

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
GOODMAN OIL COMPANY,)
and) **Docket No. RCRA -10-2000-0113**
GOODMAN OIL COMPANY OF)
LEWISTON,)
)
Respondents.)

INITIAL DECISION

Before: Susan L. Biro
Chief Administrative Law Judge

Issued: January 30, 2003

Appearances:

For Complainant: Deborah E. Hillsman, Esq.
Mark A. Ryan, Esq.
Assistant Regional Counsels
United States Environmental Protection Agency, Region 10
1200 Sixth Avenue
Seattle, Washington 98101

For Respondent: John C. McCreedy, Esq.
Naylor, Hales & McCreedy, P.C.
1199 N. Shoreline Lane, Suite 200
P.O. Box 9496
Boise, Idaho 83707

I. BACKGROUND

A Complaint initiating this proceeding was filed on June 19, 2000, alleging that Goodman Oil Company violated Section 9003 of the Resource Conservation and Recovery Act, (RCRA), and the regulations promulgated thereunder concerning underground storage tanks (USTs). Complainant, Unit Manager of the Groundwater Protection Unit, Region 10 of the United States Environmental Protection Agency (EPA), alleged in the Complaint 35 counts of UST violations. Goodman Oil Company (Goodman) answered the Complaint, prehearing exchanges were filed, and this matter was set for hearing.

On March 2, 2001, Complainant submitted a Motion to Amend Complaint And Compliance Order To Add Respondent And To Withdraw Certain Claims. The Motion was granted, adding Goodman Oil Company of Lewiston (Goodman Lewiston), a wholly owned subsidiary of Goodman, with the same officers and registered agents, as an additional Respondent in this matter. The Amended Administrative Complaint and Compliance Order (Amended Complaint), filed on April 4, 2001, alleged 23 counts of violation and proposed a penalty of \$545,194 against Goodman, and alleged four counts of violation and proposed a penalty of \$88,276 against Goodman Lewiston. The Respondents submitted an Answer to the Amended Complaint on May 4, 2001, denying the violations, asserting several defenses and requesting a hearing. Prehearing exchange information was supplemented by the parties.

At all times relevant to the Amended Complaint, Respondents owned and/or operated USTs and UST systems which contained petroleum and which are located at various retail and bulk-storage petroleum supply facilities in the State of Idaho. Goodman owned and/or operated: (1) "Capitol Exxon" at 1265 Capitol Blvd, Boise, Idaho, with five 4,000 gallon USTs, including two sets of manifolded tanks, and one 500 gallon tank; (2) "16th & State Exxon" at 1522 State Street, Boise, with one 10,000 gallon tank and two 3,000 gallon tanks manifolded together; (3) "Collister Exxon" at 4780 West State Street, Boise, with one 10,000 gallon tank and two 3,000 gallon tanks manifolded together; (4) "Homedale Tiger Mart Exxon" at 120 South Main, Homedale, Idaho, with one 10,000 gallon tank, one 12,000 gallon tank and one 5,000 gallon tank; (5) "Nampa Exxon" at 920 Second Avenue, Nampa, Idaho, with one 10,000 gallon tank, two 3,000 gallon tanks manifolded together, and one 500 gallon tank; and (6) "Weiser Exxon" at 205 E. Main Street, Weiser, Idaho, with one 10,000 gallon tank, one 6,000 gallon tank, one 4,000 gallon tank, and one 500 gallon tank. Goodman Lewiston owned and/or operated: (1) "Tiger Mart #5" at 3201 Fifth Avenue, Lewiston, Idaho, with one 10,500 gallon tank and two 2,700 gallon tanks; (2) Goodman Oil Bulk Plant at 501 Snake River Avenue, Lewiston, Idaho, with two 8,000 gallon tanks and two 5,000 gallon tanks; and (3) "Mountain Mart #2" at 102 Thain Road, Lewiston, Idaho, with two 2,500 gallon tanks.

In 1991, 1992, 1993, and 1998, EPA inspected several of Respondents' facilities and issued to the Respondents field citations for UST violations, including release detection violations, for which Respondents paid penalties to EPA. Jacqueline Poston and Gary McRae of EPA Region 10 conducted the inspection in May 1998, during which they met with Charles Conley and Kent Lamberson of Goodman Oil Company. On or about June 10, 1999, Eric Sirs of EPA Region 10 conducted an inspection of Goodman's headquarters in Boise, Idaho, and examined records

regarding its USTs. Thereafter, EPA requested further information from Goodman, concerning its USTs. By letters dated July 30 and December 21, 1999, Goodman provided additional information to EPA. EPA also requested information from Goodman Lewiston under Section 9005 of RCRA, but former counsel for Respondents responded by letter indicating that it would not provide the information requested under the circumstances.

The Amended Complaint alleges in Count 1 that Goodman failed to permanently close a UST system at its Capitol Exxon facility within the 12-month temporary closure period. Counts 2 through 6 allege that Goodman failed to demonstrate that it met financial responsibility requirements for USTs at five of its facilities. The Amended Complaint alleges in Counts 7 through 14 that Goodman and Goodman Lewiston failed to properly conduct inventory control for several months at certain facilities. Counts 15 through 17 allege that Respondent¹ failed to upgrade piping which routinely held petroleum but which had not been cathodically protected at facilities owned by Goodman. The Amended Complaint alleges in Counts 18 through 22 that Goodman continued to use steel tanks that had not been upgraded at five of its facilities. In Counts 23 and 24 Goodman is alleged to have failed to notify EPA of the Idaho State Division of Environmental Quality when inventory control records for several months showed that two tanks had a suspected release, and in Counts 25 and 26 Goodman is alleged to have failed to investigate a suspected release from those tanks. Count 27 alleges that Goodman Lewiston failed to provide complete and accurate responses to the October 2, 2000 Information Request.

On July 6, 2001, Complainant filed a Motion For Partial Accelerated Decision on Liability and Defenses and Memorandum in Support, requesting an accelerated decision on Respondents' liability for Counts 1 through 6, 15 through 22, and 27, and on Respondents' Affirmative Defenses. On August 22, 2001, the Motion was granted as to Respondent's liability for those Counts, but denied as to Respondent's Affirmative Defenses. Respondent filed a Motion for Reconsideration and sought to supplement its Prehearing Exchange, asserting that the accelerated decision as to Count 1 was in error and that newly discovered evidence supports an affirmative defense as to liability. The request to supplement the Prehearing Exchange was granted, but the Motion for Reconsideration was denied by Order dated September 6, 2001.

A hearing was held in Boise, Idaho on September 11th² through the 14th and on November 6th and 7th, 2001. Each party put forward and cross-examined witnesses and introduced

¹ The Amended Complaint refers in Counts 15 through 17 to "Respondent" without specifying either Goodman or Goodman Lewiston. However, the Amended Complaint refers in those Counts to the particular facilities by name, and alleges in Paragraph 2 that they are owned by Goodman.

² The hearing was commenced on September 11, 2001, the same day as the World Trade Center and Pentagon tragedies. This tribunal gratefully appreciates the efforts made by counsel, the witnesses and the court reporter to proceed with the hearing that week to the best of their abilities despite the stress of those tragedies.

documentary evidence. Complainant presented the testimony of Jacqueline Poston, Eric Sirs, Gary McRae, Beatrice Carpenter, and Richard Jarvis. Respondent presented testimony of Kent Lamberson, Charles (“Chuck”) Conley, Dean Sorbel, Dennis Nichols, and Bruce Wiskel. During the hearing, Complainant’s Exhibits (“C’s Ex.”) 1 through 193 were received into evidence. Respondents’ Exhibits (“R’s Ex.”) 1 through 59, 65 through 68, 70, 71, 74A, 74H, 74I, 74J, 74K, 74M, 75, 76, 89, 90, 90A and 90B were received into evidence at the hearing. The parties’ Stipulated Facts, dated February 14, 2001, were received into evidence as Joint Exhibit A (“Stip.”).

The parties submitted motions to correct the transcript, and they were granted by Orders dated January 8, 2002 and January 28, 2002. One motion appears not to have been ruled upon yet, namely Respondents’ Second Motion to Conform Transcripts on January 15, 2002, to correct testimony of Dean Sorbel (Transcript pp. 645, 652, 660, 665, 691, 699, 700, 712). Respondents’ Second Motion to Conform Transcripts is hereby **GRANTED**.

II. RESPONDENTS’ LIABILITY FOR COUNTS 7 THROUGH 14

Section 9003 of RCRA authorizes EPA to promulgate regulations for UST release detection, prevention and correction. The statute provides at Section 9003(c) that the regulations must include, *inter alia*, “requirements for maintaining a leak detection system, an inventory control system together with tank testing, or a comparable system or method designed to identify releases in a manner consistent with the protection of human health and the environment” and “requirements for maintaining records of any monitoring or leak detection system or inventory control system or tank testing or comparable system.” 42 U.S.C. § 6991b(c)(1) and (2).

Accordingly, EPA promulgated regulations to implement those statutory provisions, including 40 C.F.R. § 280.41 which provides in pertinent part as follows:

(a) *Tanks*. Tanks must be monitored at least every 30 days for releases using one of the methods listed in § 280.43(d) through (h) except that:

(1) UST systems that meet the performance standards in § 280.20 or §280.21, and the monthly inventory control requirements in § 280.43(a) or (b), may use tank tightness testing . . . at least every 5 years until December 22, 1998, or until 10 years after the tank is installed or upgraded under § 280.21(b), whichever is later;

(2) UST systems that do not meet the performance standards in § 280.20 or § 280.21 may use monthly inventory controls (conducted in accordance with §280.43(a) or (b)) and annual tank tightness testing . . . until December 22, 1998 when the tank must be upgraded under § 280.21 or permanently closed under §280.71

In turn, Section 280.43(a) provides as follows, in pertinent part:

Each method of release detection for tanks used to meet the requirements of §280.41 must be conducted in accordance with the following:

(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;

* * * *

(3) The regulated substance inputs are reconciled with delivery receipts by measurement of the tank inventory before and after delivery;

* * * *

(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.

Respondents are charged in Counts 7 through 14 of the Amended Complaint with failure to properly conduct inventory control to ensure that their USTs were not leaking, in violation of 40 C.F.R. § 280.41(a).

Inventory volume measurements for “regulated substance inputs” are the gallons of fuel delivered, and “withdrawals” are the gallons of fuel pumped out of the tank as measured by a totalizer or meter. Inventory volume measurements for the amount still remaining in the tank are made by dipping a measuring stick into the tank and noting the level of liquid in the tank to the nearest one-eighth of an inch, referred to as “sticking the tanks” or taking “stick readings.” The amount of fuel in the tank in inches is then converted to gallons by using a conversion chart, and the resulting number of gallons is recorded as the “stick inventory.” C’s Ex. 176.

To perform inventory control, the stick inventory is compared with the “book inventory” which is the beginning inventory plus gallons delivered, minus gallons pumped. The number of gallons “over or short,” *i.e.*, gained or lost, is the difference between the “book inventory” and the “stick inventory.”

A. Count 7

Count 7 of the Amended Complaint alleges that Goodman “failed to properly conduct inventory control for the months of April 1999 and for the months of June and July, 1999 for the USTs at the 16th and State Exxon,” in violation of 40 C.F.R. § 280.41(a). In its Post-Hearing Brief, Complainant argues that the evidence shows that for April 1999, Goodman failed to take stick readings and record stick inventory on all operating days, complete monthly reconciliation, and document that the required water measurements were taken for the month in the tanks. For June and July 1999, Complainant asserts that no monthly inventory records exist, and Goodman’s reconstructed records cannot demonstrate compliance with Section 280.43(a).

Goodman's monthly inventory forms for April 1999 show that for the Supreme grade gasoline tank in April 1999, stick inventory was not recorded for eight days: April 15 through 19, and April 21 through 23. C's Ex. 146; R's Ex. 1. Correspondingly, no calculations were recorded for April 15 through 24 for the book inventory, and therefore there is no calculation of the daily over or short. *Id.* The data for stick inventory and daily over or short for April 5 through 8 appears illegible. *Id.* There is also no calculation of the total gallons over or short for the month. *Id.* No totalizer data were recorded for the Supreme tank for eleven days, from April 14 through 24. *Id.*

For the Regular gasoline tank in April 1999, no stick inventory was recorded for nine days (April 15 through 23), and no daily over or short calculations for those days, or for the 24th. *Id.* For ten days (April 15 through 24), no totalizer data were recorded. *Id.* For June and July 1999, Goodman did not present any monthly inventory records, and stipulated that it could not locate them. *Id.*; Joint Ex. A ("Stip.") ¶ 25.

Complainant presented Goodman's response to an information request as to water measurements, which was an invoice dated April 2, 1999, from a fuel delivery service, showing a water measurement for only two of the three tanks. C's Ex. 140. Complainant asserts that no other evidence of water measurements was presented for April, June or July 1999.

Gary McRae, an Environmental Protection Specialist and UST project officer for Idaho, testified as to the importance of recording stick inventory each operating day. He testified that "inventory control is the least precise method" of monitoring USTs, and "if you don't stick every day, it becomes even more imprecise," and that EPA limits the availability of that method to ten years. Tr. 365. He explained that "if you stick every day, you're going to be able to identify a catastrophic leak at the time," whereas if stick inventory was not measured on a weekend, or a long holiday weekend, there may be three days with a major leak undetected. Tr. 365-366.

Goodman, however, asserts that EPA failed to prove the violation alleged in Count 7 by a preponderance of the evidence. Kent Lamberson, who was responsible for Goodman's inventory control records in the Boise area stores, testified that, for June and July 1999, he went to the 16th and State Street station each weekday in June and July to help the store manager complete the inventory control forms, and that, because he did not trust what appeared on the inventory control forms, he reconstructed them. Tr. 815-818. He reviewed and analyzed the records and rebuilt the inventory control sheets in the third week of August 1999 by using stick inventory that was called in to the main office on weekdays, the fuel delivery invoices, and daily computer reports for fuel sales. Tr. 818-824; Rs' Ex. 27. Thereby he was able to conduct inventory reconciliation to demonstrate that the standard of 1.0 percent of flow-through plus 130 gallons was not exceeded, Goodman asserts. For April 1999, Mr. Lamberson testified that, toward the end of the month, he checked the inventory control sheet and "realized we had a problem." Tr. 822-823. He testified that he then performed reconciliation for April 1999 in the first part of May. Tr. 823. Goodman proffered Mr. Lamberson's memorandum, dated April 13, 2001, describing his analysis of the fuel inventory sheets, and concluding that there was no reason to suspect a leak in the tanks. Rs' Ex. 27. Attached to the memorandum (Rs' Ex. 27) were the actual store inventory control records for March through May 1999, undated reconstructed inventory records for April through July 1999, and an undated

spreadsheet “review evaluation summary” of inventory reconciliation. R’s Ex. 27; Tr. 852-853. Mr. Lamberson testified that he relied upon the Amended Complaint, and computer printouts, fuel delivery invoices, called-in stick inventory and “whatever information he could get a hold of” to prepare the memorandum. Tr. 855-856.

Goodman asserts that the fact that the latter documents used to prepare the memorandum were not proffered, and that Mr. Lamberson did not record stick inventory for weekends and holidays, does not require a finding of violation. Goodman make a number of arguments in this regard. First, Goodman states that EPA neither requested the supporting documents nor objected to the admission of the April 13, 2001 memorandum (R’s Ex. 27), and Federal Rule of Evidence 1006 allows the contents of voluminous documents to be presented in the form of a summary or calculation. Second, EPA’s inventory control expert, Jacqueline Poston, admitted at the hearing that monthly reconciliation would be “acceptable” if stick readings were not taken on weekends. Tr. 239-240. Third, UST owners and operators should be allowed a brief period of time to analyze discrepancies in inventory records, which is suggested by the allowance in 40 C.F.R. § 280.50(c)(2) of a second month of inventory control to be completed before a suspected release must be reported. Fourth, Mr. Lamberson and Charles Conley, president of Goodman, testified that fuel delivery drivers stick the tanks for water and report results on delivery invoices. Tr. 870. Two of the tanks of Supreme grade fuel were manifolded together. Tr. 254-255, 948; C’s Ex. 86, 130. Goodman asserts that it is just as likely as not that the delivery drivers did check water in each of the two manifolded tanks, and that its inventory records show that fuel was delivered into the manifolded tanks 17 times from April through July 1999. R’s Ex 27, attachments. Further, Goodman argues, Complainant failed to prove that checking for water in one of two manifolded tanks is inadequate, and asserts that the tanks should be treated as one because the product flows through both tanks, and that tank stick readings are combined for inventory control.

Complainant interprets Section 280.41(a)(1) as requiring inventory reconciliation to be completed “within a reasonable time after the last day of the prior month,” such as a one or two day delay, acknowledging EPA guidance which states that reconciliation should be done at the end of the month. C’s Post-Hearing Reply Brief (C’s Reply) at 7; C’s Ex. 176. Complainant asserts that reconstructing inventory control records years after the fact does not establish timely inventory control. According to Complainant, Mr. Lamberson’s assertion that he performed reconciliation “several days or weeks after the fact,” is undocumented, unsubstantiated, not credible, and does not comply with the regulatory requirement to conduct inventory control on a monthly basis. C’s Post-Hearing Brief at 15- 17. Moreover, the validity of the reconciliations would be “questionable” without stick inventory for weekends and holidays. *Id.* at 17. Although Ms. Poston testified in the affirmative as to whether a reasonably valid monthly reconciliation could result where stick inventory was not measured on weekends, she stated that it “might not be in the letter of the law.” Tr. 239. Complainant asserts that the rationale for the requirement to measure the tanks each operating day “is to minimize the environmental harm that could occur from any sudden large

release from the tank.” C’s Reply at 3. Checking water levels may reveal a hole in the tank. *Id.*³

Goodman argues that EPA was not so concerned about a catastrophic release as to issue a citation against another of Goodman’s facilities for failure to take stick readings on weekends, and EPA had thus communicated to Goodman that inventory control is not mandatory on weekends. Rs’ Post-Hearing Reply Brief (Rs’ Reply) at 3-4. Goodman points out Ms. Poston’s testimony that in 1998, no citation was issued because she “didn’t consider that to be so significant that [Goodman] couldn’t use the numbers they had,” but she explained that “it was something that they should . . . begin to invoke.” Tr. 214-215. EPA does not claim that any sudden release occurred from the tanks. Although the inventory control records were “not perfect,” the data was capable of detecting a release as required by the regulation, and the discrepancies do not constitute per se violations, Goodman asserts. The Amended Complaint does not mention failure to check for water in the tanks, and EPA never disputed testimony that delivery drivers measured water in the tanks, Goodman points out. Tr. 990.

It is not necessary for the Amended Complaint to allege specific facts as to violations of each subparagraph of 40 C.F.R. § 280.43(a) in order to meet the regulatory requirement of 40 C.F.R. § 22.13(a)(3) to include in a complaint “[a] concise statement of the factual basis for each violation alleged.” Therefore, the fact that the Amended Complaint did not specifically allege failure to measure water in the tanks does not shield Goodman from liability for Count 7 under its Eleventh Affirmative Defense, which states that EPA has no factual basis for the alleged violations.

As to whether Complainant has established a violation for failure to check water levels, the regulation requires measurement of water in the bottom of “the tank.” The definition of “tank” as a “stationary device designed to contain an accumulation of regulated substances . . .” (40 C.F.R. § 280.12) does not exclude two manifolded tanks being considered a “tank.” The definition of “underground storage tank or UST” as “any one or combination of tanks . . .” would include two manifolded tanks. Therefore, the evidence that water was checked in only two of the three tanks in April 1999, does not establish a violation of 40 C.F.R. § 280.43(a)(6) for that month. For June and July, 1999, however, Goodman did not produce any invoices or other document showing that water levels were measured in the tanks in June or July, 1999. Goodman relies on Mr. Lamberson’s and Mr. Conley’s testimony that water levels are generally measured and recorded by delivery drivers before and after depositing fuel in the tanks.

The plain language of the regulation governing inventory control, 40 C.F.R. § 280.43(a), sets forth mandatory requirements: “release detection . . . must be conducted in accordance with the following: . . . Product inventory control . . . must be conducted . . . on a monthly basis in the

³ Complainant also asserts that Goodman did not establish that the computer system Mr. Lamberson relied upon to recreate the amount of fuel sold meets the regulatory requirement of 40 C.F.R. § 280.43(a)(5) for totalizer meter calibration. However, Complainant does not develop or support this assertion, and in any event it does not affect the disposition of liability or penalty for this Count.

following manner: (1) Inventory volume measurements for regulated substance inputs, outputs and the amount still remaining in the tank are recorded each operating day; . . . [and] [t]he measurement of any water level at the bottom of the tank is made . . . at least once a month.” If inventory control is not conducted in accordance with each requirement of Section 280.43(a)(1) through (6), then it does not meet the monthly inventory control requirement of § 280.43(a), and therefore is not in compliance with 40 C.F.R. § 280.41(a).

Ms. Poston’s opinion that without weekend stick readings a reasonably valid monthly reconciliation could be obtained, is not inconsistent with the regulatory language and certainly does not refute it. “Reasonably valid” is not necessarily synonymous with “compliant”; and obtaining a reasonably valid reconciliation of inventory each month does not ensure that sudden or catastrophic leaks are immediately detected. The fact that EPA in its discretion did not issue citations to other Goodman facilities for failure to record stick inventory on weekends is not affirmative misconduct, and is therefore insufficient to support a defense of estoppel against the EPA or any other defense to liability, particularly in the circumstances of this case *See, United States v. City of Toledo*, 867 F. Supp. 603, 607 (N.D. Ohio 1994)(EPA's inaction, failure to clarify the lawfulness of certain conduct, or acting in an indifferent, passive or negligent manner, does not meet “the demanding standard of affirmative misconduct” to support an estoppel defense against EPA, which would require a showing that EPA affirmatively caused the defendant to believe that its actions were lawful so far as the EPA was concerned, but that EPA anticipated taking legal action.)

