

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION  
STATE OF OHIO

BARBER’S ASHLAND, : ERAC No. 086325  
: :  
: :  
Appellant, : :  
: :  
v. : :  
: :  
MICHAEL P. BELL, : :  
STATE FIRE MARSHAL, : :  
: :  
Appellee. : :

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DECISION

Rendered on July 11, 2012

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Barber’s Ashland, pro se Appellant

*Mike DeWine*, Attorney General, *Kate M. Barcalow*, and  
*Nicholas J. Bryan*, for Appellee Michael Bell, State Fire  
Marshal

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ESCHLEMAN, COMMISSIONER

{¶1} This matter comes before the Environmental Review Appeals Commission (“Commission”) upon a Notice of Appeal filed by Appellant Barber’s Ashland on April 13, 2009. Appellant challenges the State Fire Marshal’s March 11, 2009 issuance of Final Findings and Orders (“FFOs”) finding that Barber’s Ashland failed to comply with Ohio Administrative Code (“Ohio Adm.Code”) 1301:7-9-13 and imposing a \$30,919 civil penalty. The Commission held a de novo hearing on November 29, 2011. Based on the pleadings, evidence adduced at the hearing, and relevant case law, statutes, and regulations, the Commission

hereby issues the following Findings of Fact, Conclusions of Law, and Final Order AFFIRMING IN PART and VACATING AND REMANDING IN PART the State Fire Marshal's March 11, 2009 FFOs.

### **FINDINGS OF FACT**

{¶2} The State Fire Marshal is comprised of eight distinct bureaus, including the Bureau of Underground Storage Tank Regulations ("BUSTR"). Funded by federal grants and program and service fees, BUSTR is responsible for the regulation of underground storage tanks ("USTs") located throughout Ohio. Ohio Revised Code ("R.C.") 3737.882.

{¶3} Barber's Ashland is located at 117 South High Street, Mount Orab, Ohio 45154. The site contains three 6,000 gallon USTs and one 8,000 gallon UST.<sup>1</sup> Fire Marshal's Exhibit 29.

{¶4} Roger Barber acquired ownership of the Barber's Ashland site in 1993. Since then, Mr. Barber has been an "owner" and "operator" as defined by R.C. 3737.87(G) and (H). Testimony Barber; Fire Marshal's Exhibits 9 and 28.

{¶5} On November 29, 1994, Mr. Barber observed fuel in an observation well that had been installed near the USTs at the Barber's Ashland site. Mr. Barber called the local fire department, who contacted the Ohio Environmental Protection Agency ("Ohio EPA"). Ohio EPA subsequently notified BUSTR of a release of petroleum product at the Barber's Ashland site. At least one BUSTR inspector, Wayne Wallace, was dispatched to the site. Upon arrival, Mr. Wallace confirmed the presence of "free product" in the observation well, as

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<sup>1</sup> The 8,000 gallon UST was installed in February 1995 to replace the damaged UST at issue in this appeal. Director's Exhibit. 29.

well as in the storm sewer near the Barber's Ashland site.<sup>2</sup> Testimony Israel; Fire Marshal's Exhibit 9.

{¶6} Along with Ohio EPA and local fire department personnel also at the scene, Mr. Barber placed absorbent pads in the storm drains to contain the release. In addition, Mr. Barber recovered approximately 200 gallons of free petroleum product from the observation well. Mr. Wallace's report indicated that the release did not result in contamination of local streams. Fire Marshal's Exhibit 9.

{¶7} The following day, a BUSTR representative advised Mr. Barber that corrective action would be required to address the release. Specifically, BUSTR informed Mr. Barber that he would need to "formally" notify BUSTR of the release and complete a tank tightness test of the failed UST. Testimony Barber; Fire Marshal's Exhibits 9 and 28.

{¶8} Mr. Barber completed the tank tightness test on December 8, 1994. The test revealed a hole in the UST labeled "Tank Three." The testimony established that the hole was caused by the previous owner of the site, and that Mr. Barber had not discovered the hole prior to the November 29, 1994 release. Mr. Barber notified BUSTR of the results of the tightness test on December 9, 1994. Testimony Barber.

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<sup>2</sup> The Ohio Administrative Code ("Ohio Adm.Code") defines "free product" as "a separate liquid hydrocarbon phase that has a measured thickness of greater than one one-hundredth of a foot." Ohio Adm.Code 1301:7-9-02(B)(22).

