond, (5) letter of credit, and (6) trust fund. The financial assurance mechanisms purportedly relied upon by Euclid are the self-insurance and guarantee mechanisms.

### **b. The Charges of Violation**

The financial responsibility violations charged in the First Amended Complaint involve facilities, which as noted, are located in Washington, D.C. The financial responsibility counts are as follows:

#### **Count 3**

EPA charges that respondent violated 40 C.F.R 280.90 and 280.93 prior to May 4, 1998, and 20 DCMR §§ 6700.1 and 6700.10 through 6700.17 beginning on May 4, 1998, by failing to demonstrate financial responsibility for the Underground Storage Tanks at the 420 Rhode Island Avenue facility. F. Amend. Compl. ¶ 29. The period of alleged violation is from September 30, 1997, to April 29, 2002. *Id.*

#### **Count 5**

EPA charges that respondent violated 20 DCMR §§ 6700.1 and 6700.10 through 6700.17 by failing to demonstrate financial responsibility for the Underground Storage Tanks at the 1400 W Street facility. F. Amend Compl. ¶ 43. The period of alleged violation is from July 1, 1998, to April 29, 2002. *Id.*

#### **Count 38**

EPA charges that respondent violated 40 C.F.R. 280.90 and 280.93 prior to May 4, 1998, and 20 DCMR §§ 6700.1 and 6700.10 through 6700.17 beginning on May 4, 1998, by failing to demonstrate financial responsibility for the Underground Storage Tanks at the 4225 Connecticut Avenue facility. F. Amend. Compl. ¶ 306. The period of alleged violation is from September 30, 1997, to April 29, 2002. *Id.*

#### **Count 56**

This count involves Euclid's facility located at 1576 Wisconsin Avenue. EPA charges that respondent violated 40 C.F.R. 280.90 and 280.93 prior to May 4, 1998, and 20 DCMR §§ 6700.1 and 6700.10 through 6700.17 beginning on May 4, 1998, by failing to demonstrate financial responsibility for the Underground Storage Tanks at this location. F. Amend. Compl. ¶ 435. The period of alleged violation is from September 30, 1997, to April 29, 2002. *Id.*

#### **Count 61**

EPA charges that respondent violated 20 DCMR §§ 6700.1 and 6700.10 through 6700.17 by failing to demonstrate financial responsibility for the Underground Storage Tanks located at 22 Florida Avenue. F. Amend. Compl. ¶ 473. The period of alleged violation is from September 30, 1997, to April 29, 2002. *Id.*

#### **Count 67**

This count involves Euclid's facility located at 5001 Georgia Avenue. EPA charges that respondent violated 20 DCMR §§ 6700.1 and 6700.10 through 6700.17 by failing to demonstrate financial responsibility for the Underground

Storage Tanks at this facility. F. Amend. Compl. ¶ 518. The period of alleged violation is from May 1, 2000, to April 29, 2002. *Id.*

### **Count 69**

This count involves Euclid's facility located at 5420 New Hampshire Avenue. EPA charges that respondent violated 20 DCMR §§ 6700.1 and 6700.10 through 6700.17 by failing to demonstrate financial responsibility for the Underground Storage Tanks located at this location. F. Amend. Compl. ¶ 532. The period of alleged violation is from November 1, 2001, to April 29, 2002. *Id.*

In its post-hearing brief, Euclid submits that it has demonstrated compliance with the UST financial responsibility requirements for all of the involved facilities. First, respondent states that it had "insurance coverage" for each of the facilities, as well as a reasonable belief that this insurance coverage satisfied the financial responsibility regulations. Second, respondent states that "the financial net worth tests for establishing financial responsibility were met for all the years at issue." Resp. Br. at 4-5. As explained below, respondent's assertion that it was in compliance with the UST financial responsibility requirements is incorrect.

With respect to its insurance coverage argument, Euclid cites to the testimony of Eric Dana, a principal in the firm of Dana Insurance and Risk Management, Incorporated. TR-11 at 94. Respondent states that Dana's "insurance firm specializes in pollution control insurance," that this firm "is qualified to write pollution control insurance in the District of Columbia which meets the financial responsibility requirements," and that in 1994, Dana discussed with Koo Yuen, Euclid's President and COO, "the scope of coverage of a general liability insurance policy written by Nationwide." Resp. Br. at 5, citing TR-11 at 94-95.<sup>76</sup>