Mr. Lamberson testified that after stick measurements are taken, they are immediately called into Goodman’s corporate office and recorded by Steve Annis, who keeps a separate file. Tr. 819-820. Mr. Lamberson testified that he received inventory control forms at the corporate office within the first two weeks of the following month. Tr. 783. He testified that he would review them and perform inventory reconciliation, and keep the original inventory control forms and send a copy to the fuel station. Tr. 917-918. Mr. Lamberson testified that he used the called-in stick readings for June and July 1999 to complete inventory reconciliation for those two months, because after looking at the inventory control forms, he did not trust what he had seen on the forms. *Id.* However, no documentation of called-in stick inventory was proffered for April, June or July 1999. His testimony neither states nor reasonably supports an inference that stick readings were called into the corporate office each day from April 15 through 23, 1999. No explanation is given as to why stick readings would be called in to the corporate office for those days but not recorded on the inventory control form. Goodman has not proven that it recorded stick inventory each operating day, or even each weekday, between April 15 and 23, 1999.

The reconstructed records do not constitute proof of facts on original inventory control sheets, or on other contemporaneous documents for inventory control, and do not prove that inventory reconciliation was performed timely. Federal Rule of Evidence 1006 permits presentation of a summary or calculation where the “contents of voluminous writings [or] recordings . . . cannot conveniently be examined in court,” provided that the writings are available for examination or copying. Even if this Rule applied to administrative enforcement proceedings, it would not apply to the situation at hand, in which there is no indication that the records of stick inventory and water measurements were “voluminous.” An inference can be drawn from the evidence and testimony that

the original inventory control documents were not voluminous.

As to June and July 1999 inventory control, Goodman relies on Mr. Lamberson's testimony that the inventory control records existed, that stick readings were called into the office each weekday, and that he performed reconciliation in August 1999 for those months. Goodman also relies upon Mr. Lamberson's reconstructed inventory control forms, on which appear stick inventory for weekdays, but not for weekends. R's Ex. 27. Mr. Lamberson testified that he reconstructed these forms near the end of 2000 or the first quarter of 2001 to "exemplify" the process he used earlier to perform monthly inventory reconciliation. Tr. 853, 883-884. To credit his testimony would require a finding that each of the following records for June and July 1999 were either lost or discarded: the original store inventory control forms, the copy of the store inventory control forms that were sent to the corporate office, Gilbarco computer system printouts, Steve Annis' office records of called-in stick inventory, delivery invoices showing water level measurements, and Mr. Lamberson's notes or records of performing inventory reconciliation in August. This is simply too much to believe. It is concluded that Goodman did not conduct inventory control, as required by 40 C.F.R. § 280.43(a), for June and July at the 16th and State Exxon.

In sum, a preponderance of the evidence shows that Goodman failed to record the amount of product in the tanks each operating day in April, June and July 1999, and failed to measure water levels in the tanks in June and July 1999. Consequently, Goodman failed to comply with 40 C.F.R. § 280.43(a). Such failure to comply with the requirements of Section 280.43(a) constitutes a violation of 40 C.F.R. § 280.41(a).

Count 8

Goodman is alleged in Count 8 to have failed to properly conduct inventory control for the months of January, February and March 1999 for the USTs at the Collister Exxon. Complainant argues that Goodman did not complete monthly reconciliation within 30 days and did not take stick inventory each operating day. Complainant presents Goodman's inventory control forms for January, February and March 1999, showing inventory data for each day, but no monthly reconciliation – no calculation of the difference between stick and book inventory ("total gallons over or short") for the month -- for both regular and premium fuel tanks. C's Ex. 149; R's Ex. 2. Goodman's inventory control forms for February 1999 show no stick inventory data for February 12 and 13. *Id.* Mr. Lamberson testified that when he received the inventory forms from the store the following month, he "went through them" and "[d]id a summary on them and recap," and he testified that he "would have gone through February, sometime in March" Tr. 828, 829. He guessed that the 12th and 13th of February were a weekend. Tr. 829.

Goodman presents Mr. Lamberson's undated summary of inventory reconciliation calculations for January, February and March 1999, for regular and supreme grade gasoline. Rs' Ex. 14. Goodman also presents Mr. Lamberson's memorandum, dated April 26, 2001, concluding that there was no reason to suspect a leak in the tanks, along with another undated "review evaluation summary" of the inventory reconciliation calculations. Rs' Ex. 28. These documents were not prepared until after this proceeding was initiated by issuance of the Complaint. Tr. 846-

847. Accompanying the April 26, 2001 memorandum were copies of January, February and March 1999 fuel inventory forms received from the store, with inventory reconciliation calculations written at the bottom of the forms. Rs' Ex. 28. Mr. Lamberson's testimony does not suggest that he wrote those calculations on the forms within a month of receiving them from the store; rather, he testified that on those forms he "recapped what had occurred before." Tr. 830. His testimony as to when he performed the calculations after he received the inventory forms from the store is vague, and not supported by any documentation. A preponderance of the evidence shows that inventory reconciliation was not performed within a reasonable period of time following each month of January, February and March 1999 for the USTs at the Collister Exxon. Consequently, Goodman failed to comply with 40 C.F.R. § 280.43(a). Such failure to comply with the requirements of Section 280.43(a) constitutes a violation of 40 C.F.R. § 280.41(a).

Count 9

Goodman is charged in Count 9 with failure to properly conduct inventory control from December 1998 through at least November 1999 for USTs at the Homedale Tiger Mart Exxon. Complainant asserts that many stick readings are not recorded for that period, that there are no inventory control records for June 1999, and that monthly inventory reconciliations were not performed for January through May 1999. C's Ex. 152; Rs' Ex. 3.

For the months of December 1998 through May 1999, and July through November 1999, inventory control forms show data recorded for each tank for each day except for what appear to be holidays and weekends. C's Ex. 152; Rs' Ex. 3, 29. At the hearing Mr. Lamberson stated that the forms do not include data for weekends. Tr. 834. He explained that he concurred in the store manager's choice to take stick readings herself so she could control them and have accurate data, and not have to depend on other employees. Tr. 834-835; *see also* Rs' Ex. 29.

While the inventory control forms for December 1998 through May 1999 do not show inventory reconciliation for the month, the forms for July 1999 through November 1999 do show monthly inventory reconciliation figures. C's Ex. 152; Rs' Ex. 3, 29. Mr. Lamberson testified that he wrote on the July through November 1999 forms the total gallons pumped and total gallons over or short for the month, and the monthly inventory reconciliation, or "leak check threshold," and that he thought he may have done it "after the fact . . . in anticipation of . . . this kind of inquiry." Tr. 831-832. He testified that he originally performed the reconciliations on scrap paper, but threw them away. Tr. 832-833. His testimony is unclear as to when those calculations were performed. As to why he would write inventory reconciliation figures for the Homedale station on scrap paper, and then throw them away, without recording them on the inventory forms, he testified that while "[e]arly on" he wrote on the inventory control forms, Mr. Conley "made it very clear" that he should not be making any marks on the original forms, although he "deviated from that rule from time to time." Tr. 799. He also testified that if he "saw a problem beyond that [initial] investigation," he would "investigate further," but that Homedale was a "well-manned station." Tr. 834. His testimony does not address any inventory reconciliation having been performed, prior to the Complaint, for the Homedale USTs for December 1998 through May 1999. Complainant's evidence and Mr. McRae's testimony, however, indicate that the reconciliation figures were on the forms for

July through November 1999 when Goodman submitted them to EPA on December 17, 1999. C's Ex. 142, 143, 152. Therefore the reconciliation for November 1999 was timely.

Goodman again argues that the absence of stick inventory on weekends and holidays does not impact the validity of its inventory control. Goodman posits that it is reasonable to allow one month to complete inventory reconciliation, based on the regulatory allowance of a second month of data to be collected to verify a possible leak. Respondents' Reply at 13. A memorandum dated April 26, 2001 from Mr. Lamberson, responding to Count 9, states that inventory records were "reviewed" at least once per month and that "supervisors' familiarity with the unique characteristics of personnel and site enabled proper evaluation of data." R's Ex. 29. Accompanying the April 26, 2001 memorandum was an undated "review evaluation summary" of inventory reconciliation calculations for December 1998 through December 1999.

As to the inventory control records for June 1999, Mr. Lamberson stated in his April 26, 2002 memorandum that they were missing, but that he performed inventory reconciliation based upon in-house records. Rs' Ex. 29. No such records were proffered in this proceeding. The only document in the record showing an inventory reconciliation for June 1999 was the review evaluation summary, but it was prepared after the Complaint was issued. He states in the April 26, 2001 memorandum that the inventory reconciliation resulted in excessive over/short values for the month of June 1999, but that there was no such irregularity for two or more consecutive months, so it was "probably a bookkeeping error." Rs' Ex. 29.

Even if Goodman's position of a one-month time period to complete reconciliation is accepted, a preponderance of the evidence shows that Goodman did not complete inventory reconciliation for the USTs at the Homedale Tiger Mart Exxon within thirty days of each month from December 1998 through October 1999. In addition, Goodman failed to record stick inventory when it was operating on weekends and holidays for that time period. Therefore Goodman is liable for failure to comply with 40 C.F.R. § 280.41(a).

Count 10

Count 10 charges Respondent Goodman Lewiston with failure to properly conduct inventory control, or to assure that the facility's operator had been properly conducting inventory control, for the months of December 1998 through March 1999 for USTs at Tiger Mart # 5. Goodman Lewiston's defense is that the tanks were empty, that the operator of the station had filed bankruptcy, and that a bankruptcy trustee had taken possession of the station during that time. Complainant asserts that Goodman Lewiston produced no documentation that the USTs were empty or that inventory control was conducted during that time.

For USTs that are temporarily closed, the regulations provide that "release detection is not required as long as the UST system is empty," which is "when all materials have been removed using commonly employed practices so that no more than 2.5 centimeters (one inch) of residue, or 0.3 percent by weight of the total capacity of the UST system, remain in the system." 40 C.F.R. § 280.70(a).

Dean Sorbel is an independent contractor for Goodman Lewiston, who leased and operated fuel stations from Goodman Lewiston, including Mountain Mart # 2 and the Goodman Bulk Plant in Lewiston, and at which stations he performed UST inventory control. Tr. 644-647, 757. He testified that he delivered fuel to Tiger Mart # 5, went over inventory control procedures with Jean Stroud, the operator of Tiger Mart # 5, and helped her with monthly inventory control “a couple times.” Tr. 697-698; 718-721. Mr. Sorbel testified that Ms. Stroud declared bankruptcy in June 1998, that she stopped getting fuel deliveries because she did not have the money to pay for it, that she told him that she sold all the fuel from the tanks, that the tanks were empty, and that signs were placed on the pumps indicating that no fuel was for sale. Tr. 698-699, 707, 718-720. Mr. Sorbel testified that he knew that the tanks were empty enough that they did not pump product out from the dispensers, and when asked how he knew they were not working his testimony was as follows:

The pumps were not working. When we took it back over, she [Ms. Stroud] told me herself that her tanks were empty. And she put bags on the pumps, “No More Product Left.”

Tr. 707. He testified that when he asked Ms. Stroud for copies of the inventory control records, she told him that the records on her computer and the handwritten inventory control forms were gone in the bankruptcy, and that whatever was not sold was thrown away. Tr. 701-702.

As to operation of Tiger Mart #5 from December 1998 and April 1999, Mr. Sorbel testified, “I believe we were kept out of there for the bankruptcy,” because the property was attached until after the bankruptcy was done. Tr. 700-701, 720. When asked whether he had a chance to take stick readings during that time period, his testimony was that he did not take stick readings until April 1999. Tr. 709, 721-722.

The tanks were not operated again until April 7, 1999, when the store was reopened by Goodman Lewiston.⁴ Tr. 709, 721-722, 1295-1296. Mr. Sorbel started taking stick readings at that time, and inventory control resumed. Tr. 709, 721-722; R’s Ex. 44. Specifically, he testified that in April 1999:

when we actually took that over, when I put product in there, that was the first time that we stuck tanks. We stuck tanks when we were going to put the product in, to get the store up and running again when we took it over.

Tr. 721-722. His testimony is unclear as to whether stick readings were taken before product was

⁴ Dennis Nichols, vice president of Respondents, testified that he also reviewed Ms. Stroud’s inventory control. Tr. 1292. Mr. Nichols’ testimony corroborated that of Mr. Sorbel that the station was taken into possession by the bankruptcy trustee, was not operated, that no fuel was delivered there until it was reopened in April, except that he testified that Ms. Stroud filed bankruptcy in October or November 1998. Tr. 1293-1297, 1344-1345.

delivered or after.

Inventory control records for Tiger Mart #5 proffered by Respondents include computer generated inventory forms “Daily Book” for April 7 through April 11, 1999, “Tank Inventory Data Sheets” with handwritten data for April 8 through 30, 1999, and a daily form showing pump readings and stick inventory for April 8, 1999. Rs’ Ex. 6, 44; C’s Ex. 99. Goodman’s computerized “Daily Book” for April 7, 1999 shows for “open” (presumably stick inventory at opening time that day) 6100 gallons for Unleaded, 2200 for Premium, and 1500 for Plus. For the Unleaded tank, the “Daily Book” shows fuel sales of 116 gallons, a stick inventory of 5984, and consequently zero “over or short” for the day. Rs’ Ex. 44. The “Daily Book” for April 8, 1999 shows, accordingly, opening stick inventory of 5984 for the Unleaded tank. *Id.* It also shows no fuel deliveries, 20 gallons sold from the Unleaded tank, and a stick inventory of 5964 gallons. *Id.* It shows no sales from either Plus or Premium tanks on April 8, and zero “over or short” for all three tanks *Id.*

The computerized “Daily Book” data for April 8 is inconsistent with the handwritten data on the “Tank Inventory Data Sheet” for that day. For the Unleaded fuel tank, the “Tank Inventory Sheet” shows zero “previous stick (gallons),” delivery of 6037 gallons, sales of 82 gallons, and 6037 gallons for “today’s stick (gallons).” Rs’ Ex. 6; C’s Ex. 99. The handwritten data for April 8 for the “Plus” fuel tank includes a delivery of 2200 gallons, 2200 gallons for “today’s stick (gallons),” and a “previous stick (gallons)” of zero gallons. *Id.* Interestingly, the gallons sold for those days, 82 gallons of Unleaded and 7 gallons of Plus gasoline, are the same number of gallons as the “over/short” recorded for the day. *Id.* The handwritten data for April 8 for the “Premium” tank shows a delivery of 1500 gallons, no sales, 1500 gallons for “today’s stick (gallons)” and zero for “previous stick (gallons).” *Id.*

In addition to the inconsistencies in data between the “Daily Book” and the “Tank Inventory Data Sheet,” these data are also inconsistent with data on Goodman’s daily form showing handwritten stick and pump readings taken on April 8. The morning stick readings recorded on the daily form for April 8 shows tank stick readings of 63 1/4 (presumably inches) and 6400 (presumably gallons), 49 1/2 (presumably inches) and 2273 (presumably gallons), and 34 1/2 (presumably inches) and 1480 (presumably gallons). R’s Ex. 6. Matching those data to the numerically closest data on the “Tank Inventory Data Sheet,” there appears to be a 363 gallon discrepancy for the Unleaded tank (and a 416 gallon discrepancy from the “Daily Book” data), 73 gallon discrepancy for the Plus tank, and 20 gallons discrepancy for the Premium tank, between the two sets of handwritten data for April 8.

Goodman Lewiston argues that from approximately December 1998 to April 7, 1999, the tanks at Tiger Mart # 5 were empty and that no fuel was added. Respondents’ Brief at 15; Tr. 707, 1297. In support, it points out Ms. Poston’s testimony that one to three inches of fuel would remain in a tank using regular pumps attached to the system. Tr. 205.

Ms. Poston’s testimony, when asked how much fuel would be left in a tank if all of the fuel is pumped out that is capable if being pumped out by dispensers in the normal course of events, was that there would be “about anywhere between one and two inches,” depending upon how far down

the suction pipe goes, whether there is a submersible in the tank, the configuration and the tilt of the tank. Tr. 205. This testimony does not establish that the tanks could only have contained one inch or less of residue.

Neither Goodman Lewiston's fuel inventory records, which are inconsistent, nor testimony of Mr. Sorbel or Ms. Poston, persuasively establish that the tanks contained residue of no more than one inch, or 0.3 percent by weight of the total capacity of the UST system.

Goodman Lewiston also argues that it should not be held liable because it was not in a position to remove residual product in the tanks when the bankruptcy trustee had asserted possession over Ms. Stroud's inventory. Respondents' Brief at 16; Tr. 1131. Mr. Conley testified that Goodman Lewiston was not allowed access to the store and that the bankruptcy trustee "said that you're not allowed because of her [Ms. Stroud's] equipment and inventory and so on that was tied up in bankruptcy." Tr. 1131. Dennis Nichols testified that "we were told to stay out and do not come on the premises," that there was no access to the "inside of the facility," and that "[w]e could have gotten to the outside if we chose to trespass on our own property." Tr. 1295, 1297, 1344-1345. However, cathodic protection was installed on the tanks in December 1998 by Respondents' contractor, Corpro. C's Ex. 160; Tr.1347-1348. Mr. Sorbel testified that he went by the Tiger Mart #5 three or four times a week, and that he inspected the cathodic protection system of the USTs at Tiger Mart # 5 on a monthly basis from December 1998 to April 1999. Tr. 700-701; R's Ex. 17.

While Goodman Lewiston may not have been able to remove inventory from the tanks, it did not establish that it was unable to obtain brief, intermittent access to the tanks for purposes of taking stick readings. Goodman Lewiston was not required to remove residual product in the tank, but was merely required to maintain inventory control, unless the tanks were "empty" as defined by 40 C.F.R. § 280.70. The evidence shows that Goodman Lewiston failed to conduct inventory control from December 1998 through March 1999. Goodman Lewiston has not proven by a preponderance of the evidence its defense that the tanks were "empty" during that time. Accordingly, Goodman Lewiston violated 40 C.F.R. § 280.41(a) for failure to conduct inventory control, or to assure that the facility's operator had been conducting inventory control, for the months of December 1998 through March 1999 for USTs at Tiger Mart # 5.

Count 11

Count 11 of the Amended Complaint alleges that, in regard to the Goodman Oil Bulk Plant in Lewiston, from December 1998 through at least November 1999, Goodman Lewiston was utilizing a computerized system to record inventory control but that the system as used by Goodman Lewiston does not detect a release of at least one percent of flow-through plus 130 gallons as required by 40 C.F.R. § 280.43(a).

Mr. Sorbel testified that he dispatches trucks to deliver fuels from the Bulk Plant to service stations. Tr. 645. The Bulk Plant has two 8,000 gallon USTs and two 5,000 gallon USTs. Tr. 651. At the hearing Mr. Sorbel stated that, of the four USTs, only one tank, holding "Plus" fuel, was operating during the time period from December 1998 through November 1999. Tr. 652.

Mr. Sorbel further testified at the hearing that he performed inventory reconciliation every month for all tanks at the Bulk Plant, including the time period between December 1998 and November 1999, and usually liked to have it done within three days after the end of the month. Tr. 682, 684-686, 760. According to his testimony, he used handwritten forms to record daily data, including meter readings and stick inventory, "which is balanced for gallons lost in the tank versus gallons that went through the pumps," and he reconciled "for dollar figure." Tr. 653-655. He stated that he inspected the end results of the inventory form at the end of the month. Tr. 656. He testified that "the stickings and meter readings, that is on a handwritten form" and "[t]hen it's transferred to a spreadsheet on the computer and balanced that way" on his computerized form for the reconciliation. Tr. 655, 664-665, 684-685. He stated that "the end results of the inventory control form is inspected by me every month, at the end of the month." Tr. 656. He answered in the affirmative when asked at the hearing whether he performed handwritten inventory calculations to reconcile. Tr. 685, 694-695. He stated that he discards the handwritten calculations, but keeps a handwritten record of the gallon balance. Tr. 685-686. He testified that he used the formula of one percent of flow-through plus 130 gallons for monthly reconciliation. Tr. 686, 760.

Goodman Lewiston's inventory control forms for the Bulk Plant have meter readings handwritten on one side of the page and have spaces to record stick readings on the other side, for six tanks: five above-ground tanks (which are not at issue) and the one UST containing "Plus" fuel. Tr. 659-661; Rs' Ex. 7. Some of the forms had no data recorded for stick readings; the reverse side of the forms are blank. Rs' Ex. 7. Mr. Sorbel explained that stick readings were taken every day, but no stick reading data was recorded on the form because his employees write down stick readings on a tablet and either attach that page to the form or write them on the form. Tr. 659, 667. He stated that the readings were "probably stapled" to the handwritten inventory sheet but "when she got her actual gallons, threw it away." Tr. 667-668.

Goodman Lewiston also presented its computer printouts of tank inventory. Rs' Ex. 7. Mr. Sorbel testified that the data for meter readings and stick readings from the handwritten forms were entered into the computer. Tr. 665-667. The computer printouts include daily data for gallons added, gallons sold, book inventory, actual inventory, and net/loss for that day. Rs' Ex. 7; Tr. 665. He stated that the stick readings were converted to gallons and only the gallons were recorded on the computer inventory forms. Tr. 690-691. Mr. Sorbel's testimony indicates that each day, the book inventory data from the previous day was carried over, gallons were added and/or subtracted for the day's deliveries and sales, and compared with the day's stick reading in gallons, to determine the "running balance" over or short. Tr. 731-733.

The computer printouts also include monthly tank inventory data for the months of May, June, August, September, October and November 1999. Rs' Ex. 7. The monthly data, all in gallons, include the "Beginning" (book inventory for the last day of the previous month), total deliveries, total sales (gallons pumped), "book inventory" ("Beginning" plus deliveries minus sales), "actual inventory" (which is the stick inventory for the last day of the month), and resultant net/loss ("book inventory" minus "actual inventory"). *Id.*; Tr. 667. There is no data showing a comparison of the net/loss with one percent of flow-through plus 130 gallons. The computer printouts do not show that computation and therefore do not indicate any comparison of that figure with the "net/loss." Tr. 141.

Ms. Poston testified that on the computer sheets for the Bulk Plant “There’s no monthly reconciliation.” Tr. 164.