{¶9} Subsequently, on December 27, 1994, BUSTR sent Mr. Barber a letter stating that a “site assessment” would be required pursuant to Ohio Adm.Code 1301:7-9-13. The letter read in pertinent part:

On December 4, 1994, the State Fire Marshal’s Office was notified by phone of confirmed release from your underground petroleum storage tank system(s) \* \* \*. You are required to perform a site assessment according to OAC 1301:7-9-13(I)(1) to define the vertical and horizontal extent of soil and groundwater contamination on site and off site.

The on-site assessment shall be completed and the report received by the Fire Marshal within 180 days of reporting the release or suspected release.

\* \* \*

When compiling information from your assessment activities, refer to OAC 1301:7-9-13 and the Corrective Action Guidance Document for all data required in your report. Enclosed is an order form for ordering guidance material to assist in the preparation of your report.

Fire Marshal’s Exhibit 11.

{¶10} Approximately two months later, in February 1995, Mr. Barber chose to close Tank Three using the “closure in place” process, which involves filling the tank with a solid inert material. Mr. Barber also installed a new 8,000 gallon UST to replace the closed tank. Pursuant to the closure requirements contained in Ohio Adm.Code 1301:7-9-12, Mr. Barber completed a “Closure Assessment Report” on March 25, 1995. However, BUSTR did not receive this report until February 10, 1997. Testimony Stewart; Fire Marshal’s Exhibit 15.

{¶11} Upon review of the Closure Assessment Report, Steven Krichbaum, an Environmental Specialist 2 at BUSTR, determined that BUSTR’s December 27, 1994 letter had incorrectly stated that a “site assessment” would be required. At the hearing, Mr. Krichbaum explained that the purpose of a “site

check” is to determine if contamination exists, whereas the purpose of a “site assessment” is to delineate the vertical and lateral extent of the contamination (if it exists). Pursuant to Ohio Adm.Code 1301:7-9-13(E)(1), a “site assessment” is required only if a “site check” determines that contaminant levels exceed certain action levels for the facility. Testimony Krichbaum; Fire Marshal’s Exhibit 14.

{¶12} Here, Mr. Krichbaum explained that the Closure Assessment Report failed to confirm that the December 9, 1994 release resulted in the contamination of soil or groundwater at the Barber’s Ashland site above action levels. Thus, because the presence of contamination had not yet been confirmed, pursuant to Ohio Adm.Code 1301:7-9-13, a “site check,” rather than a “site assessment,” was required. Testimony Krichbaum; Fire Marshal’s Exhibit 14.

{¶13} Accordingly, on August 11, 1997, Mr. Krichbaum sent Mr. Barber a letter instructing him to conduct a “site check” rather than a “site assessment.” This August 11, 1997 letter also stated that the Closure Assessment Report did not meet the requirements of a “site check.”<sup>3</sup> Mr. Krichbaum’s letter reads in pertinent part:

Upon review of the available information, BUSTR has determined that a site assessment is not warranted at this time. Instead, the December 9, 1994 occurrence meets the definition of a suspected release as found in Ohio Administrative Code (OAC) 1301:7-9-13(B)(3) and therefore you are requirement to perform activities to determine if a release has occurred. Your March 25, 1995 [Closure Assessment Report] does not fulfill the requirements of OAC 1301:7-9-13.

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<sup>3</sup> Pursuant to Ohio Adm.Code 1301:7-9-13(D)(3), a site check must, at a minimum, contain (1) three soil borings placed in locations where contamination would most likely be present or would have migrated, (2) soil samples taken from each of the boring locations, (3) boring logs and a characterization of soils, and (4) laboratory analysis of the soil samples with the highest contaminant levels.

You must conduct a site check and the results should be submitted to BUSTR within 90 days from the date of this letter. The required report must contain specific information, which is prescribed in OAC 1301:7-9-13(D)(3) and explained in BUSTR's *Corrective Action Guidance Document*. These documents also prescribe the activities that must be conducted during the site check. \* \* \*

Thank you for your cooperation. If you have any questions, please contact me at (614) 752-4232.

Appellant's Exhibit 15.

{¶14} In response to BUSTR's August 11, 1997 letter, Mr. Barber hired James Stewart, a professional geologist, to complete the required site check and submit the required site check report. On behalf of Barber's Ashland, Mr. Stewart submitted a report entitled "Site Investigation Report" ("SIR") to BUSTR on February 12, 1998. Although titled "Site Investigation Report," the SIR's cover letter indicated that it was in response to BUSTR's August 11, 1997 letter requiring the completion of a "site check." Therefore, BUSTR construed the SIR as a "site check" report. Testimony Israel, Krichbaum; Fire Marshal's Exhibit 16.