Respondent further states that Dana never advised Yuen "clearly" that the Nationwide policy did not meet the financial assurance requirements until April of 2002. *Id.* Respondent adds, "In the course of this discussion with Mr. Dana in April 2002, upon being notified that the Nationwide policy was not adequate, Respondent immediately secured additional coverage from Mr. Dana's company to meet these requirements." Resp. Br. at 5.<sup>77</sup>

Respondent's insurance coverage argument is rejected. As noted, Euclid admits that its President and COO, Koo Yuen, was advised by its insurance agent, Dana, in April of 2002, that

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<sup>76</sup> Euclid adds, "Mr. Dana advised Mr. Yuen, in connection with this inquiry, that it is very possible that Respondent believed that the Nationwide policy satisfied the financial responsibility requirements." Resp. Br. at 5. While the import of this sentence is unclear, this Tribunal is unable to read it in any way that would support respondent's overall insurance coverage argument.

<sup>77</sup> The end date for the period of violation charged in all five financial responsibility counts is April 29, 2002.

the company's Nationwide policy did not meet the financial assurance requirements of the District of Columbia. This admission undercuts one of the two pillars of its defense. Moreover, it is a significant admission inasmuch as respondent concedes that it did not have proper insurance to meet its regulatory financial responsibility obligations prior to April 29, 2002, the date that EPA states it finally came into compliance. *See* Compl. Br. at 242.

The fact that Yuen may have at one time believed that the Nationwide policy provided the requisite financial responsibility coverage, as respondent claims, has no bearing on the underlying issue of liability. Not only was that belief incorrect, but the testimony of Yuen suggests that the reason that Euclid did not have the proper financial responsibility arrangements is due to the fact that the company was unaware that there was such a requirement in the District of Columbia. In that regard, Yuen testified:

Now Maryland has been quite proactive about certain requirement by the EPA or whatever their state requirements, so we never have second opinion about the insurance Mr. Dana have offered. The District of Columbia, it seem like, you know, they never even, you know, assisted the dealer or -- that other requirement, you know, in their, in their own regulation. So I took the liberty that that commercial part of liability coverage does cover clean-up costs and all that, so I mean, I, as a layman, do not understand the real difference between so-called financial responsibility and what the commercial policy can do. *So it really kind of slipped my mind and never really inquired with Mr. Dana about a requirement for [the] District of Columbia.*

TR-13 at 22-23 (emphasis added).

Euclid's main defense regarding the financial responsibility violations, however, is its "net worth" defense. Respondent offers the following overview (unfortunately, without record citation) of this defense:

Mr. Yuen testified that the tangible net worth of Euclid's interest in the 23 facilities at issue in this case ranged from an amount of more than 20% in excess of the regulatory requirements in 1977 to more than 60% in excess of these requirements in 2002. Moreover, these tangible net worth figures are "bottom line" figures which include a large offset each year for negative retained earnings resulting from losses incurred prior to the periods at issue. These prior period losses would not affect the ability of Respondent to realize value from the sale of assets, and would arguably not be counted in the "tangible net worth" of the facilities, which would consist of the total worth of all of the assets of the businesses subject only to secured debt and possibly to general business liabilities. [Fn.

omitted.] General business liabilities, as a practical matter, may not have preference over environmental damage claims, and so may not be counted in determination of tangible net worth, but this issue is not addressed by the regulations. Respondent meets the requirements even if all of its liabilities and negative retained earnings are offset against the value of the assets.

Resp. Br. at 6.

In addition to Yuen's testimony, Euclid also relies upon the testimony of Ed Davis, identified by respondent as a Certified Public Accountant who "prepared accountants' reports which meet the requirements of the regulations." Resp. Br. at 7; RX X-9.<sup>78</sup> According to Euclid, Davis utilized the fair market values (values supplied by Koo Yuen) of certain real estate holdings in preparing his report. *Id.*

In response, EPA refers to Euclid's defense as a "hazy combination of self-insurance and guarantees" that have "varied considerably over time." Compl. Br. at 242. Whether that characterization is correct need not be addressed here. The fact of the matter is, as explained below, that complainant has carefully and methodically dismantled Euclid's defenses in showing that respondent did indeed violate the cited UST financial responsibility requirements as alleged. *See* Compl. Br. at 244-253.

**(i). The Stipulations**

As noted by EPA, "[i]n a series of stipulations, Euclid has admitted that it did not comply with critical requirements of the federal and District of Columbia financial responsibility requirements, particularly as they relate to self-insurance and guarantees." Compl. Br. at 244. First, Euclid admitted that it has never filed a Certificate of Financial responsibility with the District of Columbia Department of Consumer and Regulatory Affairs for any of its District of Columbia facilities, pursuant to 20 DCMR §§ 6700.8 and 6702.7. Stip. 8 (First Set).