It is noted that Goodman Lewiston’s calculation of the monthly “net/loss” is not the same as the “total gallons over or short” as set out in EPA’s guidance document titled “Doing Inventory Control Right, ” and in Ms. Poston’s testimony. Tr. 140; C’s Ex. 176. As described therein, the monthly “total gallons over or short” is the sum total of the daily overages and shortages, and it is the comparison of that number with the regulatory standard of one percent of flow-through plus 130 gallons which constitutes the reconciliation. Tr. 140-141; C’s Ex. 176.

Complainant did not specifically claim that Goodman Lewiston’s method of calculating “net/loss” did not meet the requirements of 40 C.F.R. § 280.43. Furthermore, Ms. Poston testified, “I believe that the math that he is using would lead to the same conclusion as the EPA describes.” Tr. 1474.

Although not disputing that the three USTs were not in operation, Complainant argues that Respondents did not reveal that until the hearing, and had refused to respond to EPA’s October 2, 2000 information request. C’s Brief at 23; C’s Reply at 10; C’s Ex. 185, 186. The three USTs contained fuel at levels from 37 to 42 inches on August 18, 1998, according to tank tightness test records. C’s Brief at 23-24; C’s Ex. 106. Complainant asserts that there was no evidence that the three USTs were “empty” as defined in 40 C.F.R. § 280.70 or that inventory control or other release detection was conducted during that time period. Complainant asserts that release detection “would have required sticking the tanks at least once a month and recording the result.” C’s Brief at 24.

As to the “Plus” tank, Complainant argues that there are no records to show that any reconciliation was completed, or that it was done accurately and timely. Therefore, Complainant alleges in its Post Hearing Brief that Goodman Lewiston is “liable for failure to conduct inventory control on the four USTs at the Bulk Plant from December 1998 through November 1999 as alleged in Count 11 of the Amended Complaint.” C’s Brief at 25.

Goodman Lewiston points out that this allegation is not what is alleged in the Amended Complaint, namely that it was utilizing a computerized system to record inventory control but that the system as used by Goodman Lewiston does not detect a release of at least one percent of flow-through plus 130 gallons. It argues that EPA’s evidence was not of sufficient quantity and quality to establish to infer that Mr. Sorbel did not empty or monitor the four USTs during the time in question. It emphasizes Mr. Sorbel’s testimony that he did not want to lose product, money, clean up a spill, or lose his livelihood, and that he therefore takes stick readings of both his underground and aboveground tanks,⁵ and that he reconciles inventory for all of his tanks within three days of the

⁵ In a footnote, Goodman Lewiston requests, in the event Mr. Sorbel’s testimony is deemed not to include the three non-operating USTs, permission to reopen the hearing, pursuant to 40 C.F.R. § 22.28, “to submit evidence on the compliance status” of the three USTs during the time in question. Rs’ Brief p. 19 n. 2. A request to reopen must meet the requirements of 40
(continued...)

end of the month. Tr. 660-661, 682, 684, 761, 762, 766.

The documentary evidence indicates that Goodman Lewiston's computer system did not include a monthly balancing of the difference between stick and book inventory with the regulatory standard of one percent of flow-through plus 130 gallons. Rs' Ex. 7. However, the issue is whether Goodman Lewiston, with or without use of the computer system, conducted its inventory control monthly to detect a release of at least one percent of flow-through plus 130 gallons in the manner prescribed in Section 280.43(a). The Amended Complaint is hereby deemed amended to conform to the evidence at the hearing, as the parties have fully litigated the issue of whether Goodman Lewiston complied with inventory control requirements, in regard to both the computerized system and handwritten inventory reconciliation, at the Bulk Plant. *H.E.L.P.E.R., Inc.*, 8 E.A.D. 437, 449 (EAB 1999)(interpreting the Consolidated Rules of Practice to allow amendment of pleadings to conform to the evidence, noting Federal case law recognizing that district courts have discretion to treat pleadings as conforming to evidence presented at trial).

Mr. Sorbel's testimony that he performed timely inventory reconciliation for all of the USTs at the Bulk Plant may be credited with regard to the "Plus" tank for the months of May, June, August, September, October and November 1999, because the documentary evidence shows that daily data was gathered, and that monthly net loss or gain in inventory was calculated for those months Rs' Ex. 7. This data on the monthly inventory forms was sufficient to perform a monthly inventory reconciliation. Tr. 727-733, 1474, 1502. From the data on the monthly forms, "one percent of flow-through plus 130 gallons" is easily computed from the total gallons pumped for the month, and that could be easily compared with the "net/loss" recorded for the month. Rs' Ex. 7. Inventory reconciliation could easily have been performed mentally, even for two months of data. Thus it is likely that Mr. Sorbel could easily have performed inventory reconciliation by simply comparing data recorded on the monthly forms. Rs' Ex. 7. Ms. Poston testified that it is important to record the monthly reconciliation, because it is necessary to compare two consecutive months of data, and the regulations require that records be kept for 12 months. Tr. 1474-1475. Goodman Lewiston is not charged with failure to comply with recordkeeping requirements. There is no compelling reason to doubt Mr. Sorbel's testimony as to his comparison of consecutive months of inventory reconciliation.

Nevertheless a preponderance of the evidence shows that Goodman Lewiston did not record stick inventory each operating day, as the daily inventory forms show no stick inventory recorded an average of eight days per month, and, for those days, the stick ("actual") inventory appearing on the daily computer printouts merely repeats the prior day's stick readings. Rs' Ex. 7. Therefore

⁵(...continued)

C.F.R. §§ 22.16(a) and 22.28, which requires a motion which states the nature and purpose of the evidence to be adduced, a showing that the evidence is not cumulative, and a showing of good cause why such evidence was not adduced at the hearing. The request does not meet those requirements and therefore the request is denied. Moreover, Mr. Sorbel's testimony is construed to include all of the USTs at the Bulk Plant.

Goodman Lewiston failed to comply with 40 C.F.R. § 280.43(a)(1) for May, June, and August through November 1999 for the “Plus” tank.

For December 1998, and January, February, March, April and July 1999, there are no monthly data for the “Plus” tank, and no explanation for the absence of these records, other than that they were thrown away. Rs’ Ex. 7; Tr. 685. The data on the daily inventory sheets could not even form the basis for monthly inventory control, despite Mr. Sorbel’s testimony that, when he did not print the monthly summary, he would “look to the last day of the month.” He admitted he would still need to calculate how much inventory he went through in the tank, *i.e.* determine flow-through, to determine whether he met the standard of one percent of flow through plus 130 gallons. Tr. 759-760. The data for the last day of the month only show the gallons sold for that day, not the gallons sold for the month.⁶ Therefore the daily inventory sheets do not support a finding that monthly inventory control was conducted. As to the other three USTs, no inventory records have been proffered. A preponderance of the evidence shows that Goodman Lewiston failed to conduct monthly inventory control for December 1998 and January, February, March, April, and July 1999 for the “Plus” USTs.

Therefore, it is concluded that Goodman Lewiston failed to comply with the inventory control requirements of 40 C.F.R. §§ 280.43(a) and 280.41(a) for four USTs from December 1998 through November 1999, at the Bulk Plant.

Count 12

Count 12 alleges that, in regard to Mountain Mart # 2, from December 1998 through at least November 1999, Goodman Lewiston was utilizing a computerized system to record inventory control, and that the system as used by Goodman Lewiston does not detect a release of at least one percent of flow-through plus 130 gallons as required by 40 C.F.R. § 280.43(a).

The inventory records for Mountain Mart # 2, submitted as evidence, consist of computer printouts with daily data, handwritten daily records of pump readings and stick inventory (“tank readings”), and a computer printout with monthly data, for the months of December 1998 through September 1999. Rs’ Ex. 8; C’s Ex. 159; Tr. 687-690. The monthly data include, in gallons, the fuel pumped as measured from pump meters (“recap gallons”), fuel deliveries (“purchases”), the “beginning inventory” (which is the “ending inventory” from the previous month), and the “ending

⁶ Moreover, Goodman Lewiston calculates the daily tank inventory “net/loss” from the running book inventory: the previous day’s book inventory is the next day’s beginning inventory. Rs’ Ex. 7. Ms. Poston testified that the initial inventory for the day should be the stick reading, and not the book inventory from the previous day, because it results in error being built in every day. Tr. 170-172.

inventory, ” which is the “beginning inventory” plus deliveries minus fuel pumped. Rs’ Ex. 8; Tr. 687-688, 1484-1486. The monthly data do not include stick inventory, gallons over or short, net gain or loss, or a calculation of flow-through plus 130 gallons. Rs’ Ex. 8; Tr. 738-739, 746-747, 1484-1486. The daily computer printouts are similar to the daily computer data for the Bulk Plant, showing, in gallons, “Beginning” (the previous day’s book inventory), deliveries, sales, book inventory (“Beginning” plus deliveries minus sales), “actual inventory” (stick inventory), and “net/loss” (book inventory minus stick inventory). Rs’ Ex. 8.

Dean Sorbel testified that every operating day his employees stick the tanks and record the stick inventory and the meter readings on the handwritten inventory form, and that the data from that form is put into a computer and the daily over or loss is computed for the day, similar to the process at the Bulk Plant. Tr. 689-691; Rs’ Ex. 8. He testified that from December 1998 through November 1999, he performed inventory reconciliation, using the one percent of flow through plus 130 gallon formula, for the Mountain Mart on a monthly basis, the same day as those for the Bulk Plant. Tr. 692, 694-695. At the hearing, he demonstrated his method of reconciliation. He calculated one percent of gallons sold (flow-through) plus 130 gallons, and compared it with the difference between the stick inventory for the last day of the month and the running daily book inventory for that day. Tr. 691-692, 746-747. Ms. Poston also demonstrated how inventory reconciliation would be calculated, assuming Mr. Sorbel “did all his math correctly.” Tr. 1484. In order to conduct inventory reconciliation using Goodman Lewiston’s data, they needed to look not only at the monthly data for the gallons sold, but also at the daily data for the last day of the month, on which was recorded the difference between the stick inventory for the last day of the month and the running daily book inventory for that day. Tr. 738, 746-747, 1484-1486. Mr. Sorbel admitted that he did not have documents showing reconciliation, explaining that he did not realize that he would have to have them. Tr. 696.

Mr. Sorbel admitted at the hearing that stick inventory was not recorded on the handwritten daily inventory forms for June 1, 2, 3, 9, 10, 11, and 23, 1999. Tr. 741-742. He could not explain why the number of gallons recorded as the book inventory was identical to that for “actual inventory” on the daily computer inventory sheets for June 1 through 3, 1999, and why the word “computed” appeared below those numbers for June 1 and June 2. Tr. 739-741. Stick inventory is missing from the daily handwritten forms for December 5, 12, 13, 19, 20, 26, 27 and 29, 1998, and for January 2, 3, 7, 10, 13, 16, 17, 19, 23, and 24. R’s Ex. 8. For almost each day in December 1998 and January 1999, the following morning’s stick inventory is recorded on the computer form as the day’s “actual inventory,” except that for days when no stick inventory was recorded on the handwritten form, the same morning’s stick inventory is repeated on the computer form for those days, and where stick inventory was not recorded on the handwritten form for two consecutive days, the same number of gallons is repeated again for a third day on the computer form. Rs’ Ex. 8. This confirms a finding that Goodman Lewiston failed to record stick inventory each operating day. For the months thereafter, the data tends to get better; stick inventory is missing from eight days in March 1999 but is missing from only three or four days in August and September 1999. *Id.*

Ms. Poston testified that the initial inventory recorded for each day should be the stick inventory, and not the book inventory from the previous day. Tr. 170. By starting with the book inventory, Goodman records running totals for book inventory, which results in error being built in every day, and fails to calculate daily overages and shortages. Tr. 169-172.

Because the inventory records showing monthly data do not include all of the data needed for inventory reconciliation, Mr. Sorbel's testimony that he performed monthly inventory reconciliation as required by the regulations is not persuasive as to Mountain Mart # 2. In addition, Goodman Lewiston failed to maintain the integrity, accuracy and completeness of the daily data, including stick readings. There are no inventory records in evidence as to October and November 1999. It is concluded that Goodman Lewiston did not perform inventory reconciliation as required by 40 C.F.R. § 280.43(a), for Mountain Mart # 3 from December 1998 through November 1999, and therefore violated 40 C.F.R. § 280.41(a).

Count 13

In Count 13, Goodman is alleged to have failed to properly conduct inventory control for January through April 1999 for the three USTs it owned and operated at the Nampa Exxon. Goodman's inventory records for the USTs for January and February 1999 include daily data but no inventory reconciliation data for the month. C's Ex. 154; Rs' Ex. 4. The copies of inventory control records for March and April 1999 submitted by Goodman in response to EPA's information request of November 3, 1999 include inventory reconciliation figures. C's Ex. 142, 143, 154; Tr. 381-382. However, the copies of inventory records for March and April 1999 that Mr. McRae testified were "the original records" that he received from Goodman, do not include inventory reconciliation figures. C's Ex. 183; Tr. 388-390.

Complainant asserts that Goodman only retrospectively reconciled inventory records months after they were required to be reconciled. In response, Goodman asserts that Mr. Lamberson's testimony establishes that he reviewed inventory records for each station within the first two weeks of the following month, and completed on a separate piece of paper any inventory reconciliation that was not completed on the station inventory forms. Rs' Reply at 12 (citing Tr. 782-784, 799, 832-833).

Mr. Lamberson's testimony is not so clear. At the hearing, Mr. Lamberson explained his general procedures for reviewing inventory control records, stating that he would receive records from the store "[t]ypically, within the first two weeks of the following month," including the Nampa store. Tr. 783. He stated further that he would review the records, summing up the figures on a separate sheet of paper and comparing the numbers, "and if it was okay, I passed them, made copies, sent them to the store," but stated that his calculations were thrown away. Tr. 799-800, 832-833. He did not testify that he reviewed or completed the inventory reconciliation within two weeks of the following month, however, and it cannot be inferred that he did so, considering that he only

received the forms after two weeks and he had to review them for each UST at several stores.⁷ This general testimony is insufficient to show that Goodman performed inventory reconciliation for the USTs at the Nampa store within any particular time period.

His testimony with respect to inventory reconciliation for the USTs at the Nampa Exxon is vague and does not indicate that reconciliation was performed within thirty days after each month in question. He testified that he wrote the inventory reconciliation figures at the bottom of inventory control forms, but when asked whether he did it contemporaneously when he received it in the corporate office, he responded, “I don’t think it was contemporaneous” and “I think it was after.” Tr. 838. In addition, Mr. Lamberson testified that he “couldn’t easily follow Nampa” but he “studied and stayed with it,” and “didn’t see any reason for concern numerically until we got a little further along.” Tr. 837. Mr. Lamberson explained that the Nampa store manager recorded stick readings one day later than the totalizer readings, and that some fuel deliveries were recorded on the wrong date. Tr. 837; R’s Ex. 30. Mr. Lamberson revised the data to correct these deficiencies and calculated inventory reconciliation based on this revised data, but did not indicate how soon he did so after the end of each month in question. R’s Ex. 15, 30.

A preponderance of the evidence shows that Goodman did not perform inventory reconciliation within a reasonable time period after each month of January through April 1999 for the Nampa Exxon. Therefore, for that time period for the Nampa Exxon USTs, Goodman failed to comply with 40 C.F.R. § 280.41(a).

Count 14

Count 14 alleges that Goodman failed to properly conduct inventory control for December 1998 through May 1999 for the three USTs at the Weiser Exxon. Count 14 also alleges that Goodman failed to monitor these tanks every day they were in operation from May 1, 1997 through July 17, 1999.

Goodman’s inventory control forms for December 1998 through May 1999 include daily data for weekdays but not weekends, and have no inventory reconciliation figures on them. C’s Ex. 157; R’s Ex. 5, 31. Indeed, the forms for May 1997 through July 17, 1999 do not include data for weekends. *Id.*; C’s Ex. 58. During direct examination, Mr. Lamberson was asked when he completed the inventory control records for December 1998 through May 1999, and he testified, “At the earliest, it would have been a month after I received it. I can’t remember.” Tr. 842. The testimony does not persuasively establish that Mr. Lamberson performed inventory reconciliation within thirty days after each month of December 1998 through May 1999. Mr. Lamberson typically received the forms two weeks after the end of the month (Tr. 783), but if he completed them a month after he received them, then they may have been completed six weeks after the end of the month.

⁷ Indeed, Goodman’s attorney referred to the Nampa records arriving at Mr. Lamberson’s office a month after they had been prepared by store employees. Tr. 836.

Inventory reconciliation performed six weeks after the end of the month does not satisfy even Goodman's interpretation of the regulations as requiring inventory reconciliation to be performed within thirty days.

Moreover, Goodman's failure to include any data for weekends is a failure to comply with the requirement of 40 C.F.R. § 280.43(a)(1) that "[i]nventory volume measurements for regulated substance inputs, outputs and the amount still remaining in the tank are recorded each operating day." Complainant has shown by a preponderance of the evidence that Goodman failed to comply with inventory control requirements of 40 C.F.R. § 280.43(a)(1) from May 1997 through July 17, 1999, and failed to timely perform inventory reconciliation for December 1998 through May 1999, and therefore failed to comply with 40 C.F.R. § 280.41(a) at the Weiser Exxon for the time period of May 1997 through July 17, 1999.

III. RESPONDENT'S LIABILITY FOR COUNTS 23 THROUGH 26

Counts 23 and 24 allege that Goodman failed to notify EPA or the Idaho Department of Environmental Quality (IDEQ) when inventory control records for several months showed that two tanks, one at each the Weiser and Nampa stations, had a "suspected release," and that such failure constitutes a violation of 40 C.F.R. § 280.40(b). Specifically, in Count 23 Goodman is charged with failure to timely notify either EPA or the IDEQ when inventory control records for the months of April through July 1999 showed that the 10,000 gallon "unleaded" tank at Nampa Exxon had a suspected release. In Count 24 Goodman is charged with failure to timely notify EPA or IDEQ when inventory control records for the months of December 1998 through June 1999 showed that the 10,000 gallon tank at the Weiser Exxon had a suspected release.

Counts 25 and 26 allege that Goodman failed to immediately investigate a suspected release from those tanks, at Nampa Exxon and Weiser Exxon respectively, after said inventory control records indicated that a release of regulated substance may have occurred from those tanks, in violation of 40 C.F.R. § 280.52.

The regulatory requirement at 40 C.F.R. § 280.40(b) states as follows:

When a release detection method operated in accordance with the performance standards in § 280.43 and § 280.44 indicates a release may have occurred, owners and operators must notify the implementing agency in accordance with subpart E.

In turn, subpart E (40 C.F.R. § 280.50-53) provides as follows, in pertinent part:

Owners and operators of UST systems must report to the implementing agency

within 24 hours, or another reasonable time period specified by the implementing agency, and follow the procedures in § 280.52 for any of the following conditions:

* * * *

(c) Monitoring results from a release detection method required under §280.41 and § 280.42 that indicate a release may have occurred unless:

* * * *

(2) In the case of inventory control, a second month of data does not confirm the initial result.

40 C.F.R. § 280.50.

Further, section 280.52 of subpart E provides that -

Unless corrective action is initiated in accordance with subpart F, owners and operators must immediately investigate and confirm all suspected releases of regulated substances requiring reporting under § 280.50 within 7 days

40 C.F.R. § 280.52.

Complainant must establish as elements of its case that: (1) a release detection method was operated in accordance with performance standards of § 280.43; (2) monitoring results from that method indicate a release may have occurred; (3) that a second month of inventory control data confirmed the initial monitoring result; and (4) that Goodman failed to report to EPA or IDEQ within 24 hours of that confirmation.

A. Counts 23 and 25 - Nampa Exxon

Complainant and Respondent each presented Goodman's inventory control records for the unleaded gasoline UST at the Nampa station for April through July 1999. C's Ex. 154; Rs' Ex. 4. On these records for April, June and July 1999, the figure written in or beside the box marked "total gallons over or short" exceeded the figure of 1 percent of flow through plus 130 gallons, indicating that there was a suspected release. *Id.* Specifically, on the April 1999 form, *next to* the box marked "total gallons over or short" is written "-300," and the figure written for one percent of flow through plus 130 gallons is 236. On the June 1999 form, *in the box* marked "total gallons over or short" is written the figure 376, and the figure written for one percent of flow through plus 130 gallons is 224. On the July 1999 form, *next to* the box marked "total gallons over or short" is written "-307," and the figure written for one percent of flow through plus 130 gallons is 211. On these inventory record forms is printed the question "Is 'TOTAL GALLONS OVER OR SHORT' LARGER than 'LEAK CHECK' result?" and the warning, "If answer is 'YES' for 2 MONTHS IN A ROW, notify regulatory agency as soon as possible." *Id.* The word "yes" is underlined on the April and July records and circled on the June record. On the records for May 1999, the word "no" is circled, and the figure "-112" is marked *in the box* labeled "total gallons over or short," which is smaller than the figure "249" marked in the space for one percent of flow through plus 130 gallons. *Id.* However, there is no data on the "leak check" space for recording one percent of flow through, a

handwritten question mark precedes the figure "249", and the figure "-278" is written beside the box marked "total gallons over or short." *Id.*

Mr. McRae testified that the April and May records showed that the unleaded tank had a suspected release, and that based on these first two months of tank failure, Goodman was required to report it to EPA or the IDEQ in June 1999, but did not report it. Tr. 477-478. His penalty calculation sheet for Count 23 simply states, "They have not provided records showing compliance" with the reporting requirement. C's Ex. 187.

Mr. Lamberson testified that he wrote the "total gallons over or short" to the side of the box when he was reviewing the data. Tr. 838. He explained in testimony and in a written memorandum, dated April 28, 2001, the deficiencies in the inventory control records for the Nampa facility. Tr. 837; Rs' Ex. 30. Mr. Lamberson stated that there were "unique recording and transcription characteristics of station personnel," namely that the "End stick inventory" was recorded one day late, that some fuel deliveries were recorded on an incorrect day, and that "over/short" signs are typically reversed. Rs' Ex. 30. He could not specify when he discovered the data recording deficiencies, but merely indicated that it was in 1998. Tr. 894-895. He explained at the hearing that he and Mr. Conley sat with the station manager and tried to explain and to correct her method of recording data, but when she tried to fix it, she "screwed up the next month's sheet," so they "let it slide because at least we knew what we were dealing with." Tr. 904-905. The station manager had been there for quite some time, and "worked her heart out" and "was just as good as could be," and that he and Mr. Conley "had to work with what we had." Tr. 837, 903-904. Mr. Conley testified that he evidently was not successful in explaining the inventory control form to her. Tr. 985.