{¶15} The SIR indicated that a monitoring well, labeled "MW-3," "contained BTEX values above Site Feature Scoring System action levels." Because BTEX levels exceeded action levels for the Barber's Ashland site, BUSTR determined that, pursuant to Ohio Adm.Code 1301:7-9-13(E)(1) and (I)(1), a "site assessment" was required. Testimony Israel; Fire Marshal's Exhibit 16.

{¶16} The then-effective version<sup>4</sup> of Ohio Adm.Code 1301:7-9-13(I) outlined the requirements of a "site assessment." Specifically, Ohio Adm.Code 1301:7-9-13(I)(3) provided in pertinent part as follows:

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<sup>4</sup> As discussed in greater detail below, a new version of Ohio Adm.Code 1301:7-9-13 became effective in 2005.

(3) [A] [s]ite assessment shall consist of the following:

\* \* \*

(e) A determination of the vertical and horizontal extent of the soil release. Soil borings drilled to determine the vertical extent of contamination shall be drilled to auger refusal, a ground water confining liner, the ground water table, or forty-five feet, whichever shall be encountered first. However, if ground water is known to be contaminated from the release, borings shall be drilled to such ground water. Continuous split spoon samples shall be taken from soil borings. Ground water monitoring wells shall be extended a minimum of five feet into the water table and shall be screened to accommodate seasonal fluctuations in the ground water table. Data collection for monitoring wells shall include the depth to product, product thickness, depth of water to top of casing, and the elevation to top of casing;

\* \* \*

{¶17} At the hearing, Mr. Israel testified that BUSTR could not have considered the SIR to have satisfied the requirements of Ohio Adm.Code 1301:7-9-13(I)(3)(e) for two reasons. First, Mr. Israel explained that the SIR indicated that a backhoe had been used to install the monitoring wells at the Barber's Ashland site. Mr. Israel explained that although use of a backhoe was permitted (with prior BUSTR approval) for the purpose of satisfying the "site check" requirement, a backhoe cannot be used to install monitoring wells for the purpose of satisfying the "site assessment" requirement because doing so disrupts the soil in such a manner that an accurate delineation is not possible. Testimony Israel.

{¶18} Second, Mr. Israel explained that the placement of the monitoring wells did not satisfy the requirements for a "site assessment." Specifically, Mr. Israel testified that placement of additional monitoring wells was necessary to fully delineate the extent of the contamination. Testimony Israel.

{¶19} In response, Appellant argued that the SIR should have satisfied both the “site check” and “site assessment” requirements. Mr. Stewart testified that although use of a backhoe is not standard procedure, he used a backhoe in this instance because he had obtained oral approval from BUSTR to do so. Further, Mr. Stewart explained that he did not install additional monitoring wells in the area surrounding Tank Three because doing so posed an unnecessary risk of hitting power, water, and other utility lines. Testimony Stewart; Fire Marshal’s Exhibit 16.

{¶20} Because BUSTR determined that a “site assessment” was required, and that the SIR did not satisfy that requirement, BUSTR sent Mr. Barber another letter on May 8, 1998 ordering him to complete a “site assessment.” The letter stated in pertinent part:

The Bureau of Underground Storage Tank Regulations (BUSTR) has reviewed your reported titled “Site Investigation Report” dated November 30, 1997. BUSTR has determined that soil and/or ground water contamination exists in excess of the action levels calculated for this site. You are required to perform a site assessment as prescribed in Ohio Administrative Code 1301:7-9-13(I)(3) and explained in BUSTR’s *Corrective Action Guidance Document*. These documents describe the activities that must be performed during the site assessment and the information which is to be submitted to BUSTR in the site assessment report. You must submit the site assessment report within 180 days of the day the release was reported.

\* \* \*

An order form is enclosed to assist you in obtaining the documents described in this letter and other publications which may help you understand the requirements for compliance with BUSTR’s rules and regulations.

Thank you for your cooperation. If you have any questions, please contact me at (614) 752-4232.

Fire Marshal’s Exhibit 17.

{¶21} Mr. Israel testified that BUSTR received no response to this letter.  
Testimony Israel.