Second, Euclid admits that, prior to at least December 11, 2003, neither its chief financial officer, nor the chief financial officer of any of the Yuen trusts, had ever prepared and signed a "CFO" letter as set forth in 20 DCMR § 6703.3 or 40 C.F.R. 280.95(d) or 280.96(b). Stip. 9 (First Set).

Third, Euclid admitted that neither it, nor any of the Yuen trusts, have ever established a "stand-by trust fund," as specified in 20 DCMR § 6711 and 40 C.F.R. 280.103. Stip. 11 (First Set).

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<sup>78</sup> Euclid states, "Admittedly, this accountants' report was not prepared contemporaneously, but with the exception of being late, it fully complies with the applicable requirements." Resp. Br. at 7.

**(ii). Euclid’s Self-Insurance Lacks Formal Guarantees**

EPA is correct in asserting that “Euclid has never submitted financial information to support a self-insurance argument using solely its own assets, but instead has submitted statements purporting to show that its assets, when combined with the assets of its affiliates, are sufficient to support a self-insurance claim.” Compl. Br. at 245. The statements being referred to by complainant are financial statements as to the assets of Euclid of Virginia, guarantor, the Patricia Yuen life insurance trust, the Koo Yuen life insurance trust, and the Yuen children’s trust. TR-14 at 7. EPA is further correct in asserting that respondent is “clearly relying on guarantees from affiliates instead of its own financial resources.” Compl. Br. at 245.

First, Euclid’s COO, Yuen, has stated that there was no need for formalities because the involved trusts and partnerships were under “common control” and had a “common business purpose.” TR-10 at 47-48, TR-14 at 8. Yuen further stated that he considered the combined assets of all the trusts and the partnerships to be available to cover any liability arising out of the ownership of the USTs. TR-13 at 229, TR-14 at 9-11. EPA’s response is that “an informal agreement to help out in the case of an UST release is not even remotely akin to a binding financial assurance.” Compl. Br. at 245. EPA is correct.

In that regard, Joan Meyer, EPA’s financial assurance expert (TR-6 at 30), explained the problems posed by respondent’s purported self-insurance financial arrangement having multiple guarantors.<sup>79</sup> Meyer testified:

[I]f you have the same facility that has three different guarantors, you face these potential problems should those guarantors be required to pay up of whether they’re all equally liable. If one of the guarantors is unable to pay, do the other two guarantors then pay for the entire amount that’s sought by the regulator? There’s all those problems. That’s in contrast to a situation where a particular site is covered by a single guarantor, where there is no question should money be required to remediate a leak at that facility, there is no question that the guarantor is available should the owner-operator not be able to pay for cleanup and third-party liability.

TR-6 at 53-54.

Moreover, as noted by complainant, both the Federal and the District of Columbia UST financial responsibility regulations, 40 C.F.R. 280.96(c) and 20 DCMR § 6706.3, require (1) an explicit guarantee, (2) to the regulatory agency, (3) to find an already existing standby trust fund, (4) immediately upon notice to the guarantor. Compl. Br. at 246.

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<sup>79</sup> Joan Meyer was accepted as an expert in the areas of financial assurance, economic benefit, and business records. TR-6 at 32. She is a Principal with Industrial Economics, Inc., an economics and policy consulting firm.



EPA's expert, Joan Meyer, also testified that "the whole purpose of the guarantee is to ensure that the regulator has instant and immediate access to the money when it becomes needed." TR-6 at 46, 55. According to Meyer, the mandatory language relating to the guarantee is necessary to promote this expeditious access to cleanup funds. She explained, "the reason the wording is so carefully worked out is to minimize, to the extent practical, any barriers a guarantor might raise when a regulator comes to the guarantor to require the funding. The guarantee is there to prevent these lengthy piercing the corporate veil proceedings that occasionally are required in order to access funds." *Id.*

**(iii). Euclid's Self-Insurance Claim Lacks Independent Verification**

In drafting its financial responsibility regulations, EPA placed the burden of financial verification upon the entity claiming self-insurance. For example, in the preamble to these regulations, the Agency stated that they included requirements "meant to ensure that the information used to support a financial test would be publicly available and therefore easily verified by EPA or state regulators." 53 Fed. Reg. 43322, 43341 (October 26, 1988). *See* CX Y-19 at 1630. Indeed, the financial responsibility regulations themselves specifically require that self-insuring entities either file annual financial statements with the Securities Exchange Commission ("SEC"), or submit their net worth annually to Dun and Bradstreet and obtain a financial strength rating of 4A or 5A. 40 C.F.R. 280.95(b) & 20 DCMR § 6704.