The only documents in evidence showing Mr. Lamberson's subsequent analyses, which corrected these deficiencies, were prepared after the Complaint was filed. Rs' Ex. 15, 30; Tr. 846-852. Mr. Lamberson adjusted the figures to account for these errors, and recorded the adjustments on his re-created monthly inventory records, and calculated the inventory reconciliation based on these adjustments on an undated spreadsheet entitled "Review Evaluation Summary" for the months of January through July 1999, and on a one-page summary of inventory reconciliation of the tanks from April through July 1999. Rs' Ex. 15, 30; Tr. 849. Complainant has not challenged the validity of these adjustments and reconciliation calculations. Mr. Lamberson concluded in the memorandum that the review confirms "earlier judgments by supervisory staff" that no leaks had occurred. Rs' Ex. 30. At the hearing, he testified that he did not recall finding any leak check comparisons that were out of line for more than one month, and answered in the negative when asked whether he had reason or cause to report a suspected leak in any of the tanks at Nampa during the time period of January through April 1999. Tr. 837, 839.

In response to Mr. McRae's July 9, 1999 information request letter, Mr. Lamberson submitted a letter, dated July 30, 1999, which states, as to the USTs at Nampa, "The tanks are not leaking. Stickings compared with sales volumes demonstrate no reportable losses. Inventory sheets for monitored tanks are included for the period January, 1999 through June, 1999." C's Ex. 133; Tr 795. It is inferred from this response letter that at some point in June or July 1999, Mr.

Lamberson analyzed the inventory control records for April and May 1999, and determined that there was no suspected release.

In sum, the testimony and evidence show that Mr. Lamberson's initial review of the inventory control data for April through July 1999 as generated by the station manager and her personnel could evidence a suspected release, which might support the second element of Complainant's *prima facie* case.

However, in subsequent analyses, Mr. Lamberson corrected the deficiencies in the data recorded by station personnel, performed inventory reconciliation for the months at issue, and found that there was no suspected release. Mr. McRae acknowledged at the hearing the possibility that the suspected release was merely a "paper error." Tr. 480. Mr. Lamberson's testimony of his awareness that there were errors in the recording of data and of his attempts to explain to the station employee how to record it correctly, is credible. It would be nonsensical to require notification based upon data which is known to be erroneous. Indeed, the regulations only require notification based upon release detection methods operated in accordance with the performance standards set forth in 40 C.F.R. § 280.43, and not upon unauthorized leak detection methods or upon release detection methods that do not meet the performance standards. 40 C.F.R. §§ 280.40(b), 280.50(c). Goodman would not be required to report that under deficient data recording techniques, a release would be suspected, if it knew that there was no suspected release based upon the correct data. While the evidence is not clear as to exactly when Mr. Lamberson corrected the data and determined that there was no suspected release, considering the documents of record and the testimony and credibility of all of the witnesses, there is insufficient support in the record to find that Goodman was required to provide notification of a suspected release at the Nampa station for the months at issue.⁸

⁸ For the months of April and May 1999, Complainant's evidence suggests that Goodman *may have* provided notice to the IDEQ at some point prior to July 9, 1999, concerning a suspected release for the tanks at Nampa, as Mr. McRae's July 9, 1999 information request letter states, in regard to the Nampa facility, "The inventory control records for the Plus tank and the Unleaded tank showed that the leak detection failed. I need the *documentation you provided to [I]DEQ stating you failed two consecutive months of leak detection* for the months of April and May, 1999." C's Ex. 130 (emphasis added). Mr. McRae's testimony at the hearing did not explain the discrepancy between this correspondence and his testimony that Goodman did not report. *See*, Tr. 477. When asked at the hearing why he asked for the documentation provided to IDEQ, he merely stated that the April and May records he had showed tank failures, so he "identified to Goodman Oil that there were failures there" and he wanted to determine whether that trend continued. Tr. 366-367. Thus, Complainant's own evidence undermines the fourth element of its case, that Goodman failed to report to IDEQ within 24 hours of performing inventory reconciliation for May 1999 or for June 1999. On the other hand, Mr. McRae in his July 9 letter may have used the term "stating" inaccurately; he should have used the term "indicating," if Goodman had simply submitted inventory forms to IDEQ without a document
(continued...)

Therefore, Complainant has not shown by a preponderance of the evidence that Goodman violated 40 C.F.R. § 280.40(b) or that Goodman violated 40 C.F.R. § 280.52, as alleged in Counts 23 and 25 of the Amended Complaint. Thus, Goodman is found not liable on these counts.

B. Counts 24 and 26 - Weiser Exxon

The parties proffered into evidence Goodman's inventory control records for December 1998 through November 1999. C's Ex. 157; R's Ex. 5. Mr. McRae testified that the inventory control records for the Weiser station for December 1998 through June 1999 showed that the 10,000 gallon tank, containing regular unleaded fuel, had a suspected release. Tr. 478-479. He testified that in December 1999, Goodman indicated it had investigated a release after he had notified Goodman that there was a suspected release, and Goodman indicated that it had found a technical problem and had corrected that. Tr. 479. Mr. McRae acknowledged that there was a meter reading problem that Goodman could easily correct. Tr. 480.⁹

In response to EPA's information request, Mr. Lamberson's letter, dated July 30, 1999, states that Goodman "didn't notify anyone because the tank isn't leaking, according to stick and sales volume comparisons." C's Ex. 133. Tr. 373. Tr. 367. Mr. Lamberson provided a written explanation for the deficiencies in the inventory control records for the Weiser facility in a memorandum dated April 13, 2001. R's Ex. 31. Therein he stated, "Reviewing station and applicable in-house records for the period [December 1998 through June 1999] confirms earlier judgements that there were no leaks were correct [sic]." *Id.* He explained that station personnel had difficulty using decimals when summing totalizer readings, resulting in a consistently low reading of gallon dispensed, but when he calculated inventory using the totalizer readings from the three dispensers, recorded on station reports, there was no shortage of fuel. *Id.*; Tr. 857-859. Mr. Lamberson included in his memorandum a written demonstration using station records, and attached both the original station inventory records and his revised inventory records for February 7 and 8, 1999, as an example. *Id.* He explained further at the hearing the difficulties of the employee who recorded inventory control data in setting decimals on the adding machine and accounting for two totalizers with decimal readings and a third without. Tr. 902-903. Mr. Lamberson testified that he could not remember when he first discovered that the totalizers were not being read correctly, but guessed that it was "probably toward late '99" or early 2000. Tr. 895.

⁸(...continued)

"stating," *i.e.*, notifying, that there was a release. This issue need not be decided here, as the record does not support a finding that Goodman was required to notify of a suspected release.

⁹ Mr. McRae's information request letter, dated July 9, 1999, states, "The inventory control records for the 10,000 gallon tank show that it failed. I need the documentation you provided to [I]DEQ stating you failed two consecutive months of leak detection for the months of March, April and May 1999." C's Ex. 130. As explained in the previous footnote, this letter suggests that Goodman may have notified IDEQ of a suspected release.

As discussed above, in regard to Count 14, no inventory reconciliation figures appear on the records from December 1998 through May 1999, and stick readings were not recorded on weekend operating days, as required by 40 C.F.R. § 280.43. Tr. 391; C's Ex. 58, 157; R's Ex. 5. Thus, Complainant has not established the first element of its case, that a release detection method was operated in accordance with performance standards of § 280.43.

Furthermore, Complainant has not met the second element of its case. It has not demonstrated that the monitoring results indicate a release may have occurred. On one hand, the evidence indicates that Goodman had no monitoring *results*, because there were no inventory reconciliation figures on the records. On the other hand, if the data on Goodman's incomplete inventory control records were used as a basis for inventory reconciliation, such reconciliation would not indicate that a release may have occurred, due to the demonstrated errors in recording the data.

It is concluded that Complainant has not shown by a preponderance of the evidence that Goodman violated 40 C.F.R. § 280.40(b) or that Goodman violated 40 C.F.R. § 280.52, as alleged in Counts 24 and 26 of the Amended Complaint. Thus, Goodman is found not liable on these counts.

IV. AFFIRMATIVE DEFENSES

Except to the extent addressed above, Respondents have not addressed in their post hearing briefs the remaining affirmative defenses raised in the Answer with respect to liability for Counts 7 through 14. Moreover, as to the Third Affirmative Defense of selective enforcement, that the "Amended Complaint is the result of bias and prejudice on the part of EPA or EPA officials, [against companies doing business with Indians or on Indian land]" and the Fourth Affirmative Defense, that "EPA's actions are arbitrary, capricious, an abuse of discretion and unconstitutional," there is insufficient support in the record to meet the elements of a selective enforcement defense. *See*, Order on Complainant's Motion for Accelerated Decision; Tr. 1104-1125. Further, during Respondents' cross examination, Mr. McRae, the EPA official involved in the initiation of this action, testified, "I never involve myself in the targeting of Indian-land inspections," because "we have very limited resources" and "we have one full-time inspector for all the Indian lands," and denied that he had ever heard of any EPA Region 10 enforcement strategy to focus on businesses which do business with tribes. Tr. 590-592. He testified that he had not discussed Goodman with any person from any tribe, tribal business or any business on the reservations, and that he was only aware that Goodman sold fuel to businesses on reservations after the Complaint was issued. Tr. 595-596. He also testified that he did not consider evidence contained in an EPA Region 10 database of all field citations issued to UST owners, and that has separate data for violations on Indian land. Tr. 603-605.

In addition, Respondents have not supported their Twelfth Affirmative Defense of "estoppel, laches and unclean hands" with evidence sufficient to meet the elements of those defenses, in regard to Counts 7 through 14, or sufficiently to warrant reduced penalties. *See*, Order on Complainant's Motion for Accelerated Decision. As to Respondents' Sixth Affirmative Defense that "EPA failed

to conduct inspections, review records, properly interpret records, and comply with all laws, regulations and policies governing EPA's use of its inspection and enforcement authority," this Defense also does not bar liability as to Counts 7 through 14, considering the testimony and evidence of record, and furthermore does not mitigate penalties, except for the claim that EPA failed to properly review and interpret records, which is addressed below.

V. PENALTY

For violations of the UST regulations promulgated under Section 9003 of RCRA, EPA is authorized to assess civil penalties under Section 9006 of RCRA, which provides, in pertinent part, that ". . . whenever on the basis of any information, the Administrator determines that any person is in violation of any requirement of this subchapter, the Administrator may issue an order requiring compliance . . ." and "[a]ny order issued under this section shall . . . 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(a) and (c). In regard to the amount of such penalty, Section 9006 provides that "any owner or operator of an underground storage tank who fails to comply with – (A) any requirement or standard promulgated by the Administrator under section [9003 of RCRA] . . . shall be subject to a civil penalty not to exceed \$10,000 for each tank for each day of violation." 42 U.S.C. § 6991e(d).

The Consolidated Rules of Practice provide that a penalty shall be determined based on the evidence in the record and in accordance with any penalty criteria set forth in the Act, and that any civil penalty guidelines issued under the Act shall be considered. 40 C.F.R. § 22.27(b). EPA issued guidelines for the calculation of penalties under Section 9006 of RCRA, the "U.S. EPA Penalty Guidance for Violations of UST Regulations," OSWER Directive 9610.12 ("Penalty Policy"). C's Ex.175. Using the Penalty Policy and its penalty calculation worksheets, Mr. McRae calculated proposed penalties, as amended, of \$516,979 against Goodman and \$88,276 against Goodman Lewiston. C's Ex. 187, 190, 191, 192.¹⁰

The Penalty Policy sets out a method of calculating penalties by calculating two components which are then added together: (1) a component representing the economic benefit of the respondent's noncompliance; and (2) a gravity-based component. The latter component is comprised of a basic penalty figure ("matrix value") from the Penalty Policy's matrix of dollar values. The axes of the matrix are "potential for harm" and "extent of deviation from the requirement," and the levels on each axis are "minor," "moderate" and "major." C's Ex. 175 p. 16. The dollar matrix value is then adjusted (increased or decreased) for violator-specific factors:

"degree of cooperation or noncooperation," "degree of willfulness or negligence," and "other unique factors," each of which allow between a 50% increase and 25% decrease in the matrix value, and "history of noncompliance," which allows up to a 50% increase in the matrix value. *Id.* at 17-19.

¹⁰ The penalties for Counts 7, 8 and 13 were subsequently reduced, and the Amended Complaint amended accordingly, at the hearing. Tr. 455-456; C's Ex. 190, 191, 192.

The resulting adjusted matrix value is then multiplied by two factors: “environmental sensitivity multiplier” and “days of noncompliance multiplier.” *Id.* p. 20. The former is an assessment of a low, moderate or high adverse actual or potential impact that a release, once it occurred, would have on the local environment and public health. *Id.* The adjusted matrix value is multiplied by 1 for a low environmental sensitivity, 1.5 for moderate, and 2 for high. For the “days of noncompliance multiplier,” the value is multiplied by 1 for up to 90 days of noncompliance, by 1.5 for three to six months, by 2 for six to nine months, or by 2.5 for nine months to one year of noncompliance, and for violations lasting more than a year, an additional 0.5 for each additional 6 months of noncompliance. *Id.* at 21.

The penalty component representing the economic benefit of noncompliance is based on the costs the respondent avoided, such as operational and maintenance costs, and the monetary advantage from delaying capital and/or non-depreciable costs. C’s Ex. 175. EPA calculates the economic benefit of noncompliance by using either a “rule of thumb” method outlined in the Penalty Policy, or by using EPA’s computer software program called the BEN model. Under the BEN methodology, the costs avoided per year are reduced by the amount of income tax that would be deducted. Then a discount rate, which is the weighted average cost of capital, is applied to each year of costs. The weighted average cost of capital is derived on a year by year basis taking into account the average cost of the use of debt after tax and the cost of the use of equity capital. C’s Ex. 188.

Although Mr. McRae included in his penalty calculation worksheets his own calculations of the economic benefit of Respondents’ noncompliance, Complainant also proffered testimony of Beatrice Carpenter, a financial analyst of EPA Region 10, and her calculation of economic benefit penalties under the BEN model. Her calculation, in total, is \$355 more than Mr. McRae’s total calculation of economic benefit penalties. C’s Ex. 188; C’s Brief n. 6. Complainant relies on Ms. Carpenter’s analysis and calculations of the economic benefit of Respondents’ noncompliance, but does not request any increased penalty amount. Tr. 23-24; C’s Brief n. 6.

Count 1

In the August 22, 2001 Order on Complainant’s Motion for Partial Accelerated Decision, Goodman was held liable for violating 40 C.F.R. § 280.70(c), by failing to permanently close five USTs 12 months after they were temporarily closed in February 1998. The requirements for permanent closure, set out in 40 C.F.R. §§ 280.71-280.74, require the UST owner or operator to empty and clean the tanks by removing all liquids and sludges, submit notification of permanent closure, perform a site assessment and take corrective action if a release is discovered, remove the tanks or fill them with an inert solid material, and maintain records that demonstrate compliance with closure requirements. Complainant proposed a penalty of \$98,914 for this violation.¹¹

¹¹ Mr. McRae’s total proposed penalty for Count 1 was \$98,914, based on a higher economic benefit calculation than Ms. Carpenter’s economic benefit calculation. C’s Ex. 187, 188. Using Ms. Carpenter’s calculation, the proposed penalty would be \$98,134 for Count 1.

Goodman argues that separate penalties should not be assessed for each tank, contests Complainant's assessment of "major" potential for harm and extent of deviation, and challenges Complainant's upward adjustments for environmental sensitivity, lack of cooperation and history of noncompliance.

Potential for Harm and Extent of Deviation

Complainant assessed both the potential for harm and extent of deviation as major and thereby obtained \$1,500 from the Penalty Policy matrix. Complainant added ten percent for the Civil Monetary Inflation Rule at 40 C.F.R. Part 19 ("Inflation Rule"), and multiplied by five for each of the five USTs at the station, yielding a matrix value of \$8,250.

As to potential for harm, Goodman points out Mr. Lamberson's testimony that it had the tanks drained in October and November 1999 so that they were "empty" as defined in 40 C.F.R. § 280.70(a). R's Brief at 27; Tr. 863-864. The evidence indicates that the level of product in the tanks remained constant from February 1998 until the tanks were drained. *See*, Tr. 193-194. Stick inventory was taken weekly or monthly during that time. Tr. 859-861; R's Ex. 48. Stick measurements taken on May 18, 1998 in each of the tanks were approximately 3 inches, 22 ½ inches, 29 inches, 29 ½ inches and 51 ½ inches of liquid, and the stick measurements recorded on Goodman's inventory records for 1998 and 1999, were consistently approximately zero inches, 24 inches, 29 inches, 29 inches, and 52 inches. C's Ex. 44; R's Ex. 48. Tightness testing of the USTs in August 1997 and September 1998 showed that the tanks and lines were tight. C's Ex. 46, 134. Therefore, the tanks were not leaking, so the failure to permanently close the UST system did not pose a serious threat to human health or the environment, Goodman asserts.

As to extent of deviation, Mr. McRae assessed this factor as "major" for failure to permanently close or upgrade a tank because a tank is either permanently closed or it is not, and that "[y]ou can't halfway close a tank." Tr. 417. Goodman points out that EPA did not determine if a release had in fact occurred, and contrasts EPA's proposed penalty in this case (\$98,914) with the penalty of only \$25,000 assessed in *V-1 Oil Company*, RCRA(9006) Appeal No. 99-1 (EAB, Feb. 25, 2000).¹² In response, Complainant asserts that Goodman has avoided conducting a site assessment for over three years, and that the last site assessment indicated contamination. C's Reply at 17; R's Ex. 56. Complainant asserts further that Goodman had its tanks in temporary closure for four years and still had not permanently closed the tanks at the time of the hearing in this matter. C's Reply at 18.

The contamination indicated in the 1994 site assessment was diesel fuel found at a depth of ten feet in one of three soil borings taken at the site, and Goodman asserted in a letter to the IDEQ that it has never sold diesel at that facility and that the contamination must therefore have migrated

¹² The EAB in *V-1 Oil* did not address the issues of extent of deviation, or of potential for harm under the Penalty Policy, because it affirmed the ALJ's penalty assessment using only the statutory penalty factors.

from off-site. R's Ex. 56. Mr. Conley testified that other businesses handled diesel fuel in the vicinity, and IDEQ never requested any follow-up action. Tr. 960-962. EPA has not taken soil or groundwater samples at the site. Tr. 199, 306.

In *Carroll Oil Company*, RCRA (9006) Appeal No. 01-02 (EAB, July 31, 2002), the EAB acknowledged the Penalty Policy's automatic ranking of violations of § 280.70(c) as having a "major" potential for harm, but, noting that it is not bound by Penalty Policies, reduced the potential for harm as "moderate" on the basis of evidence that the USTs contained a minimal amount of gasoline after the tanks were pumped out upon ending operations. *Carroll Oil*, slip op. at 46 and n. 34. In that case there were two 6,000-gallon tanks and one 8,000-gallon tank, and they contained visible amounts of gasoline, although most of the gasoline had been pumped out into drums and taken off-site. Slip op. at 8. In the present case, the Capitol station has five 4,000-gallon tanks, which include two sets of two manifolded tanks. There is no significant factual distinction in this case which would merit a departure from the EAB's reasoning in assessing a "moderate" potential for harm in *Carroll Oil* for the period in which Goodman's tanks were pumped out, *i.e.*, after November 1999. However, before they were pumped out, from the time the temporary closure period ended in February 1999, and until November 1999, four of the five tanks contained a moderate amount of gasoline. Although the evidence does not indicate that the tank were leaking, there is a major potential for harm from a release, given the volume of fuel in the tanks and the evidence that monitoring was done only weekly or monthly. Accordingly, the penalty must account for the period of the violation in which the potential for harm was "moderate" and the period in which the potential for harm was "major." Accordingly, a dollar value between the values for "major" and "moderate" potential for harm represents the potential for harm for Count 1.

As to "extent of deviation," EPA states that the objective of the permanent closure requirement is to identify and contain existing contamination and prevent future releases from USTs no longer in service. 53 Fed. Reg. 37082, 37181 (Sept. 23, 1988). There is neither case precedent nor evidence in the record that suggests a departure from the Penalty Policy's assessment of a "major" for failure to permanently close a temporarily closed UST. Therefore, the extent of deviation is deemed "major." C's Ex. 175, Appendix A.

Unit of Violation

The Penalty Policy (at Appendix A) provides that a separate penalty may be calculated for each tank ("per-tank"), or one penalty may be calculated for the facility ("per-facility"), for violations of Section 280.70(c). Mr. McRae chose to calculate separate penalties for each of the five tanks, on the basis that "you can separate the activity per tank," and because Goodman could choose to upgrade, close or cathodically protect each tank individually. Tr. 414- 416. Goodman points out EPA's treatment in *V-1 Oil* (at n. 2) of the failure to close two USTs as a single violation, and Mr. Conley's testimony that Goodman's tanks are permanently closed at a facility all at the same time, not separately. Tr. 992. Goodman also points out that the regulation, 40 C.F.R. § 280.70(c), requires permanent closure of a "UST system." In response, Complainant points to the regulatory definition of "UST system," which is "an underground storage tank, connected underground piping, underground ancillary equipment, and containment system" (40 C.F.R. § 280.12 (emphasis added))

and to the statute, Section 9006(d)(2) of RCRA, authorizing penalties on a per-tank, per violation, per day basis. Complainant states that the case developer in *V-1 Oil* assessed the penalty on a per-facility basis as an exercise of discretion.