As argued by EPA in its tracing the promulgation of the financial responsibility rule (*see* Compl. Br. at 248), in the preamble to the proposed financial responsibility rule EPA expressed the view that each of these alternative requirements would provide sufficient verification. With regard to the SEC filings, EPA noted that "firms that file annually with the SEC must be independently audited to meet the SEC requirements." 52 Fed. Reg. 12786, 12808 (April 17, 1987). While Dun and Bradstreet does not strictly require audited financial statements, the Agency noted that about 75% of the firms that obtain a rating of 4A and 5A do submit audited financial statements and that Dun and Bradstreet will not assign financial strength ratings to firms believed to have submitted questionable data. 52 Fed. Reg. at 12808.

In the preamble to the final UST financial responsibility regulations, EPA noted the inclusion of the financial alternative test in the final rule (*i.e.*, Alternative II), stating that for this test "the reporting and certification requirements are stricter." 53 Fed. Reg. at 43343. EPA further noted that Alternative II "requires that the financial statements of an owner or operator using the financial test be independently audited." *Id.*

With respect to the instant case, there is no evidence that Euclid has ever filed financial statements with the SEC, or obtained audited financial statements of any kind. Instead, respondent presented unaudited financial data that it termed as "compiled financial statements." This clearly is not in compliance with the UST financial responsibility regulations at issue in this case. Moreover, as EPA argues, "Euclid has never been clear as to exactly which combination of entities are involved in its 'self'-insurance calculation of net worth," Compl. R.Br. at 11; *see* Compl. Br. at 242-247. EPA further correctly argues, "Euclid has not provided any

documentation that the entities involved actually exposed their assets to liability for clean-ups, at least not in the direct manner required by the financial responsibility regulations.” *Id.*

To the extent that Euclid claims that 40 C.F.R. 280.95(c)(2) and 20 DCMR § 6705.2 do not require audited financial statements, that claim is rejected. To the extent that Euclid also claims that its “accountant’s report,” which is a compiled financial statement, complies with these financial responsibility provisions, that claim likewise is rejected. *See* TR-10 at 26. In that regard, a compiled financial statement is considered the lowest level of review of a financial statement. It essentially involves the acceptance at face value of unverified information submitted by the company. TR-6 at 113, 117-118, TR-10 at 38-40.

**(iv). Euclid’s “Net Worth” Claim Must Fail**

Nearly all of the assets claimed by Euclid to support its net worth claim consists of real estate. As noted earlier, Euclid utilizes the fair market value of the real estate assets as determined by Koo Yuen. In that regard, respondent observes, “ Mr. Yuen testified as to extensive experience in the gasoline service station business, including more than 30 years of multiple operations, buying, selling, leasing and developing gasoline service station properties in each jurisdiction. Mr. Yuen’s valuation for each of the properties was, in his view, conservative.” Resp. Br. at 7-8, citing, TR-13 at 8-15, 28.<sup>80</sup>

Both EPA witness Joan Meyer and Euclid witness Ed Davis testified that, in contravention of generally accepted accounting principles (“GAAP”), respondent assessed this real estate at fair market value instead of using purchase price. TR-6 at 71-72, TR-10 at 45. *See* Compl. Br. at 252. When Euclid’s properties are valued using their purchase price, as required by the GAAP, the net worth of the combined properties is less than \$10 million for each year claimed. TR-6 at 63.

Moreover, even if Euclid were allowed to use the fair market value of its real estate to measure its net worth, it has not provided a credible, documented appraisal of the fair market value of the properties. Euclid’s only evidence in this regard was the favorable, but unsupported, view of its President and COO, Koo Yuen, that the real estate was exceptionally valuable. TR-6 at 72-74. This is simply not enough to support the net worth claim made by respondent.

In that regard, as argued by EPA, “Respondent’s only evidence of the value of the properties consists of a two-page document prepared by Mr. Yuen containing conclusions, without explanation, as to the values of the properties at issue.” Compl. R.Br. at 14, citing RX X-

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<sup>80</sup> Euclid further states, “At the hearing, it was left open whether Mr. Yuen would be qualified as a valuation expert.” Resp. Br. at 8. To the extent that such a question is outstanding, Mr. Yuen is not accepted as a “valuation expert” by this Tribunal. While respondent generally has articulated that Yuen was involved in purchasing, selling, leasing, and developing gasoline service stations, it has not laid a proper foundation addressing his specific expertise in determining the value of such properties.