Although the definition of “UST system” refers to “an underground storage tank” in the singular, the term “underground storage tank” is defined in 40 C.F.R. § 280.12 and in Section 9001(1) of RCRA as “any one or combination of tanks . . . that is used to contain an accumulation of regulated substances . . .” (emphasis added). EPA has stated in the preamble to the September 23, 1988 Final Rule, “Tanks that are simply manifolded together are considered as one UST system.” 53 Fed. Reg. 37082 (September 23, 1988). Therefore, at most, two violations may be assessed here, for the two sets of manifolded tanks at the Capitol station. In *Carroll Oil*, as well as in *V-1 Oil*, the EAB adopted EPA’s assessment of a single penalty although two or three separate tanks were at issue. Complainant has not presented any factual evidence or argument which compel a per-tank penalty assessment in this case. Accordingly, Count 1 is assessed as a single violation for the facility.

Under the Penalty Policy, the matrix value for one violation with a moderate potential for harm and major extent of deviation is \$750, and with a major potential for harm and major extent of deviation is \$1500. The appropriate dollar amount between those values, to represent the potential for harm and extent of deviation for Goodman’s failure to permanently close the USTs at the Capitol station, is \$1000.

Inflation Adjustment

Complainant adjusted the matrix value upward by ten percent under the Inflation Rule, 40 C.F.R. part 19, which provides for a ten percent increase in statutory maximum penalties for violations after January 30, 1997 to account for inflation, and under EPA’s guidance document, “Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule,” dated May 9, 1997 (“Inflation Guidance”). C’s Ex. 174, 187; Tr. 401, 416. The guidance document modifies all penalty policies “to increase the initial gravity component of the penalty calculation by 10%” for violations subject to the Inflation Rule. C’s Ex. 174, pp. 2-3. The ten percent increase is to be applied prior to any mitigation or adjustment factors. *Id.* p. 4. Accordingly, the \$1000 matrix value is increased upward by 10%.

Degree of Cooperation/noncooperation

Complainant increased the matrix value by ten percent to account for Goodman’s “degree of noncooperation,” for its alleged failure to readily provide information and for providing incomplete, inaccurate responses. Mr. McRae testified that he adjusted almost all of the violations upward by ten percent because Goodman was told, but failed, to monitor tanks every day of operation; Goodman would state that records were not available when EPA requested records; and that Goodman continually made mistakes as to ownership of tanks and facilities. Tr. 418. Goodman denies that it provided EPA with incomplete or inaccurate information regarding closure of the Capitol UST system, and asserts that it was cooperative during the inspections, supplying inventory

records. C's Ex. 45, 62.

Ms. Poston's and Mr. Sirs' testimony supports Goodman's assertion. Tr. 191, 219-220, 296-297, 301. Mr. McRae did not testify that Goodman was uncooperative with respect to the closure of tanks at the Capitol station. Goodman responded to EPA's July 9, 1999 information request with regard to the status of the Capitol USTs, stating that no fuel was being pumped and that all USTs are locked and monitored monthly, and supplying tank tightness testing records, and inventory records as requested in the letter. C's Ex. 130, 134, 135; Tr. 368. While Goodman stated in the letter that the tanks were not placed in temporary closure, Mr. McRae presumed it to mean that Goodman was "confused." C's Ex. 130, 133; Tr. 369. An increase in the penalty for degree of noncooperation is not warranted. However, because Goodman's conduct does not go "beyond what is minimally required to comply with the requirements that are closely related to the initial harm addressed", and "good faith efforts consist primarily of coming into compliance" (Penalty Policy at 18), no decrease in the penalty for "degree of cooperation" is warranted either.

Degree of Willfulness/Negligence

An upward adjustment of 30 percent was added for "degree of willfulness or negligence," based on Mr. McRae's testimony that Goodman had been warned prior to the 12 month period about the one year deadline for permanent closure or upgrade of temporarily closed USTs. Tr. 419. EPA's report for the May 18, 1998 inspection indicates that Goodman intended to upgrade the tanks. C's Ex. 44. However, the associated field citation only instructs Goodman to either maintain inventory control or drain the tanks and submit the invoice to EPA; it does not refer to all of the permanent closure requirements. C's Ex. 47. The Capitol facility was closed before the inspection, but as of the date of hearing, the tanks had not been permanently closed or upgraded; according to Mr. Conley, Goodman does not have the cash flow to remove the tanks until it sells some real estate or the facility is sold. Tr. 419-420, 1011, 1015, 1017. An increase of ten percent is deemed appropriate for Goodman's degree of willfulness or negligence.

History of Noncompliance

Complainant increased the penalty by 25 percent for Goodman's history of noncompliance, based on all of the field citations issued to Goodman, including its failures to comply with 40 C.F.R. §§ 280.40(a), 280.41(b)(2), 280.43(a), 280.44(a) and (b), 280.45, 280.70(a), and 280.93(a). Tr. 404. Field citations had been issued to Respondents for UST violations at the Capitol station and other facilities in 1991, 1992, 1993, and 1998, and Respondents corrected the violations and paid the penalties. Joint Ex. A ¶¶ 3, 4, 5, 7, 8; C's Ex. 31, 32, 33, 35 through 40, 47, 55, 60, 65, 69. Mr. McRae admitted there was no correlation of similarity between Count 1 and previous field citations. Tr. 431.

Goodman argues that history of noncompliance is not included as a penalty determination factor in the statute, and that field citations against Goodman may lack validity although penalties are paid, because payment may be a more cost effective alternative than contesting them. R's Brief at 38-39. Goodman argued that field citations from 1991 through 1993 were issued beyond the five

year statute of limitations, by EPA inspectors who did not testify at the hearing. Tr. 421. Goodman argues that the field citations were related to different types of violations, and points to Mr. Conley's testimony of numerous instances where Goodman has permanently closed UST systems. Tr. 421, 954-968; R's Ex. 49, 50, 51, 55, 56.

In response, Complainant asserts that the Penalty Policy provides for an increase even if the previous violation is not of the same regulation or at the same facility, including field citations. C's Reply at 19-20. Complainant cites to penalty assessments in cases under the Clean Air Act and Clean Water Act, where history of prior notices of violations were the basis for increased penalties. *Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 548-549 (EAB 1998)(history of "immediate compliance orders" indicates the party was not deterred by knowledge of the sanctions for noncompliance); *Student Public Interest Research Group of N.J. v. Hercules, Inc.*, 29 ERC 1417, 1422-23 (D.N.J. 1989)(past unpunished violations under Clean Water Act); *C.L. "Butch" Otter*, EPA Docket No. CWA-10-99-0202, slip op at 24-25 (ALJ, April 9, 2001)(prior cease and desist orders issued from Corps of Engineers).

Although "history of noncompliance" is not included as a penalty determination factor in the statute, the Consolidated Rules of Practice provide that the Presiding Judge "shall consider any civil penalty guidelines issued under the Act," 40 C.F.R. § 22.27(b). The EAB has emphasized the importance of utilizing penalty policies in adjudicating enforcement cases. *See, e.g., Carroll Oil, supra; M.A. Bruder and Sons, Inc.*, RCRA (3008) Appeal No. 01-04 (EAB, July 10, 2002). The Penalty Policy provides that "[p]revious violations of any environmental regulation are usually considered clear evidence that the violator was not deterred by previous interaction with enforcement staff and enforcement actions." C's Ex. 175 at 19. The factors to be considered in assessing the history of noncompliance are the number, seriousness, and duration of previous violations, similarity of previous violations, enforcement tools utilized, and the violator's correction of the problem. *Id.* The Penalty Policy states that "a 'prior violation' includes any act or omission for which an accountable enforcement action has occurred (e.g., an inspection that found a violation, a notice of violation . . . or a consent order)." *Id.* Prior field citations fit within the Penalty Policy's stated parameters and purposes of the "history of noncompliance" factor.

However, field citations should be given less weight than other enforcement tools utilized, particularly where they are remote in time, and where the violation alleged therein was corrected timely and the penalty paid. The field citations issued against Goodman will be given very little weight as to Count 1, particularly because the field citations did not allege tank closure violations. An increase of 5 percent is reasonable as to Count 1, to account for Goodman's history of noncompliance.

Environmental Sensitivity

Complainant assessed the level of environmental sensitivity as "high," yielding an "environmental sensitivity multiplier" of 2, based on evidence that five tanks contained fuel and were not upgraded, were located over a shallow aquifer of approximately 11 feet deep in the spring and 30 feet deep in the fall, and were within 1/4 mile of a public drinking water supply well, a city

park and a school, and the Boise River. Tr. 434-436; C's Ex. 161, 187. Mr. McRae explained that one of the major impacts of a UST leak is contamination going into the groundwater, and that in Boise, the shallow aquifer used for irrigation purposes, which could pump the contamination into the surface, or the petroleum could float over the groundwater and thereby spread out. Tr. 435. He explained that a well, and some rivers, would pull the contaminated groundwater toward it. Tr. 436. Goodman challenges the environmental sensitivity multiplier by asserting that there is no product left in the tanks, and that EPA did not show any actual or potential threat to groundwater, surface water, drinking water or area residents. R's Brief at 30.

The Penalty Policy provides that the "environmental sensitivity multiplier takes into account the adverse environmental effects that the violation may have had, given the sensitivity of the local area to damage posed by a potential or actual release," or the actual or potential impact that a release would have on the local environment and public health. C's Ex. 175 at 20. The factors to consider in determining the appropriate environmental sensitivity level include:

- The amount of petroleum . . . potentially or actually released . . . ;
- Toxicity of petroleum or hazardous substance released;
- Potential hazards presented by the release or potential release, such as explosions or other human health hazards;
- Geologic features of the site that may affect the extent of the release and may make remediation difficult;
- Actual or potential human or environmental receptors, including:
 - Likelihood that release may contaminate nearby river or stream;
 - Number of drinking water wells potentially affected;
 - Proximity to environmentally sensitive areas, such as wetlands; and
 - Proximity to sensitive populations, such as children (e.g. in schools).
 - Ecological or aesthetic value to environmentally sensitive areas.

Id.

The Penalty Policy describes as an example of a "low" environmental sensitivity a facility with one petroleum tank located in clay soil in a semi-residential area where all drinking water is supplied by municipal systems, and where little wildlife is expected to be affected. C's Ex. 175 at 20. An example of a "moderate" environmental sensitivity is where several tanks are in violation, site geology would allow for some movement of a plume of released substance, and several drinking water wells could have been affected. *Id.* An example of a "high" environmental sensitivity is where a number of tanks, or very large tanks, were involved, there were several potential receptors of the released substance through drinking water wells or contact with contaminated surface water, and the contamination would be difficult to remediate. *Id.*

The potential impact resulting from a release from petroleum USTs based on proximity to a city park and school are not self evident and were not adequately explained by Complainant (see, Tr. 436), and thus do not weigh significantly in determining the environmental sensitivity. Complainant has not shown evidence as to potential hazards, geologic features of the site other than

the aquifer, difficulty of remediation, and any ecological or aesthetic value to environmentally sensitive areas. Considering the number of tanks and volume of gasoline they contained from February 1999 to November 1999, the minimal volume of gasoline they contained thereafter, the shallow aquifer and 1/4 mile proximity to a public drinking water supply well and Boise River, the appropriate environmental sensitivity is between “low” and “moderate” and accordingly the multiplier is 1.25.

Days of Noncompliance

To account for the duration of the violation, Complainant multiplied the penalty by 3.5 as a “days of noncompliance multiplier,” based on 722 days of noncompliance, from February 9, 1999 to February 1, 2001. Goodman has not challenged this assessment, and the evidence does not suggest any shorter period of noncompliance; as of the date of hearing, Goodman had not permanently closed the tanks. Accordingly Complainant’s proposed multiplier of 3.5 is applied.

Economic Benefit

The economic benefit of Goodman’s noncompliance, for delayed costs, was calculated under the BEN model. The costs that Goodman should have incurred in 1999 to close the five tanks was based on the lowest bid from contractors that perform tank closures, according to Mr. McRae, at \$17,300. Tr. 409-410; C’s Ex. 170, 171, 188. The economic benefit of Goodman’s delay, from February 9, 1999 to December 31, 2001 (an estimated compliance date), in permanently closing or upgrading a temporarily closed UST system at the Capitol Exxon was calculated by Ms. Carpenter to be \$2,847. C’s Ex. 188. Although Goodman questioned Ms. Carpenter’s assumption of the start date of February 9, 1999, Goodman has not challenged her calculation. Tr. 633-634, 638. Indeed, Goodman has not shown that it has complied with Section 280.70(c) at the Capitol station, so there is no reason to reduce the duration of the noncompliance for purposes of calculating the economic benefit. Ms. Carpenter’s calculation for Goodman’s economic benefit of noncompliance is accepted as reasonable.

Penalty Calculation for Count 1

For Count 1, the value representing potential for harm and extent of deviation, adjusted upward by 10% under the Inflation Guidance, is \$1,100. Adjusting this value upward by 10 % for willfulness or negligence, and by 5% for history of noncompliance, and multiplying by 1.25 for environmental sensitivity and by 3.5 for days of noncompliance, yields a gravity-based penalty of \$5,469. This figure is added to the economic benefit figure of \$2,847, yielding a penalty of \$8,316.

Counts 2 through 6

The regulations in 40 C.F.R. part 280 subpart H require UST owners and operators to show evidence of financial responsibility to corrective action or third party liability, in amounts dependent on the activity, amount of petroleum handled, and number of USTs. 40 C.F.R. § 280.93. The regulations provide owners and operators a choice of several methods with which

they may meet the requirement, including self-insurance and state funds approved by EPA.

In the Order on Complainant's Motion for Partial Accelerated Decision, issued in this matter on August 22, 2001, Goodman was found liable for failure to comply with financial responsibility requirements of 40 C.F.R. § 280.93(a) for the Capitol, Collister, Homedale, Nampa and Weiser Exxon stations, as alleged in Counts 2, 3, 4, 5, and 6, respectively. For each of those violations, Complainant proposed a gravity-based penalty of \$18,743, and added to it economic benefit penalties according to the number of tanks at each facility. Goodman asserts that EPA overstated the seriousness of the violation and underestimated its good faith efforts to comply.

Potential for Harm and Extent of Deviation

For the violations of 40 C.F.R. § 280.93(a), Complainant assessed the potential for harm as moderate and the extent of deviation as major, in accordance with the Penalty Policy, Appendix A, yielding a \$750 matrix value from the Penalty Policy for each of the five facilities.

Mr. McRae explained that the potential for harm from this type of violation is moderate, and not low, because in the event of a spill, the "insurance is a key tool to alleviate it," as the cost of addressing a leaking UST "can be substantial depending in the area." Tr. 442-443.

Goodman asserts that it "had a strong record of closing its facilities in compliance with IDEQ standards and taking prompt action in response to any accidental releases," as indicated by Mr. Conley's testimony. R's Brief at 30; Tr. 954-968, 973-978, 1062; R's Ex. 49, 50, 51, 55, 56. Mr. Conley testified that Goodman has sufficient financial resources in real estate holdings to take corrective action in the event of an accidental release. Tr. 1008, 1062. Goodman had submitted to EPA a certification, dated July 28, 1998, signed by Steven Annis, Goodman's Secretary-Treasurer, stating that Goodman and its Subsidiary have a net worth in fee simple assets in excess of \$5 million. C's Ex. 66. Mr. Conley admitted that, other than that certification, Goodman had not ever submitted any documentation to EPA showing it met the financial responsibility requirements. Tr. 1054.

To meet the requirements for self-insurance under 40 C.F.R. § 280.95, the facility owner or operator, *inter alia*, "must have tangible net worth of at least \$10 million," and at least ten times the total applicable aggregate amount required by Section 280.93, based on the number of USTs, and the chief financial officer "must sign, within 120 days if the close of each financial reporting year . . . a letter worded exactly" as provided in section 280.95(d). 40 C.F.R. § 280.95(b)(1), (b)(2), (b)(3) and (d).

Goodman's testimony and evidence does not suggest any modification to the Penalty Policy's directive to assess financial responsibility violations as "major" deviation from the requirement and "moderate" potential for harm. The Penalty Policy directs the same assessments

whether the violation is failure to have insurance or merely failure to meet a requirement of insurance coverage, or using an unapproved mechanism to demonstrate financial responsibility. C's Ex. 175, Appendix A.

Degree of Cooperation/noncooperation, Degree of Willfulness/Negligence, History of Noncompliance

Complainant increased the matrix value by ten percent for "degree of cooperation or noncooperation," as it did for Count 1, for Goodman providing incomplete, inaccurate responses and not readily providing information. Ms. Poston responded to Mr. Annis' July 28, 1998 statement by letter dated September 4, 1998, asserting that his statement did not qualify as proper documentation under the requirements of 40 C.F.R. § 280.95. C's Ex. 69. The letter also indicated that a response from Goodman was expected by September 25, 1998. Goodman obtained Idaho Petroleum Storage Tank Fund Insurance ("state UST insurance") for the 16th and State station, covering it from March 19, 1999 to March 1, 2000. C's Ex. 88. However, Ms. Poston testified that she did not receive from Goodman a "Schedule A," the part of the state UST insurance record that lists the facilities covered, and that she tried to contact Goodman through "numerous phone calls" and facsimiles to make Goodman aware of the financial responsibility regulations. Tr. 186, 188; C's Ex. 70, 71. In its information request letter of July 9, 1999, EPA requested documentation to pass the self insurance test of 40 C.F.R. § 280.95, with respect to Capitol, Collister, Homedale, Nampa and Weiser stations. C's Ex. 130. In its response letter of July 30, 1999, Goodman simply stated that it was "adequately self-insured" and did not provide documentation. C's Ex. 133. The proposed ten percent increase for degree of noncooperation is deemed appropriate.

Complainant increased the matrix value by 30 percent for "degree of willfulness or negligence," because, according to Complainant, Goodman knew it needed insurance, stated it did not want to participate in the state UST insurance, and was told that it did not provide the information to be self insured. EPA sent letters to Goodman dated September 4, 1998, October 6, 1998, enclosing respectively, a copy of 40 C.F.R. § 280.95 and the preamble thereto, and stating that the self insurance must be in compliance with 40 C.F.R. § 280.95. C's Ex. 69, 131. Complainant characterizes the state UST insurance as "an easy mechanism" with which to comply. C's Brief at 20. At the hearing, Mr. Sirs described the requirements for obtaining the state UST insurance. He stated that such insurance requires documentation of leak detection, tightness tests, mechanical equipment function tests, a site inspection, and an evaluation "very, very similar" to a private insurance company. Tr. 325-326; see, C's Ex. 172. Mr. McRae testified that a UST owner is qualified for state UST insurance as long as the facility is in compliance with UST regulations. Tr. 442.

Mr. Conley testified to the negative experiences he had with private environmental insurance. He stated his belief that with environmental insurance "you spend more money fighting the insurance company to get them to handle a claim than it will cost you to go ahead and handle the claim yourself," that Goodman had a ten year fight with its private insurance carrier to get them to pay, and that "[t]hey overcharge us outrageously for insurance," with six month renewal periods

at which rates increase. Tr. 1004-1006. As to the state UST insurance, Mr. Conley testified that, “[t]here was a great amount of concern” because a marketer successfully sued the storage fund, and he questioned how the fund could operate without money. Tr. 1007, 1096-1097.

In *B & R Oil*, 8 E.A.D. 39, 1998 WL 830609 (EAB 1998), the EAB affirmed the penalty of \$60,000 assessed by the ALJ, which was calculated by the ALJ without relying upon the Penalty Policy, for B & R’s failure to comply with financial responsibility requirements for 38 facilities and approximately 138 USTs. B & R argued in mitigation of the proposed \$76,601 penalty (\$72,663 of which was the economic benefit component) that it had paid fees to a mandatory state UST excess liability fund (which B & R knew was not approved by EPA as meeting the financial responsibility requirements), and that it made attempts to obtain private insurance, but that it was very expensive and difficult to obtain adequate coverage. As in the case at hand, B & R was repeatedly informed of the financial responsibility requirements, knew it did not meet them, and made “less than diligent” efforts in trying to obtain private insurance. 8 E.A.D. at 56. Nevertheless, the ALJ reduced the total proposed penalty by about 21 percent, on the basis that private UST insurance is difficult to obtain and that B& R at least made some inquiries into it, and the EAB affirmed the reduction.

While Mr. Conley indicated that private UST insurance was expensive and did not easily handle claims, he did not establish that it was difficult to obtain. He acknowledged that state UST insurance was available at \$25 per tank annually (Tr. 1097; C’s Ex. 172), but neither stated that he attempted to obtain it for the five facilities at issue, nor explained why he did not or could not obtain it for them. An increase of 20% is warranted to account for Goodman’s degree of willfulness or negligence.

Complainant added an increase of 40 percent for Goodman’s history of noncompliance, for the same past violations as considered for Count 1. Mr. McRae pointed out that Goodman had a prior field citation for failure to comply with financial responsibility requirements. Tr. 439. Goodman was cited in May 1998 for failure to comply with financial responsibility requirements for the 16th and State station, and Goodman paid the penalty and obtained state UST insurance for that station effective March 19, 1999. C’s Ex. 55, 65, 73, 88. Because there was only one field citation against another facility, with which Goodman then complied, and Goodman had not been cited for financial responsibility violations in the other inspections or for other facilities, the penalty will be adjusted upward by only 5 %.

Environmental Sensitivity

Complainant assessed the level of environmental sensitivity as high for each count, and thus multiplied the adjusted matrix value by 2, because each facility had USTs which contained product, and the USTs were located over shallow aquifers, according to information Mr. McRae obtained from IDEQ and Water Resources. Tr. 434-435. The USTs were located near schools, public drinking water and groundwater supply wells, and rivers, canals or creeks, as evidenced by EPA maps. C’s Ex. 161, 162, 163, 168, 169; Tr. 433. The potential impact of a release based on the proximity of the USTs to schools was not made clear at the hearing, so this fact does not weigh significantly into the determination of environmental sensitivity. Complainant did not present

evidence as to potential hazards presented by a release, geologic features of the sites, difficulty of remediation, or ecological or aesthetic value to environmentally sensitive areas. Mr. McRae testified, “The impact of an underground storage tank going past a half mile is very unlikely.” Tr. 434.

For Count 2, as with Count 1, the environmental sensitivity multiplier for the Capitol Exxon is 1.25. For Count 3, the Collister Exxon station, Complainant’s uncontested testimony and evidence shows that the tanks are located over an aquifer 14 feet deep, 0.2 to 0.3 miles from four public groundwater supply wells, 0.3 to 0.4 miles from three other public groundwater supply wells, 0.4 miles from the Boise River, and a canal runs adjacent (approximately 0.4 miles) to the facility. C’s Ex. 163, 187. Based on this evidence, the level of environmental sensitivity is “moderate” and accordingly the multiplier is 1.5 for Count 3.

For the Homedale Exxon station, Complainant’s uncontested evidence shows that the tanks are located over an aquifer 15 feet deep, 0.1 mile from two public groundwater supply wells, 0.2 miles and 0.4 miles from two other public groundwater supply wells, and 0.5 miles from the Snake River. C’s Ex. 164, 187. Based on this evidence, the level of environmental sensitivity is “moderate” and the multiplier is 1.5 for Count 4.

For the Nampa Exxon station, based on Complainant’s uncontested evidence that the tanks are located on an aquifer approximately 20 feet deep, 0.3 to 0.5 miles from three Nampa City public groundwater supply wells (C’s Ex. 168, 187), the level of environmental sensitivity is between “low” and “moderate,” and the multiplier for Count 5 is 1.25.

For the Weiser Exxon, based on Complainant’s uncontested evidence that the tanks are located on an aquifer approximately 15 feet deep, 1/4 mile from a creek which flows for another 1/4 mile and enters the Weiser River, which in turn flows 1/2 mile and enters the Snake River, which is a half mile from the USTs. C’s Ex. 169, 187. A public surface water supply intake is located at the junction of the Weiser and Snake Rivers. *Id.* Mr. McRae admitted he did not know the groundwater gradient or direction, and that he did not know the likelihood that a release could make its way to the city’s drinking water supply. Tr. 547-548. Mr. Conley testified that topographical maps and the Department of Water Resources informed him that the groundwater gradient from the Weiser tanks did not flow in the direction of the city’s water supply. Tr. 993-994, 1087. Considering the testimony and evidence, the level of environmental sensitivity is “moderate” and the multiplier is 1.5 for Count 6.

Days of Noncompliance

Complainant multiplied the matrix value by 6.5 for the days of noncompliance, namely five years. Mr. McRae chose April 26, 1991 as the initial date of the requirement. Tr. 439; C’s Ex. 187.

The regulations require UST owners which are petroleum marketing firms owning 13 to 99 USTs at more than one facility to be in compliance with financial responsibility requirements by April 26, 1991. 40 C.F.R. § 280.91. Mr. McRae testified that Goodman is still not in compliance with the financial responsibility requirements, but he just used a five year period of noncompliance due to the five year statute of limitations. Tr. 439-440. Although some tanks at issue, such as those at the Capitol station, may have been drained at some point, Goodman was required to maintain financial responsibility until the tank has been properly closed. 40 C.F.R. § 280.113. There was at least a five year period, starting from April 26, 1991, in which Goodman was not in compliance with the financial responsibility requirements with respect to each of the five facilities at issue. Complainant's proposed days of noncompliance multiplier is deemed appropriate.

Economic Benefit

The economic benefit component was calculated by Ms. Carpenter as \$810 for the Capitol station, \$486 for the Collister and Homedale stations, and \$648 for the Nampa and Weiser stations. Representing the costs Goodman avoided by its noncompliance, these figures were calculated under the computer BEN model methodology based on the cost of \$25 per tank per year for the least expensive type of insurance, under the state UST insurance, a duration of noncompliance from 1995 through 2001, based on an assumed compliance (December 31, 2001), and the number of USTs at each station: five at Capitol, three at Collister and Homedale, and four (including one 500 gallon tank) at Nampa and at Weiser. Tr. 440-441. Although Goodman questioned Ms. Carpenter at the hearing as to the five-year statute of limitations (Tr. 634), Goodman did not contest the imposition of economic benefit penalties or the calculations thereof, perhaps realizing that the statute of limitations, 28 U.S.C. § 2462, runs from the last day of a continuing offense. *Newell Recycling Co. v. U.S. EPA*, 231 F.3d 204, 206 (5th Cir. 2000). The state UST insurance policy does not indicate that manifolded tanks are insured as one tank. C's Ex. 172. Ms. Carpenter's calculations of economic benefit for Counts 2 through 6 are deemed reasonable, and will be assessed.

Penalty Calculation for Counts 2 through 6

For each count, the matrix value of \$750 is increased by 10% for degree of noncooperation, 20% for degree of willfulness or negligence, and 5 % for history of violations. The adjusted matrix value is multiplied by 6.5 for days of noncompliance.

Multiplying by the assessed levels of environmental sensitivity, and adding the penalties for economic benefit of noncompliance, for failing to comply with financial responsibility requirements for the Capitol station, as alleged in Count 2, the penalty is \$9,036; for the Collister station, as alleged in Count 3, the penalty is \$10,357; for the Homedale station, as alleged in Count 4, the penalty is \$10,357; for the Nampa station, as alleged in Count 5, the penalty is \$8,874; and for the Weiser station, as alleged in Count 6, the penalty is \$10,519.

Inventory Control Violations: Counts 7 through 14

For each of the inventory control violations, alleged in Counts 7 through 14, Complainant

assessed the potential for harm and extent of deviation as major, resulting in a matrix value of \$1,500, increased it by ten percent under the Inflation Rule, and multiplied it by the number of USTs at each facility that were subject to the inventory control requirements of 40 C.F.R. § 280.43(a).¹³

Respondents argue that all tank and line tightness tests, and Mean Time to Corrosion Failure (MTCF) and Robo-Cam evaluations, demonstrate that the tanks and lines were sound and therefore that there was little if any risk of harm for Counts 7 through 14, and that Respondents complied with part of the applicable requirement. Respondents assert that EPA recognizes that these tests are more accurate than inventory control and that the MTCF and Robo-Cam evaluations are relevant to show that its USTs have in fact been upgraded, so annual tank tightness testing is not required under 40 C.F.R. § 280.41(a)(2). Rs' Reply at 24-25, 31. Respondents characterize the violations of Counts 7 through 9 and 11 through 14 as merely failure to maintain every record of release detection monitoring, which under the Penalty Policy is assessed a minor potential for harm and moderate extent of deviation, on a per-facility basis. *Id.*; Rs' Reply at 24.

Complainant counters that tank tightness testing is insufficient alone as release detection because it is done infrequently. The violations were more than just recordkeeping violations, and were per se monitoring violations, as Respondents intentionally ignored certain inventory control requirements and negligently violated others, Complainant maintains. Respondents' employees were inadequately trained and performed inventory control incorrectly, Complainant adds. C's Reply at 21.

The Penalty Policy provides for assessment of a "moderate" extent of deviation and "minor" potential for harm, with a per-facility unit of violation, for a failure to maintain every record of release detection monitoring, in violation of 40 C.F.R. § 280.45. Respondents were not charged with and are not held liable for mere failure to maintain inventory control records as required by § 280.45, that were properly completed under § 280.43(a). The monthly inventory control data that Respondents claim were missing, or which are absent from the record without an explanation, are: (1) for June and July 1999 at the 16th & State Exxon, at issue in Count 7; (2) for June 1999 at the Homedale Exxon, at issue in Count 9; (3) for the "Plus" tank at the Bulk Plant for December 1998, and January, February, March, April and July 1999, at issue in Count 11; and (4) for October and November 1999 for Mountain Mart # 2, at issue in Count 12. Thus, Complainant showed *prima facie* that Respondents failed to conduct inventory control at those facilities for those months as required by 40 C.F.R. § 280.43(a). Respondents have not rebutted Complainant's case with sufficient evidence that the inventory control was timely completed. The testimony of Mr. Sorbel and Mr. Lamberson that the records were lost or thrown away, and the undated reconstructed inventory control records (Rs' Ex. 27, 29), were not supported by any documentary evidence of contemporaneous inventory control data. Although some contemporaneous station records of daily

¹³ Tanks with a capacity of 550 gallons or less are not required to be monitored by inventory control requirements of 40 C.F.R. § 280.43(a); they may be monitored by weekly tank gauging under § 280.43(b). 40 C.F.R. § 280.41(a)(3).

inventory data for the “Plus” tank at the Bulk Plant was proffered into evidence, it was seriously incomplete. R’s Ex. 7.

Where Respondents proffered contemporaneous documents showing substantial daily inventory control data, upon which Respondents claim that inventory reconciliation calculations were performed but were thrown away, the potential for harm is not “minor,” because Respondents

failed to prove by a preponderance of the evidence that such calculations were made monthly, as required by 40 C.F.R. § 280.43, within a reasonable time after the end of each month.

Accordingly, potential for harm and extent of deviation for Counts 7 through 14 are not assessed as mere recordkeeping violations, and are not assessed on a per-facility basis.

Count 7

Complainant’s proposed penalty of \$18,168 for Count 7 was based upon incomplete inventory control records for April 1999, and lack of inventory control records for June and July 1999 for the 16th and State Exxon, for two USTs and 91 days of noncompliance, with upward adjustments for degree of noncooperation and of willfulness or negligence, a history of noncompliance, a high level of environmental sensitivity, and economic benefit of noncompliance. C’s Ex. 190; Tr. 453.

Potential for Harm, Extent of Deviation, Inflation Adjustment

As discussed above, Goodman’s inventory control forms for April 1999 show illegible, absent, or incomplete daily data for a total of 15 days for the Supreme tank and for a total of ten days for the Regular tank. C’s Ex. 146, Rs’ Ex. 1. Mr. Lamberson testified that he performed inventory reconciliation in the first part of May 1999. Tr. 823. Goodman stipulated that it could not locate any inventory control records for June and July 1999, but Mr. Lamberson testified that he reconstructed the inventory control records from available data and conducted the inventory reconciliation in the third week of August 1999. Tr. 818-824; Rs’ Ex. 27. The only documentation evidencing reconciliation for April, June and July 1999 are reconstructed inventory data on undated documents attached to his April 13, 2001 memorandum. Rs’ Ex. 27. The reconstructed inventory data do not include data for holidays and weekends.

The Penalty Policy directs that the potential for harm and extent of deviation are both “major” for a failure to monitor tanks at least every 30 days, in violation of 40 C.F.R. § 280.41(a). C’s Ex. 175, Appendix A. The applicable requirement of Section 280.41(a) is to monitor at least every 30 days for releases, using monthly inventory control and tank tightness testing at least every five years. Weighing the credibility of Mr. Lamberson’s testimony, the incomplete data for April, the lack of any contemporaneous inventory control records for June and July, the lack of records for water level in June and July, and the absence of data for weekends and

holidays in reconstructed records, the potential for harm is “major” and the extent of deviation is also “major.” Applying the Inflation Guidance, the matrix value is adjusted upward by 10% to \$1,650.

The Penalty Policy directs that a failure to monitor USTs monthly is assessed on a per-tank basis. C’s Ex. 175, Appendix A. Two of the tanks, containing Supreme gasoline, were manifolded together. C’s Ex. 86, 130; Tr. 254-255, 948. Inventory control is performed on manifolded tanks as one unit. C’s Ex. 133; Tr. 453. Therefore, the matrix value is multiplied by two, to account for the manifolded Supreme tanks and the Regular gasoline tank.

Adjustments

Complainant increased the matrix value by ten percent for degree of noncooperation, because Goodman provided incomplete, inaccurate responses and did not readily provide information, according to Complainant. However, Goodman submitted the inventory control records for the 16th and State Exxon along with a large volume of other documents, on December 17, 1999, which were requested in EPA’s information request dated November 3, 1999. Tr. 381-382, 383; C’s Ex. 142, 143, 146. Goodman’s good faith efforts to comply primarily consist of coming into compliance with the inventory control requirements. The penalty will not be adjusted for the degree of cooperation or noncooperation.

Complainant also increased the penalty by 30 percent for degree of willfulness or negligence because the incompleteness of Goodman’s monthly inventory monitoring records had been pointed out in previous inspections. Tr. 451. Mr. Lamberson’s testimony as to his attempts to assist and supervise the new station manager in recording inventory control data, is taken into consideration. Tr. 815-818, 822-823; Rs’ Ex. 27. However, he knew or should have known the requirement to maintain inventory reconciliation records, and for the complete lack of contemporaneous inventory control data for June and July 1999, the proposed upward adjustment of thirty percent is deemed appropriate.

For Goodman’s history of noncompliance, Complainant increased the penalty by 40 percent based on the previous noncompliance it considered as to Count 1. EPA had cited Goodman’s other stations, including 16th and State, for deficiencies in inventory control records in 1991, 1993, and 1998, for which Goodman paid penalties. C’s Ex. 31, 40, 42, 47, 55, 60, 65. The Penalty Policy provides that the penalty should be increased for history of noncompliance unless the current violation was caused by factors entirely out of control of the violator. Mr. Lamberson had some control over the violations, and certainly had control over the documentation of inventory reconciliation. Accordingly, the penalty will be increased by twenty percent to account for history of noncompliance.

Complainant multiplied the adjusted matrix value by two for a high level of environmental sensitivity, based on three USTs containing product over a shallow aquifer of 15 feet, proximity of 0.3 miles to schools and proximity of 0.4 miles to a public groundwater well, and a canal adjacent to the property. C’s Ex. 162, 187. These facts are uncontested. As stated above, the potential

impact of a release based on the proximity of the USTs to schools is not self evident and was not developed at the hearing, so this fact does not weigh heavily into the determination of environmental sensitivity. The potential impact of a release on a shallow aquifer, public well and canal, however, may be significant. Complainant did not present evidence as to potential hazards presented by a release, geologic features of the site, difficulty of remediation, or ecological or aesthetic value to environmentally sensitive areas. Considering the evidence in light of the Penalty Policy's guidance for determining environmental sensitivity, and the size and number of tanks and product volume, the environmental sensitivity multiplier is assessed as "moderate," or 1.5. C's Ex. 175 p. 20.

For the duration of noncompliance, 91 days, Complainant multiplied the adjusted matrix value by 1.5. Goodman, however, recorded daily inventory data for about half of the month of April 1999, so the duration of the violation is less than 90 days and the days of noncompliance multiplier is 1.

Economic Benefit

The economic benefit of noncompliance component was calculated by Ms. Carpenter as \$412, using the BEN formula. C's Ex. 188. This component was based on a \$2.50 per day cost of avoiding taking stick inventory for each of the three USTs for eight days in April plus 61 days in June and July 1999. *Id.* The assumption behind this calculation is that Goodman would incur an additional expense, to pay for an employee's time in wages to take stick readings on weekends. Example 1 in the Penalty Policy calculates an economic benefit for a gas station as including an avoided expenditure of \$2.50 per day as the estimated cost for labor needed to conduct daily inventory control, based on a half hour labor at \$5.00 per hour. C's Ex. 175 at C-2.

The economic benefit will be adjusted to account for two USTs at issue rather than three. Goodman took stick readings of both manifolded tanks and then determined the inventory control based on the combined number, so Goodman in essence monitored the manifolded tanks together as one tank. Tr. 453; C's Ex. 133. The economic benefit of Goodman's failure to monitor two USTs for the time period at issue is \$275.

Penalty calculation for Count 7

The dollar value derived from the matrix, accounting for the potential for harm and extent of deviation, and adjusted upward by 10% under the Inflation Guidance is \$1,650. This value is multiplied by two for the two USTs, and adjusted upward by 30% for degree of willfulness or negligence and by 20 % for history of noncompliance, and multiplied by 1.5 for the environmental sensitivity factor. Adding \$275 for the economic benefit of noncompliance, the penalty for Count 7 is \$7,700.

Count 8

For Goodman's failure to conduct monthly inventory control at the Collister station for the months of January through March 1999, Complainant proposes a penalty of \$11,880. Tr. 455-456.

As with Count 7, the potential for harm and extent of deviation were considered by Complainant to be major, resulting in the same matrix value, multiplied by two to account for each of the two USTs to monitor. C's Ex. 191; Tr. 452-453. The evidence shows that Goodman recorded and reconciled inventory each operating day, except for two days in February 1999, but that the inventory control forms did not include inventory reconciliation calculations for the month. C's Ex. 149; Rs' Ex. 2. As concluded above, a preponderance of the evidence, including the testimony of Mr. Lamberson, and the undated summary of inventory control records and reconciliation calculations presented by Goodman, shows that monthly inventory reconciliation was not performed within a reasonable time following each month of January, February and March 1999. Tr. 828; R's Ex. 14, 28. However, the daily inventory reconciliation, "over or short," was recorded on the inventory control forms, which would alert Goodman to a large or catastrophic leak, but not to a slow leak. *Id.*; Tr. 459, 617. Mr. Lamberson's testimony indicates that he reviewed the tank inventory for February sometime in March. Tr. 829. The two days of missing data does not impact significantly the potential for harm or extent of deviation. Weighing the testimony and evidence, the potential for harm from Goodman's failure to timely perform the monthly inventory reconciliation for the three months at issue is moderate, and the extent of deviation is also moderate, so the matrix value is \$500.

Complainant's proposed adjustments were the same as those for Count 7. Complainant increased the matrix value by ten percent for degree of noncooperation, on the basis that Goodman allegedly provided incomplete, inaccurate responses and did not readily provide information. However, Goodman submitted the inventory control records for the Collister Exxon on December 17, 1999, requested in EPA's information request dated November 3, 1999. Tr. 381-382; C's Ex. 142, 143, 149. No adjustment is made for degree of cooperation or noncooperation.

Complainant proposed an increase of 30 percent for degree of willfulness or negligence, considering that Goodman did not reconcile inventory control records when it has done so in the past, and that in the months at issue in this count, a leak was possible. C's Ex. 187. Mr. Lamberson knew or should have known the requirement to maintain monthly inventory reconciliation records and the importance of timely monthly reconciliation. An upward adjustment of ten percent reflects Goodman's degree of willfulness or negligence.

Complainant proposed a 40 percent increase for history of noncompliance, because EPA had cited Goodman's other stations for deficiencies in inventory control records in 1991, 1993, and 1998, for which Goodman paid penalties. C's Ex. 31, 40, 42, 47, 55, 60, 65. Mr. Lamberson had control over the inventory reconciliation of these facilities as well as the Collister station. Tr. 828. Accordingly, the penalty will be increased by 20% to account for Goodman's history of noncompliance.

The appropriate environmental sensitivity multiplier for the Collister station, as concluded

above as to Count 3, is 1.5. The “days of noncompliance multiplier” was properly assessed by Complainant as one. No economic benefit penalty was proposed or will be assessed.

In sum, the matrix value of \$500, adjusted upward by 10% under the Inflation Guidance, is \$550. This number is doubled to account for the two tanks, and adjusted upward by 10% for degree of willfulness or negligence and by 20% for history of noncompliance, and multiplied by 1.5 for the environmental sensitivity. Accordingly, the penalty for Count 8 is \$2,145.

Count 9

For Goodman’s failure to monitor USTs at the Homedale station each month from December 1998 through November 1999, Complainant proposed a penalty of \$44,550, based on the same matrix value and adjustments as those for Counts 7 and 8, and for three USTs. C’s Ex. 187; Tr. 459-410.

As discussed above, Goodman’s inventory control forms for the Homedale station do not include daily data for weekends and holidays, and do not include any inventory records for June 1999. C’s Ex. 152; R’s Ex. 3. The inventory forms for December 1998 through May 1999 do not include inventory reconciliation figures. *Id.* Mr. Lamberson’s testimony and narrative does not specifically address monthly inventory reconciliation for the months of December 1998 through June 1999, and it certainly does not establish that he conducted inventory reconciliation within thirty days of the end of each month. Tr. 782-784, 832-833; Rs’ Ex. 29. As concluded above, the lack of any contemporaneous inventory control records for June 1999 suggests that no inventory control was conducted for that month. The testimony and evidence indicate that monthly inventory reconciliation was not performed within thirty days after each month of July through October 1999. *See*, Tr. 381-382, 832-834; C’s Ex. 143, 152; Rs’ Ex. 29. Due to Goodman’s failure to monitor inventory on weekends and holidays, Goodman would allow major or catastrophic leaks to go undetected for two or three days, and a failure to monitor inventory for the month of June 1999 would allow a catastrophic leak to go undetected for over a month. Tr. 365-366. Goodman’s failure to perform inventory reconciliation within a reasonable time after the end of the month would allow slow leaks to go undetected for more than two months. Weighing the evidence and Mr. Lamberson’s, Ms. Poston’s and Mr. McRae’s testimony, the potential for harm is “major” and the extent of deviation is “moderate.” The matrix value is \$1,000, adjusted to \$1,100 under the Inflation Guidance.

Similar to Counts 7 and 8, Complainant increased the matrix value by ten percent for degree of noncooperation, on the basis that Goodman allegedly provided incomplete, inaccurate responses and did not readily provide information. However, Goodman submitted the inventory control records for the Homedale Exxon on December 17, 1999, requested in EPA’s information request dated November 3, 1999. Tr. 381-382; C’s Ex. 142, 143, 152. Therefore no adjustment is made for degree of cooperation or noncooperation.

As to degree of willfulness or negligence, Complainant commented that Goodman was told

in previous inspections to reconcile inventory each month and take stick inventory on weekends. C's Ex. 187. Indeed, in a letter to Mr. Conley, dated September 6, 1995, EPA instructed him that proper inventory control requires "**daily** stick reading," and enclosed guidance manuals on inventory control. C's Ex. 42. The degree of Goodman's negligence or willfulness as to the violation for Count 9 is 10%.

For Goodman's history of noncompliance with inventory reconciliation, an increase of 20% is warranted, on the same basis as that for Counts 7 and 8.

The environmental sensitivity for the Homedale station, as concluded above for Count 4, is 1.5. For the duration of noncompliance, Complainant properly multiplied the penalty by 2.5, to account for 271 to 365 days of noncompliance. No economic benefit component was proposed or will be added.

In sum, the matrix value of \$1,000 is adjusted for inflation to \$1,100 and multiplied by three for the number of USTs required to be monitored. The adjustments of 10% for degree of willfulness or negligence and 20% for history of violations are added, and the result is multiplied by 1.5 for environmental sensitivity and by 2.5 for days of noncompliance. The resulting penalty for Count 9 is \$16,087.

Count 10

For Goodman Lewiston's failure to properly conduct inventory control or assure that the station operator had done so, for December 1998 through March 1999 for the three USTs at Tiger Mart #5, Complainant proposed a penalty of \$8,045.