13 at 3591-3592. Indeed, as further argued by complainant, Yuen offered no explanation as to the methods used to derive the property values, presented no facts from which to determine if his valuations were reasonable, and provided no testimony relating to comparable property sales. Compl. R.Br. at 15.

Moreover, the testimony of EPA's financial expert, Joan Meyer, casts considerable doubt on the unsubstantiated real estate values offered by Koo Yuen. Meyer, in referring to a table offered by Euclid in its prehearing exchange that included information as to the purchase price, purchase date, and current fair market value of certain listed properties, found this data to be "puzzling." TR-6 at 142.

For example, one of the properties was 5420 New Hampshire Avenue and it was purchased in 1999, for \$500,000. According to the information included in respondent's table, however, the property was listed as having a fair market value of \$600,00 in the same year in which it was purchased. The other property was 5001 Georgia Avenue and it was purchased for \$702,500. The Georgia Avenue property was listed as having a fair market value of \$1.3 million. Regarding this property, Meyer looked at the consolidated balance sheet and found the results to be "very confusing." *Id.*

In that regard, Meyer noted that the value of the property, plants, and equipment had stayed the same for the years 1998, 1999, and 2000, "or even [had] gone down a little bit." TR-6 at 143. She concluded, "I didn't understand how it is the fair market value could be higher than the purchase price, and this is just an example of why the financial information to me as a financial analyst and I would image to a regulator *on the face of it doesn't show the Euclid and the trust could qualify for self-insurance and a corporate guarantee, because there are a lot of questions about where these numbers came from.* *Id.* (Emphasis added).

Accordingly, for the foregoing reasons, Euclid is found to have violated the financial responsibility regulations as charged in Counts 3, 5, 38, 56, 61, 67, and 69.

#### **(v.) Penalty Assessment**

EPA argues that "[u]nder the Penalty Policy the failure to provide financial assurances is a major deviation from the regulatory requirements, with a moderate potential for harm to the environment and the regulatory program." Compl. Br. at 393, citing CX Y-31 at 1273. EPA is correct. In other words, the intended purpose of the financial assurance provisions is to provide for financial resources for cleanup in the event that the facility owner or operator goes out of business and is otherwise unable to do so. There is no doubt that these financial assurance provisions play a key role in acting as a safety net to ensure the existence of financial resources for the cleanup of sites contaminated by the release of product from Underground Storage Tanks. A violation of these financial assurance provisions is, therefore, a serious one.

There are seven such violations found in this case. All violations having taken place in the District of Columbia. Each of these violations was the result of respondent's moderate degree

of negligence. EPA proposes a separate penalty for each violation, taking account the specific USTs involved, the length of the periods of non-compliance, and respondent's avoided costs for insurance premiums. In addition, these penalties take into account the gravity of the violations as identified in the Hennessy Report (CX Y-22) and the Rotenberg Report (CX Y-23). The penalties proposed by EPA are supported by the record evidence and are adopted by this Tribunal. The civil penalties assessed for violation of the financial responsibility provisions are as follows:

Count 3 (420 Rhode Island Avenue)	-	<b>\$22,866</b>
Count 5 (1400 W Street)	-	<b>\$17,998</b>
Count 38 (4225 Connecticut Avenue)	-	<b>\$23,622</b>
Count 56 (1576 Wisconsin Avenue)	-	<b>\$22,110</b>
Count 61 (22 Florida Avenue)	-	<b>\$22,110</b>
Count 67 (5001 Georgia Avenue)	-	<b>\$11,289</b>
Count 69 (5420 New Hampshire Avenue)	-	<b>\$ 4,881</b>

## **B. Compliance Order**

In addition to seeking the issuance of a civil penalty in this matter, EPA also seeks the issuance of an order specifically directing respondent to come into compliance with specific UST regulations. *See* Compl. Br. at 401-408. Given the numerous UST violations committed by Euclid and given the recurring nature of these violations, this Tribunal grants complainant's request for the issuance of a Compliance Order. Accordingly, to the extent that it has not already done so, within 60 days of the date of this order, Euclid shall present to EPA proof:

- (1) Ensuring compliance, as applicable, with the tank release detection regulations at 20 DCMR §§ 6000 and 6003, COMAR §§ 26.10.05.01 and 26.10.05.02.B, and 9 VAC 25-580-130, or, alternatively, show that the USTs have been taken out of service in compliance with the applicable regulations with respect to (1) the John Mosby Highway facility (Tank 50-2), (2) the Ocean Gate Highway facility (Tanks TR-2, TR-3), (3) the Enterprise Road facility (Tanks DS-1, DS-2), (4) the Frederick Avenue facility (Tanks 39-2, 39-3, 39-4), (5) the Annapolis Road facility (tanks 61-1, 61-2, 61-3), (6) the Baltimore Avenue facility ( Tank HY-1), (7) the Barlow Road facility (Tanks PP-1, PP-2), (8) the 3800 Rhode Island Avenue facility (Tanks BW-1, BW-2, BW-3), (9) the Wisconsin Avenue facility (Tanks GT-1, GT-2, GT-3), (10) the Florida Avenue facility (Tanks FL-1, FL-2), (11) the 15501 New Hampshire Avenue facility (Tanks NH-1, NH-2, NH-3), and (12) the Buckeystown Pike facility (Tanks FR-1, FR-2, FR-3);
- (2) Ensuring compliance, as applicable, of steel tanks and associated underground piping with the Federal corrosion protection regulations, as well as the District of Columbia Municipal Regulations, and the Code of Maryland Regulations with respect to (1) the Ocean Gate Highway facility (Tanks TR-2, TR-3 & underground piping associated with Tanks TR-1, TR-2, TR-3), (2) the Frederick Avenue facility (Tanks 39-1, 39-2, 39-3, 39-4), (3) the Connecticut Avenue facility (Tank VN-5),

- (4) the Annapolis Road facility (Tanks 61-1, 61-2, 61-3), (5) the 3800 Rhode Island Avenue facility (Tank BW-4), (6) the Florida Avenue facility (Tanks FL-1, FL-2, FL-3), and (7) the Buckeystown Pike facility (Tanks FR-1, FR-2, FR-3);
- (3) Ensuring compliance, as applicable, with the overflow prevention regulations at 20 DCMR § 5705.2 and COMAR § 26.10.03.01.D(1)(b), with respect to (1) the 68<sup>th</sup> Avenue facility (Tanks 67-1, 67-2), (2) the Sheriff Road facility (Tanks 53-2), (3) the University Avenue facility (Tank UN-1), (4) the Annapolis Road facility (Tanks 61-1, 61-2, 61-3), (5) the Baltimore Avenue facility (Tanks HY-1, HY-2), (6) the 3800 Rhode Island Avenue facility (Tanks BW-1, BW-2, BW-3), (7) the Florida Avenue facility (Tanks FL-1, FL-2, FL-3), and (8) the Buckeystown Pike facility (Tanks FR-1, FR-2, FR-3); and
- (4) Ensuring compliance with the spill protection regulations of COMAR § 26.10.03.01.D(1)(a) at the 3900 Frederick Avenue facility with respect to Tanks 39-1, 39-2, 39-3, and 39-4.

## **VIII. ORDER**

It is held that, to the extent set forth above, Euclid of Virginia, Inc., violated Subtitle I of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6991-6991i, as well as the Federal Underground Storage Tank regulations at 40 C.F.R. Part 280, and the Underground Storage Tank Regulations contained in the District of Columbia Municipal Regulations, 20 DCMR § 5500 *et seq.*, the Code of Maryland Regulations, COMAR § 26.10.02 *et seq.*, and the Virginia Administrative Code, 9 VAC 25-580-10 *et seq.* For these violations, a civil penalty of **\$3,085,293** is assessed against respondent. 42 U.S.C. § 6991e(d). Euclid of Virginia, Inc., is directed to pay this penalty within **90 days** of the date of this order.<sup>81</sup> Respondent also is directed to satisfy the terms of the Compliance Order issued in this matter within **60 days** of the date of this order.

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<sup>81</sup> Payment is to be by certified check, or cashier's check. The check is to be made payable to "Treasurer of the United States of America," Mellon Bank, EPA Region 3 (Regional Hearing Clerk), P.O. Box 360515, Pittsburgh, Pennsylvania, 15251.

Unless an appeal is taken to the Environmental Appeals Board pursuant to 40 C.F.R. 22.30, this decision shall become a Final Order as provided in 40 C.F.R. 22.2(c).

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Carl C. Charneski  
Administrative Law Judge