Respondents emphasize the minimal amount of product remaining in the tanks during the time at issue, due to the tanks having been pumped out by the system dispensers. Rs' Brief at 32. Under the same rationale as applied in *Carroll Oil, supra*, the potential for harm is assessed as "moderate." The extent of deviation is major, as there is no evidence that the inventory of the tanks was being monitored. The appropriate value from the matrix is \$750, and is adjusted upward under the Inflation Guidance to \$825.

Complainant made no adjustments, and no adjustments are warranted for cooperation/noncooperation, degree of willfulness or negligence, or for history of noncompliance. Complainant proposed that the level of environmental sensitivity is low, resulting in an "environmental sensitivity multiplier" of one, on the basis that the aquifer under the tanks is at a depth of 300 feet and the tanks are located one mile from a public groundwater supply well and a half mile from schools. Complainant's assessment of environmental sensitivity is reasonable and is adopted.

Complainant calculated the duration of the violation to be 121 days, and thus multiplied the gravity based component by 1.5. Respondents claim that is excessive, when taking stick readings once per month for four months would have been sufficient. Respondents' point is well taken, and Complainant concedes that stick inventory was only required once a month. C's Brief at 24. The tanks were not in operation, so inventory control requirements of 40 C.F.R. § 280.43(a)(1), (3), (4) and (5) did not apply; volume inputs, outputs and stick readings were not required to be recorded daily; only monthly product inventory control was required. Assessing a penalty reflective of a violation occurring every day for 121 days is not equitable where Goodman Lewiston was required to perform inventory control only once per month. Accordingly, the appropriate days-of-noncompliance multiplier is 1.

The economic benefit of Goodman Lewiston's noncompliance was calculated by Ms. Carpenter under the BEN model to be \$747, based on avoided costs of \$2.50 per tank per day, for three tanks over 121 days. C's Ex. 188. However, the noncompliance is not deemed to be a daily violation for 121 days. For the four days (once per month) that Goodman Lewiston was required to monitor the tanks, the economic benefit is *de minimis*.

In sum, the penalty for Count 10 is \$825, multiplied by three for the number of USTs, resulting in a penalty of \$2,475.

Count 11

For Goodman Lewiston's failure to use a system of inventory control which can detect a release of one percent of flow-through plus 130 gallons, as required by 40 C.F.R. § 280.43(a), on a monthly basis from December 1998 through November 1999 for the Bulk Plant, Complainant proposed a penalty of \$46,200. Complainant stated in its penalty calculation worksheets that there were no records of compliance for monthly monitoring for that time period. C's Ex. 187.

For one of the four tanks, the "Plus" tank, Goodman Lewiston documented daily and monthly inventory control data for May, June, and August through November 1999, including monthly net loss or gain and total gallons pumped. Rs' Ex 7. As concluded above, from that data, the inventory reconciliation easily can be computed mentally, and Mr. Sorbel's testimony is credited that he computed monthly reconciliation within the first three days after the end of the month. Tr. 682, 685-686, 694-695, 760. However, a preponderance of the evidence shows that Goodman Lewiston did not conduct monthly inventory control for the other months at issue, as there are no monthly data for December 1998, and January, February, March, April and July 1999, and no plausible explanation of such absence of data. Rs' Ex. 7.

The daily inventory control records for the "Plus" tank include a daily calculation of "net/loss," but as Ms. Poston testified, Goodman Lewiston's method of calculating by using the previous day's book inventory results in error being built in each day. Tr. 170-172. The daily monitoring may detect a catastrophic leak, but perhaps not as quickly or accurately as a proper daily "over or short" calculation. Furthermore, Goodman Lewiston did not record stick readings each operating day. From December 1998 through November 1999, the daily handwritten inventory

forms show no stick inventory recorded an average of about 8 days per month, and, for those days, the stick (“actual”) inventory appearing on the daily computer forms merely repeats the prior day’s stick reading. Rs’ Ex. 7.

Considering the above, regarding the “Plus” tank, the potential for harm for such deficiencies in daily inventory data, and for failure to perform monthly inventory control for December 1998, and January, February, March, April, and July 1999, is “major.” Because Goodman Lewiston did record daily inventory data most days of the month, and conducted monthly inventory control for the Plus tank for half of the year, the extent of deviation is between “moderate” and “major,” resulting in a gravity based penalty of \$1,300.

Complainant multiplied the matrix value by four to account for the four USTs at the facility. Mr. Sorbel’s testimony indicates that only one UST was operating during the time at issue. Rs’ Brief at 32. Complainant does not dispute this assertion, but argues that inventory control was required to be conducted at least once a month on the other three USTs. C’s Brief at 23-24; C’s Reply at 22. Neither Mr. Sorbel’s testimony nor any documents in evidence indicate the level of fuel in the tanks, or whether they were empty, during the time period in question. Mr. Sorbel’s testimony that stick readings were taken of all of the tanks, and that he reconciles inventory of all of the tanks, is not credible with regard to these three USTs, where there is a complete absence of inventory control documentation. Moreover, Mr. Sorbel’s stated reason for performing inventory control— that he does not want to lose product, money or his livelihood, or clean up a spill -- is not as persuasive with regard to tanks which are not in operation. Respondents do not claim that the three tanks were empty. The potential for harm and extent of deviation with regard to Goodman Lewiston’s failure to monitor monthly the three other USTs at the Bulk Plant are “major,” so the matrix value of \$1,500 will apply to these three USTs.

Complainant increased the matrix amount by 40 percent for Goodman’s history of violations, for the same prior citations as considered for Count 1. Respondents argue that Goodman Lewiston had no history of noncompliance. Rs’ Brief at 32. Complainant maintains that a field citation was issued in 1992 to Goodman Lewiston for failure to provide a leak detection method and to conduct line testing and monitoring, but Respondents point out that it did not concern one of the facilities at issue in this proceeding, and that it was promptly resolved. C’s Reply at 22; Rs’ Reply at 25; C’s Ex. 34, 35. To reflect this prior citation, the gravity based penalties will be increased by ten percent. No other violator-specific adjustments were proposed by Complainant or will be assessed herein.

Complainant deemed the level of environmental sensitivity to be high, based on four tanks holding product being located over a shallow aquifer of approximately ten feet, and 0.05 miles from the Snake River. C’s Ex. 166, 187. Mr. McRae testified that the facility is located on one side of a roadway and that there is a small strip of land between the roadway and the river. Tr. 463. He testified that if there was a leak, there is a strong likelihood that groundwater would be impacted or that the contamination would enter the river. *Id.* Considering these facts and testimony, and the lack

of any additional evidence as to the environmental sensitivity factors, the level of environmental sensitivity is between moderate and high, and the appropriate multiplier is 1.75.

Complainant considered the duration of the violation to be one year, and thus applied a multiplier of 2.5. This is appropriate to apply in regard to the “Plus” tank. However, as noted above in regard to Count 10, tanks that were not in operation were only required to be monitored once per month for inventory control; the requirements of 40 C.F.R. § 280.43(a)(1), (3), (4) and (5) did not apply. Assessing a penalty reflective of a violation occurring every day for a year is not equitable where Goodman Lewiston was required to perform inventory control for a total of twelve days in one year. Accordingly, the appropriate days-of-noncompliance multiplier for three of the USTs at the Bulk Plant is 1.

No economic benefit of Goodman Lewiston’s noncompliance was proposed by Complainant or will be assessed here.

In sum, the gravity based value of \$1,300 for the “Plus” UST is adjusted upward to \$1,430 under the Inflation Guidance. The matrix value for the other USTs is \$1,500, adjusted to \$1,650 for inflation, and multiplied by three to account for the three USTs. These values are adjusted upward by ten percent for the history of violations, and multiplied by 1.75 for environmental sensitivity. The penalty as to the “Plus” tank is multiplied by 2.5 for the one-year duration of the violation. The

penalty for the violation with regard to the “Plus” tank is \$6,882. The penalty for the violations with regard to the other three USTs is \$9,529. The total penalty for Count 11 is \$16,410.

Count 12

For Goodman Lewiston’s failure to conduct monthly inventory control to detect a release of one percent of flow-through plus 130 gallons, for two USTs at Mountain Mart # 2 from December 1998 through November 1999, Complainant proposed a penalty of \$17,325.

Goodman Lewiston recorded daily inventory data, but stick inventory was not recorded each operating day; stick inventory data for several days per month are missing. Rs’ Ex. 8. Similar to the data recorded for the Bulk Plant, the daily reconciliation is compromised by use of the previous day’s book inventory to calculate the daily “net/loss.” As concluded above, a preponderance of the evidence shows that Goodman Lewiston failed to conduct monthly inventory reconciliation from December 1998 to November 1999. For such incomplete, inaccurate daily data, and the lack of monthly inventory reconciliation, the potential for harm was properly assessed by Complainant as “major.” The extent of deviation is slightly less than “major,” and the value interpolated from the matrix is \$1,400, adjusted upward by ten percent under the Inflation Guidance to \$1,540. To account for the two USTs at issue, this value is multiplied by two.

Complainant increased the penalty by 40 percent for the history of noncompliance, but did not make other violator-specific adjustments. Similar to Count 11, the one field citation against another Goodman Lewiston facility for failure to provide release detection warrants an increase of ten percent, and no other violator-specific adjustments are warranted.

Complainant assessed the level of environmental sensitivity as moderate, based upon the depth of the underlying aquifer at 20 feet, the location of the two tanks at 0.3 miles from a drainage, and 1.5 miles from a creek, and the location of the facility in a highly populated area. C's Ex. 167, 187. There is no evidence as to any harm to human health based on an underground leak of petroleum from a UST occurring in a densely populated area. Based on the evidence presented, and lack of further evidence as to environmental sensitivity factors, the level of environmental sensitivity is "low," and the appropriate multiplier is one.

For the one year duration of noncompliance, Complainant properly multiplied the penalty by 2.5. No penalty representing an economic benefit of noncompliance was proposed or will be added.

In sum, the base penalty is \$1,400, increased by ten percent for inflation, doubled to account for two USTs, increased by 10% for history of noncompliance, and multiplied by 2.5 for the duration of noncompliance. The total penalty for Count 12 is \$8,470.

Count 13

For Goodman's failure to properly conduct inventory control for January through April 1999 for two USTs at the Nampa Exxon, Complainant proposed a penalty of \$17,820. C's Ex. 192; Tr. 452, 455-456, 465.

As concluded above, the inventory forms for those months include daily data, including daily "over or short" but do not include inventory reconciliation figures for the months of January and February. Although Mr. Lamberson's testimony indicates that he performed monthly reconciliation, it does not establish that he did so within a reasonable time after the end of each month. C's Ex. 154; Rs' Ex. 4, 15, 30; Tr. 783, 799-800, 832-833, 837-838. Some data was also recorded on the wrong date. Tr. 837; R's Ex. 30. Monitoring the daily inventory would alert Goodman to catastrophic leaks (Tr. 617), but failure to perform inventory reconciliation timely would allow a slow leak to be undetected for more than two months. The potential for harm will be assessed as slightly less than "major," and the extent of deviation is "moderate." The appropriate value interpolated from the matrix is \$800, adjusted under the Inflation Guidance to \$880.

Complainant proposed the same adjustments as assessed for Counts 7 through 9. Complainant increased the matrix value by ten percent for degree of noncooperation, on the basis that Goodman allegedly provided incomplete, inaccurate responses and did not readily provide information. C's Ex. 187. However, Goodman submitted the inventory control records for the Nampa Exxon on December 17, 1999, requested in EPA's information request dated November 3, 1999. Tr. 381-382, 383; C's Ex. 142, 143, 154. Therefore no adjustment is made for degree of cooperation or noncooperation.

As to degree of willfulness or negligence, Complainant commented that Goodman was told in previous inspections to reconcile inventory control records. C's Ex. 187. Mr. Lamberson knew or should have known the requirement to maintain monthly inventory reconciliation records and the importance of timely monthly reconciliation. The degree of Goodman's negligence or willfulness as to the violation for Count 13 is 10%.

For Goodman's history of noncompliance with inventory reconciliation, an increase of 20% is warranted, on the same basis as that for Counts 7, 8 and 9.

Complainant assessed a high level of environmental sensitivity for the Nampa station, based on the location of the USTs on a 20-foot-deep aquifer and proximity to three public groundwater supply wells. As concluded above, with regard to Count 5, the appropriate multiplier for environmental sensitivity is 1.25

Under the Penalty Policy, Complainant correctly multiplied the penalty by 1.5 to account for the 119-day duration of the violation. No penalty for any economic benefit of noncompliance was proposed or will be added.

In sum, the base penalty adjusted by inflation is \$880, and it is multiplied by two for the number of USTs to be monitored, adjusted upward by 10% for degree of willfulness or negligence, and by 20% for history of noncompliance, and multiplied by 1.25 for environmental sensitivity and by 1.5 for days of noncompliance. The resulting penalty is \$4,290 for Count 13.

Count 14

For Goodman's failure to properly conduct inventory control for December 1998 through May 1999, and its failure from May 1, 1997 to July 17, 1999 to monitor the tanks on weekends and holidays, for three USTs at the Weiser Exxon, Complainant proposed a penalty of \$72,624.

For the Weiser Exxon, Goodman failed to timely perform monthly inventory reconciliation for December 1998 through May 1999, and failed to record inventory data for weekends from May 1, 1997 through July 17, 1999, but otherwise recorded daily inventory and "over or short" reconciliation. C's Ex. 157; Rs' Ex. 5, 31. Daily data for totalizers, however, was recorded incorrectly. Tr. 843-845. Mr. Lamberson's testimony indicates that he performed monthly reconciliation, but not until at least six weeks after the end of each month. Tr. 842. The potential for harm will be assessed as slightly less than "major," and the extent of deviation is "moderate." The appropriate value interpolated from the matrix is \$800, adjusted under the Inflation Guidance to \$880.

Complainant proposed the same adjustments as assessed for Counts 7, 8, 9 and 13. Complainant increased the matrix value by ten percent for degree of noncooperation, on the basis that Goodman allegedly provided incomplete, inaccurate responses and did not readily provide information. C's Ex. 187. However, Goodman submitted the inventory control records for the Weiser Exxon on December 17, 1999, requested in EPA's information request dated November 3,

1999. Tr. 381-382; C's Ex. 142, 143, 157. Therefore no adjustment is made for degree of cooperation or noncooperation.

Complainant's proposed upward adjustment of 30 percent for degree of willfulness or negligence was based on the allegations that Goodman was told in previous inspections to do inventory control every operating day and that Goodman failed to reconcile inventory for some months. C's Ex. 187. Mr. Lamberson knew or should have known the requirement to maintain monthly inventory reconciliation records and the importance of timely monthly reconciliation. The degree of Goodman's negligence or willfulness as to the violation for Count 14 is 10%.

For Goodman's history of noncompliance with inventory reconciliation, an increase of 20% is warranted, on the same basis as that for Counts 7, 8, 9 and 13.

Complainant doubled the adjusted matrix value for a high level of environmental sensitivity, based on tanks containing product located over a shallow aquifer, located near a creek and the Weiser and Snake Rivers, a school and a public surface water supply. As concluded above with regard to Count 6, the environmental sensitivity level is "moderate" and accordingly the multiplier is 1.5.

Complainant multiplied the penalty by four for an 808-day duration of the noncompliance, under the Penalty Policy. However, the bulk of the penalty for Count 14 is based upon Goodman's failure to perform inventory reconciliation each month over six months, and therefore the noncompliance will be assessed at six months, with a multiplier of 1.5

An economic benefit of noncompliance of \$1,613 was calculated by Ms. Carpenter under the BEN model, based on Goodman's avoidance of the costs of \$2.50 per day for three tanks for 220 weekend days when stick inventory was not taken. This assessment was not contested by Goodman, and is deemed reasonable.

In sum, the penalty for Count 14 is \$880 multiplied by three for the number of USTs, adjusted upward by 10% for degree of willfulness or negligence and by 20% for history of noncompliance, and multiplied by 1.5 for the environmental sensitivity and again by 1.5 for the days of noncompliance, yielding a gravity based penalty of \$7,722. Adding the \$1,613 economic benefit of noncompliance, the total penalty for Count 14 is \$9,335.

Counts 15 through 22

In the Order on Motion for Partial Accelerated Decision, Goodman was found liable as alleged in Counts 15 through 22 of violating 40 C.F.R. § 280.21(b) and (c), which provide as follows, in pertinent part:

(a) *Alternatives allowed.* Not later than December 22, 1998, all existing UST systems must comply with one of the following requirements:

(1) New UST system performance standards under § 280.20;

- (2) The upgrading requirements in paragraphs (b) through (d) of this section; or
 - (3) Closure requirements * * *
- (b) *Tank upgrading requirements.* Steel tanks must be upgraded to meet one of the following requirements . . .

* * * *

- (2) *Cathodic protection.* A tank may be upgraded by cathodic protection if the cathodic protection system meets the requirements of § 280.20(a)(2) . . . and the integrity of the tank is ensured
- (c) *Piping upgrading requirements.* Metal piping that routinely contains regulated substance and is in contact with the ground must be cathodically protected

For Goodman’s use of metal piping which routinely contained petroleum but that had not been cathodically protected, from December 22, 1998 through January 17, 1999, at the Homedale, Nampa and Weiser Exxon stations, in violation of 40 C.F.R. § 280.21(c), as alleged in Counts 15, 16 and 17 respectively, Complainant proposed a penalty of \$13,365 for each count, except Count 16, which was amended at the hearing to \$8,910. Tr. 473, 563; C’s Ex. 189.

For Goodman’s use of steel USTs which were not upgraded, from December 22, 1998 through January 26, 1999 or February 5, 1999, at the 16th & State, Collister, Homedale, Nampa and Weiser Exxon stations, in violation of 40 C.F.R. § 280.21(b), as alleged in Counts 18, 19, 20, 21, and 22 respectively, Complainant proposed a penalty of \$13,365 for each count, calculated the same as the penalties for Counts 15 and 17.

Potential for Harm, Extent of Deviation, and Unit of Violation

For Counts 15 through 22, Complainant assessed the potential for harm and extent of deviation as major, and multiplied the resulting matrix value of \$1,500 (plus ten percent for inflation) by three for the three USTs at each facility, except that Count 16 was multiplied by two because two of the three tanks were manifolded together at the Nampa Exxon. Tr. 473, 563; C’s Ex. 189.

The method Goodman chose to upgrade its tanks was by installing cathodic protection. 40 C.F.R. § 280.21(b). C’s Ex. 126, 160. Before cathodic protection can be installed, tanks that are more than ten years old must be assessed to ensure that they are structurally sound and free of corrosion holes. 40 C.F.R. § 280.21(b)(2)(i); Tr. 1179. One of the methods by which Goodman’s tanks were assessed is a Mean Time to Corrosion Failure (MTCF) evaluation, and another was inspection of the interior of the tank by video camera. Tr. 264-265; C’s Ex. 82, 89, 116. Respondents presented the testimony of Bruce Wiskel, an engineer and officer of Corrpro Companies, Inc., as a corrosion and cathodic protection expert. He explained that the MTCF evaluates the probability that an underground structure would be leaking, based on the data of many components that affect the corrosion of an underground structure, and that a structure passes the evaluation if there is less than a 0.05 percent chance that the tank is leaking due to corrosion. Tr. 1177-1178. Goodman contracted with Corrpro Companies, Inc., to install cathodic protection. All but three of the UST systems at issue passed Corrpro’s MTCF integrity evaluations between

December 15 and 18, 1998, and cathodic protection was subsequently installed on all of the tanks at issue the week of January 17, 1999. Rs' Ex. 9, 10, 13; C's Ex. 94, 95, 109, 110, 160.

Because three of the USTs at issue did not pass Corpro's MTCF evaluation, at Collister 16th and State, and Weiser Exxon stations, Corpro advised Goodman that cathodic protection could not be installed, but Corpro proceeded to install the cathodic protection on those USTs anyway, and the tanks successfully passed a video camera tank inspection by Robo-Cam on February 4 and 5, 1999. C's Ex. 83, 84, 85, 89, 90, 116, 117, 126, 160. Therefore Complainant considered that those tanks were not in compliance until February 5, 1999. C's Reply Brief at 23.

Goodman contends that its short delay in completing cathodic protection did not create any threat to human health or the environment, as each UST had been tightness tested about two or three months before the upgrade deadline, and all tanks and lines were found tight and leak detectors functioning properly. Rs' Brief at 33; Rs' Ex. 9, 10, 13, C's Ex. 85, 95, 111, 115, 147. Based on the documentation of these evaluations, Mr. Wiskel testified that from the time the upgrade requirements went into effect until the cathodic protection was installed, it would be "extremely unlikely that an adverse consequence [a leak] due to corrosion-related failures would happen in that time period." Tr. 1202. After the cathodic protection is installed, he testified, "there is no further corrosion occurring on those structures," because the condition of the structures is "maintained for perpetuity, as long as the cathodic protection system is maintained." Tr. 1203, 1204.

The Penalty Policy provides that for failure to meet all tank upgrade requirements, or failure to install any cathodic protection for metal piping upgrade requirements, the potential for harm and extent of deviation are "major." C's Ex. 175, Appendix A. It provides that the penalties are assessed per tank or per pipe. *Id.* Because the tank upgrading requirement includes internal inspection of the tank to ensure soundness, and the tanks at issue were evaluated by MTCF prior to the deadline of December 22, 1998, the extent of deviation from the upgrade requirement is "moderate." Considering that most of the USTs passed the MTCF evaluation, and considering the adverse effect on EPA's regulatory program from missing the regulatory deadline, the potential for harm from the failure to install the cathodic protection by the deadline is between "minor" and "moderate." The gravity based penalty interpolated from the Penalty Policy's matrix is \$300 for each tank and for each pipe at issue, adjusted upward by the Inflation Guidance to \$330.

There were three USTs and thus three steel pipes at issue at the Homedale and Weiser stations. There was one UST plus a set of manifolded tanks at the 16th and State, Collister and Nampa Exxon stations. Mr. McRae considered that there is only a single piping system on manifolded tanks. Tr. 473; C's Ex. 189. Thus there were only two steel pipes at issue, or two separate penalties, concerning Count 16, for the Nampa station. However, Mr. McRae considered the manifolded tanks to be two separate tanks for purposes of penalties for Counts 18, 19, and 21, and would assess a separate penalty for each of the manifolded tanks at the 16th and State, Collister and Nampa stations, under his "rule" that if you can separate the activity per tank, than penalties should be assessed per tank. Tr. 414-415, 473-476, 563. The Penalty Policy provides that "penalties will be assessed on a per-tank basis if the specific requirement or violation is clearly associated with one tank." C's Ex. 175 at 15. Mr. McRae did not know whether Goodman had the tanks

cathodically protected separately, and conceded that it is common for an entire system to be cathodically protected at one time. Tr. 556-557. Mr. Wiskel testified that when there are two or three tanks in the same ditch or same area, “[i]t makes prudent sense to cathodically protect the entire structure at one time because the cables, in fact, circulate right around the whole structure,” and that “actually it would be virtually impossible” not to have the cathodic protection current directed to each tank at the site, “because all the structures at the site are electrically continuous.” Tr. 1248. Therefore, only one penalty will be assessed for two manifolded tanks.

Adjustments

As with all of the other counts against Goodman, Complainant adjusted the penalties upward by ten percent for degree of noncooperation, on grounds that Goodman provided incomplete, inaccurate responses and did not readily provide information. However, Ms. Poston testified that Mr. Conley was cooperative during the facility inspections. Tr. 208. Erik Sirs noted on his inspection report that Mr. Lamberson was very cooperative during the office inspection audit, and arranged with Corrpro to provide the MTCF evaluations and verification of cathodic protection. C’s Ex. 129; Tr. 265. He testified that during the inspection Mr. Lamberson orally provided information as to corrosion protection and piping at the facilities at issue, and thereafter provided a stack of documents, including information as to corrosion protection, in response to questions Mr. Sirs had. Tr. 258, 265, 275-276, 302. Therefore, no adjustment is deemed warranted for degree of cooperation or noncooperation.

Complainant also proposed an increase of 25 percent for Goodman’s history of noncompliance, for all of Goodman’s prior field citations, which Complainant also considered as to all of the other counts of the Amended Complaint. None of the field citations address failure to upgrade piping or USTs, and the timing of the upgrades at issue was largely under the control of the contractor, Corrpro. Therefore no increase in the penalty is deemed appropriate to account for the prior field citations.

Complainant did not adjust the penalty for degree of willfulness or negligence. Mr. Nichols testified that he made efforts to obtain a contractor to upgrade the tanks as early as 1996, but that the companies he contacted were too expensive. Tr. 1321-1322. Goodman obtained a bid from Corrpro Company on or about April 24, 1998 to complete cathodic protection installation, and in mid-May verbally authorized Corrpro to proceed. Rs’ Ex. 22; Tr. 998, 1002, 1303, 1305-1306.

Mr. Wiskel, a professional corrosion engineer and an officer of Corrpro, stated that Corrpro is the world’s largest corrosion control and cathodic protection firm. Tr. 1163. He testified that in 1998, Corrpro had contracts to install cathodic protection at 10,000 sites across the nation, and that a number of its customers did not meet the upgrade deadline because Corrpro did not have enough crews and equipment to meet the demand. Tr. 1197-1198. Mr. Nichols testified that he expressed to a Corrpro representative that the upgrades need to be done on time, and the Corrpro representative assured him that they would get the job done. Tr. 1305, 1308. Mr. Wiskel testified, however, that Corrpro did not make guarantees as to timeliness of cathodic protection in 1998. Tr. 1253. Mr. Nichols testified that he sent Corrpro a purchase order on September 16, 1998, and sent by facsimile

on November 24, 1998 a letter entitled “Authorization to proceed,” in order to motivate Corrpro to begin work on Goodman’s facilities, out of concern for the approaching deadline. Rs’ Ex. 75, 76; Tr. 1309-1310, 1312-1316. Mr. Wiskel testified that Corrpro typically proceeds to conduct the requested activities upon receipt of a purchase order. Tr. 1174-1175. Mr. Conley testified that Goodman submitted a second authorization to proceed on November 24, 1998 because Corrpro asked for another written approval. Tr. 1095. Mr. Nichols testified that Corrpro began work at the Goodman Lewiston facilities around the beginning of October. Tr. 1313, 1314. Corrpro performed MTCF tests, which must precede installation of cathodic protection, on the Goodman Lewiston facilities on November 3 and 4, 1998, but did not perform the MTCF tests on the facilities at issue until December 15 through 18, 1998. Tr. 1313, 1314; C’s Ex. 82, 83, 89, 94, 101, 105, 109, 110, 114, 121. Corrpro completed installation of cathodic protection on the Goodman Lewiston facilities on December 20, 1998. Tr. 291-292, Rs’ Ex. 23. Thus, although Corrpro could complete installation at some of Respondents’ facilities on time, it could not complete installation at the facilities at issue.

The relevant factors to consider in assessing the degree of willfulness or negligence are:

- How much control the violator had over the events constituting the violation;
- The foreseeability of the events constituting the violation; [and]
- Whether the violator made any good faith efforts to comply and/or took reasonable precautions against the events constituting the violation.

C’s Ex. 175 at 18. Applying these factors to the testimony and evidence presented, a ten percent decrease in the gravity based penalties is assessed to account for Goodman’s level of control over the delay, its good faith efforts to comply, and degree of culpability or negligence.

Deeming all of the violations as having a high level of environmental sensitivity, Complainant doubled the matrix values. However, the environmental sensitivity with regard to potential impacts on human health or the environment that could be caused by these violations are the same as that assessed for Counts 3 through 7, which involve the same UST systems. Accordingly, the environmental sensitivity multiplier for Counts 15 and 20, concerning the Homedale station, is 1.5; for Counts 16 and 21, concerning the Nampa Exxon, 1.25; for Counts 17 and 22, concerning the Weiser Exxon, 1.5; for Count 18, concerning the 16th and State Exxon, 1.5, and for Count 19, concerning the Collister Exxon, 1.5.

The duration of the violations were only 25 or 35 days, so the days of noncompliance multiplier is one. Complainant did not propose an addition to the penalty for any economic benefit of noncompliance, and no such addition will be made.

Penalty Calculation for Counts 15 through 22

The gravity based value for Counts 15 through 22 is \$300 per tank or pipe multiplied by three for the three USTs at Homedale and Weiser, and multiplied by two for the two USTs at the 16th and State, Collister, and Nampa stations. The 10 % upward adjustment for inflation is

counterbalanced by the ten percent decrease for degree of willfulness or negligence. The gravity based penalties are \$900 for Counts 15, 17, 20, and 22, and \$600 for Counts 16, 18, 19 and 21.

Multiplying by the environmental sensitivity factors, the penalty for each of Counts 15 and 20, concerning the Homedale station, is \$1,350; for each of Counts 16 and 21, concerning the Nampa Exxon, \$750; for each of Counts 17 and 22, concerning the Weiser Exxon, \$1,350; for Count 18, concerning the 16th and State Exxon, \$900; and for Count 19, concerning the Collister Exxon, \$900.

Count 27

In the Order on Motion for Partial Accelerated Decision, Goodman Lewiston was held liable for failure to provide complete and accurate responses to EPA's information request, dated October 2, 2000, issued under Section 9005 of RCRA. Complainant proposed a penalty of \$16,706 for this violation of 40 C.F.R. § 280.34.

Potential for Harm, Extent of Deviation, Unit of Violation

Complainant assessed the potential for harm and extent of deviation as major. Complainant multiplied the matrix value by three to account for three of Goodman Lewiston's facilities: at 5th and Preston, the Bulk Plant, and 102 Thain Street. Respondents point out that Mr. McRae made a sweeping request for three years worth of inventory control records for the three facilities, even though the regulation (40 C.F.R. § 280.45(d)) requires that the records be maintained for one year. Respondents assert that Mr. McRae admitted that he already had some of the release detection and other documents for the facilities at issue when he issued the Information Request. Rs' Brief at 36; Tr. 491, 492, 494. Goodman and Goodman Lewiston had made several prior efforts to provide information in response to Mr. McRae's "numerous, overlapping requests." Rs' Brief at 37

The regulation at issue requires owners and operators to "cooperate fully with inspections, monitoring and testing conducted by the implementing agency, as well as requests for document submission, testing and monitoring . . . pursuant to section 9005" of RCRA. 40 C.F.R. § 280.34. The Penalty Policy does not direct a particular level of potential for harm and extent of deviation for violations of 40 C.F.R. § 280.34, but directs that the appropriate regulatory section be referenced. C's Ex. 175, Appendix A. Thus, for failure to maintain every record of release detection monitoring, or for failure to maintain every record of cathodic protection inspections, the Penalty Policy provides that the extent of deviation is "moderate" and the potential for harm is "minor." *Id.* Accordingly, for Goodman Lewiston's noncompliance with 40 C.F.R. § 280.34, as alleged in Count 27, the potential for harm is "minor" and the extent of deviation is "moderate." The matrix value is \$100, and it is multiplied by three to account for three facilities at issue.

Adjustments

Complainant adjusted the matrix value upward by ten percent for degree of noncooperation

and by 20 percent for degree of willfulness or negligence. Because the basis for the violation itself is Goodman Lewiston noncooperation, and willful failure to provide information, and considering Respondents' prior efforts in providing information with regard to Goodman Lewiston's facilities, the penalty will not be adjusted for degree of cooperation or noncooperation or for degree of willfulness or negligence.

Complainant also increased the penalty by 20 percent for the previous violations considered with respect to Count 1. A field citation was issued in 1992 to Goodman Lewiston for failure to provide a leak detection method and to conduct line testing and monitoring, but it did not concern one of the facilities at issue in this proceeding, and it was promptly resolved. C's Ex. 34, 35. To reflect this prior citation, the gravity based penalty will be increased by five percent.

The three facilities each had different levels of environmental sensitivity, so the average level, or a multiplier of 1.5, was proposed by Complainant. Mr. McRae's penalty calculation worksheet indicates that he assessed the 5th and Preston station as having a "low" environmental sensitivity. He assessed the station at 102 Thain Street as having a "moderate" environmental sensitivity based on tanks being located over a 20-foot deep aquifer, and 1.5 miles from a creek and 0.3 miles from a drainage. He also considered that they were 0.6 miles from a school and in a highly populated area., but as discussed above, these factors are not significant here.

Increasing the penalty for environmental sensitivity is not appropriate, as it does not appear that there would be a significant impact on human health or the environment from Goodman Lewiston's failure to provide the requested documents, and any such impact would be very minor considering the sites at issue.

Complainant appropriately multiplied the penalty by 1.5 to account for the duration of the violation, 122 days, from November 2000 through the compliance date of March 2, 2001. No penalty for economic benefit of noncompliance was proposed and none is assessed here.

Penalty Summary for Count 27

The matrix value of \$100 is increased by 10 percent under the Inflation Guidance, and multiplied by three for the three facilities at issue, and increased by five percent for history of violations, and multiplied by 1.5 for the days of noncompliance. The resulting penalty for Count 27 is \$520.

Penalty Summary

Accordingly, the penalties assessed against Respondent Goodman Oil Company are as follows:

Count 1	\$8,316
Count 2	\$9,036

Count 3	\$10,357
Count 4	\$10,357
Count 5	\$8,874
Count 6	\$10,519
Count 7	\$7,700
Count 8	\$2,145
Count 9	\$16,087
Count 13	\$4,290
Count 14	\$9,335
Count 15	\$1,350
Count 16	\$750
Count 17	\$1,350
Count 18	\$900
Count 19	\$900
Count 20	\$1,350
Count 21	\$750
<u>Count 22</u>	<u>\$1,350</u>
Total:	\$105,716

The penalties assessed against Goodman Oil Company of Lewiston are as follows:

Count 10	\$2,475
Count 11	\$16,410
Count 12	\$8,470
<u>Count 27</u>	<u>\$520</u>
Total:	\$27,875

The total penalty assessed against Respondent Goodman Oil Company for the violations of 9003 of RCRA and Federal regulations promulgated thereunder, as alleged in Counts 1 through 9, and Counts 13 through 22 of the Amended Complaint, is \$ 105,716. The total penalty assessed against Respondent Goodman Oil Company of Lewiston for the violations of 9003 of RCRA and Federal regulations promulgated thereunder, as alleged in Counts 10 through 12 and 27, is \$27,875.

VI. PROPOSED COMPLIANCE ORDER

Respondents argue that Complainant's request for issuance of the proposed Initial Compliance Order, included with the Amended Complaint, should be denied noting that Paragraphs A, B, D, E, and F are moot because EPA has the information requested, including records for the last three months the USTs at issue in this case were in operation, that Goodman's Boise area facilities were closed in October, 2000, that less than one inch of product remains in the USTs at those facilities, that cathodic protection systems at each site remain operating, and that Goodman intends to get out of the retail business. Tr. 863-870. Respondents assert further that the request for a site check at the Weiser station is not warranted because Goodman investigated discrepancies in

its record and determined that suspected releases did not occur for two consecutive months. Rs' Reply at 28.

Complainant argues that Respondents have not yet complied with permanent closure, financial responsibility, release investigation and information request requirements of the regulations, and have supplied little if any documentation as to the current status of the USTs.

The information requested in the Initial Compliance Order includes facilities and tanks not at issue in this case, information which is not in the record, and follow-up information for temporarily closed tanks. However, as discussed above with regard to Counts 24 and 26, Goodman was found not to have been required to notify EPA or immediately investigate a suspected release with respect to the USTs at the Weiser station under 40 C.F.R. §§ 280.40(b) and 280.52. Therefore a site check of the Weiser facility as described in 40 C.F.R. § 280.52(b), as requested in Paragraph 65 H of Complainant's Initial Compliance Order, is not necessary. Accordingly, a Compliance Order, as edited from Complainant's Initial Compliance Order, is incorporated herein, as follows.

CONCLUSION AND ORDER

1. After hearing, Respondents are found not to have committed the violations alleged in Counts 23, 24, 25 and 26 of the Amended Complaint and are therefore not liable thereon.
2. Goodman Oil Company failed to conduct inventory control for its USTs at the 16th and State, Collister, Homedale, Nampa and Weiser Exxon stations in accordance with the requirements of 40 C.F.R. § 280.43, and therefore violated 40 C.F.R. § 280.41(a), as alleged in Counts 7, 8, 9, 13 and 14 of the Amended Complaint, and is liable thereon.
3. Goodman Oil Company of Lewiston failed to conduct inventory control for its USTs at the Tiger Mart #5, Goodman Oil Bulk Plant, and Mountain Mart #2 in accordance with the requirements of 40 C.F.R. § 280.43, and therefore is in violation of 40 C.F.R. § 280.41(a), as alleged in Counts 10, 11 and 12 of the Amended Complaint, and is liable thereon.
4. A civil penalty of \$105,716 is assessed against Respondent Goodman Oil Company for violations alleged in Counts 1 through 9 and Counts 13 through 22 of the Amended Complaint.
5. A civil penalty of \$27,875 is assessed against Respondent Goodman Oil Company of Lewiston for violations alleged in Counts 10 through 12 and Count 27 of the Amended Complaint.
6. Payment of the full amount of this civil penalty shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below.

Payment by Goodman shall be made by submitting a certified or cashier's check in the amount of \$105,716, and payment by Goodman Lewiston shall be made by submitting a certified or cashier's check in the amount of \$27,875. The checks shall be payable to the Treasurer, United States of America, and mailed to:

EPA - Region 10
Regional Hearing Clerk
P.O. Box 360903M
Pittsburgh, PA 15251

7. A transmittal letter identifying the subject case and the EPA docket number, as well as the Respondent's name and address, must accompany the check.
8. If Respondents fail to pay the penalties within the prescribed statutory period after entry of this Initial Decision, interest on the penalty may be assessed. *See*, 31 U.S.C. § 3717; 40 C.F.R. § 13.11.
9. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless:
(1) a party moves to reopen the hearing within twenty (20) days after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a); or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. § 22.30(b).
10. Respondents Goodman Oil Company and Goodman Oil Company of Lewiston are hereby ORDERED to comply with the following requirements pursuant to Section 9006 of RCRA, 42 U.S.C. §6991e(a):

Compliance Order

I. Within sixty (60) days of the effective date of this Initial Decision:

A. For all USTs it owns and/or operates, Goodman must:

- 1) describe the status of each UST by indicating whether the tank is currently being used to dispense product, currently being used to store product, currently in temporary closure or permanently closed; and
- 2) indicate the quantity in inches and gallonage of any petroleum product currently in the tank, describing how this information was obtained, the date this information was obtained, and the name and telephone number of the person who determined the quantity in the tank.

B. For all temporarily closed tanks it owns and/or operations, Goodman must provide the following information:

- 1) date the tank was last used;
- 2) quantity in inches and gallonage of petroleum product;
- 3) for all tanks that have one inch or more product in them, provide monthly monitoring records for all months the tanks were in temporary closure;
- 4) the maintenance records of cathodic protection of all temporarily closed tanks. The cathodic protection records should be submitted bi-monthly until all the tanks have been permanently closed or placed back into service. These records should include the name and telephone number of the person conducting the monitoring; and
- 5) the name and phone number of the person who capped and secured all lines, pumps, manways and ancillary equipment except the vent lines and the date that this occurred. Provide a statement for each facility that has temporarily closed tanks of exactly what procedures and steps were taken to temporarily close each tank.

C. In particular, Goodman must provide documentation that it has upgraded or permanently closed the tanks located at the Capitol Exxon, 1265 Capitol Blvd., Boise, Idaho. The documentation must include a site assessment and must demonstrate that Goodman has met all requirements of either 40 C.F.R. § 280.21, if upgrading the tanks, or 40 C.F.R. § 280.71, if permanently closing the tanks.

D. Goodman must provide proof of financial responsibility for the USTs at each facility listed below:

- 1) Capitol Exxon
- 2) Collister Exxon
- 3) Homedale Tiger Mart Exxon
- 4) Nampa Exxon
- 5) Weiser Exxon

E. Goodman shall notify EPA of all suspected releases from USTs at facilities it owned and/or operated for the past two years. For all suspected releases, Goodman shall complete an investigation into why the suspected releases occurred and submit the results of that investigation to EPA. If no explanation for a suspected release is apparent, then Goodman must conduct a systems test as described in 40 C.F.R. § 280.52(a) for each suspected release and submit copies of the test results to EPA.

F. For all USTs that continue to contain petroleum product, Goodman shall begin submitting monthly release detection records and continue submitting such records for a period of twelve months after the effective date of this Initial Decision.

G. In particular, Goodman shall provide documentation that it has upgraded or permanently closed the waste oil tank located at the Nampa Exxon. The documentation must include site assessment reports and must demonstrate that Goodman has met all requirements of either 40 C.F.R. § 280.21, if upgrading the tanks, or 40 C.F.R. § 280.71, if permanently closing the tanks. Also, Goodman shall provide documentation of the status of each UST at the Nampa Exxon facility, including the status of upgrading, corrosion protection monitoring, and a diagram of the facility with location, size and content of each tank indicated on the diagram.

II. Within sixty (60) days of the effective date of this Initial Decision, Goodman Lewiston shall:

A. Provide complete responses to Items 1, 6, 7, 8, 9, 10 and 11 listed in Enclosure 1, Section C of the October 2, 2000 Information Request.

B. For all USTs owned and/or operated by Goodman Lewiston:

- 1) describe the status of each UST by indicating whether the tank is currently being used to dispense product, currently being used to store product, currently in temporary closure or permanently closed; and
- 2) indicate the quantity in inches and gallonage of any petroleum product currently in the tank, describing how this information was obtained, the date this information was obtained, and the name and telephone number of the person who determined the quantity in the tank.

C. For all temporarily closed tanks it owns and/or operations, provide the following information:

- 1) date the tank was last used;
- 2) quantity in inches and gallonage of petroleum product;
- 3) for all tanks that have one inch or more product in them, provide monthly monitoring records for all months the tanks were in temporary closure;
- 4) the maintenance records of cathodic protection of all temporarily closed tanks. The cathodic protection records should be submitted bi-monthly until all the tanks have been permanently closed or placed back into service. These records should include the name and telephone number of the person conducting the monitoring; and

5) the name and phone number of the person who capped and secured all lines, pumps, manways and ancillary equipment except the vent lines and the date that this occurred. Provide a statement for each facility that has temporarily closed tanks of exactly what procedures and steps were taken to temporarily close each tank

D. For all USTs that continue to contain petroleum product, Goodman shall begin submitting monthly release detection records and continue submitting such records for a period of twelve months after the effective date of this Initial Decision.

III. All submissions and notifications Respondents are directed to provide in the Compliance Order must be furnished to the following EPA contact:

Gary McRae
U.S. EPA Idaho Operations Office
1435 N. Orchard
Boise, Idaho 83706

IV. If Respondents fail to comply with any requirement of this Compliance Order, Section 9006(a) of RCRA and 40 C.F.R. Part 19 provide that Respondents shall be liable for a civil penalty of not more than \$27,500 for each day of continued noncompliance.

Susan L. Biro
Chief Administrative Law Judge

Date: January 30, 2003
Washington, D.C.

CERTIFICATE OF SERVICE

I certify that the foregoing **Initial Decision**, dated January 30, 2003 was sent this day in the following manner to the addressees listed below:

Maria Whiting-Beale
Legal Staff Assistant

Dated: January 30, 2002

Original and One Copy by Pouch Mail to:

Carol Kennedy
Regional Hearing Clerk
U.S. EPA
1200 Sixth Avenue
Seattle, WA 98101

Copy by Pouch Mail to:

Deborah E. Hilsman, Esquire
Assistant Regional Counsel
U.S. EPA
1200 Sixth Avenue
Seattle, WA 98101

Copy by Regular Mail to:

Mark A. Ryan, Esquire
Assistant Regional Counsel
U.S. EPA
Idaho Operations Office
1435 N. Orchard Street
Boise, ID 83706

Copy by Certified Mail Return Receipt to:

John McCreedy, Esquire
Naylor, Hales & McCreedy, P.C.
1199 N. Shoreline Lane, Suite 200
Boise, ID 83707