{¶22} Having received no response to its May 8, 1998 letter, BUSTR sent four additional letters to Mr. Barber between September 14, 2000, and June 15, 2004, reiterating the requirement to conduct a site assessment. Like the May 8, 1998 letter, each correspondence stated that a “site assessment” was required pursuant to Ohio Adm.Code 1301:7-9-13, provided information regarding how to obtain the guidance resources, and invited Mr. Barber to contact BUSTR with any questions. No evidence was presented establishing that Appellant attempted to access any of the guidance materials referenced, contacted BUSTR to discuss the requirements of a “site assessment,” or otherwise responded to these letters. In fact, Mr. Barber acknowledged that he did not respond to BUSTR’s letters and testified that he did not respond because he believed that the letters simply indicated a “paperwork problem.” Fire Marshal’s Exhibits 18, 19, 20, and 21;  
Testimony Israel, Barber.

{¶23} On March 1, 2005, a new version of Ohio Adm.Code 1301:7-9-13 became effective, which modified the requirements for corrective actions. In particular, the new rules prescribed different methods for evaluating and delineating the extent of soil and groundwater contamination, and required owners and operators to conduct a “Tier 1 Delineation Notification” rather than a “site assessment.”

{¶24} The 2005 version of Ohio Adm.Code 1301:7-9-13(B)(3) also contained the following provision:

Owners and operators conducting corrective actions in accordance with OAC 1301:7-9-13 (effective date September 1, 1992), may

continue to conduct corrective actions in accordance with that version until September 1, 2005. Thereafter, owners and operators shall conduct corrective actions in accordance with this rule.

Thus, even after the 2005 rules became effective, Appellant still had the option to complete a “site assessment” under the 1992 rules, provided the site assessment was completed prior to September 1, 2005. Testimony Israel.

{¶25} On April 8, 2005, BUSTR issued to Barber’s Ashland a Notice of Corrective Actions Violations. The letter reiterated the “site assessment” requirement under the 1992 rules, stating in pertinent part:

\* \* \* As of this date, you remain in violation of the following Ohio Administrative Code (OAC) requirements:

- OAC 1301:7-9-13 Failure to submit a Site Assessment

**Unless BUSTR is contacted within 30 days of this correspondence to discuss your options for returning to compliance, I will recommend that the State Fire Marshal exercise his enforcement authority under Ohio Revised Code (ORC) 3737.882. \* \* \***

This letter will serve to provide you with a final opportunity to resolve this matter without incurring civil penalties. Please note that BUSTR is willing to work with you, in a cooperative fashion, to resolve these violations. Thank you in advance for your cooperation. Please contact Lynne Caughell at (614) 752-7938 to determine how to best comply with your legal obligations.

Fire Marshal’s Exhibit 22 (emphasis in original).

{¶26} Again, BUSTR received no response to this letter on behalf of Appellant. Testimony Israel.

{¶27} Thus, on May 26, 2006, BUSTR sent Mr. Barber another letter regarding Appellant’s obligations in connection with the 1994 release. This letter explained that a new version of Ohio Adm.Code 1301:7-9-13 had been promulgated. The letter also explained that Barber’s Ashland could have still

completed a “site assessment” under the 1992 rules until September 1, 2005. But because Appellant had not done so, the letter explained that Barber’s Ashland would have to comply with the new 2005 rules. The letter read in pertinent part:

[O]n March 1, 2005, a *new* revised corrective action rule (OAC 1301:7-9-13) became effective. This corrective action rule mandates how environmental assessment and cleanup activities of petroleum releases shall be conducted. The March 1, 2005 rule did provide owners and operators who, at the time, were conducting corrective actions in accordance with an older version of the rule. If an owner or operator was conducting corrective actions OAC 1301:7-9-13 effective September 1, 1992, they were allowed to continue conducting those activities until September 1, 2005. After September 1, 2005, all owners and operator [sic] were **required** to conduct any additional corrective actions in accordance with the new corrective action rule that became effective March 1, 2005. Accordingly, your facility’s petroleum release case has been automatically moved into the new corrective action rule, effective March 1, 2005. You are still under the obligation to perform the necessary assessment and/or cleanup activities regarding the petroleum release identified at your facility. As a result of this new rule conversion, our records will now reflect that you are in violation of the following OAC requirements that were effective as of March 1, 2005. \* \* \*

- OAC 1301:7-9-13(H)(3) Failure to submit either a Tier 1 Evaluation report or a Tier 1 Delineation Notification

**Unless BUSTR is contacted within 30 days of this correspondence to discuss your options for returning to compliance, I will recommend that the State Fire Marshal exercise his enforcement authority under Ohio Revised Code (ORC) 3737.882. \* \* \***

**This letter will serve to provide you with a final opportunity to resolve this matter without incurring civil penalties.** Please note that BUSTR is willing to work with you, in a cooperative fashion, to resolve these violations. Thank you in advance for your cooperation. Please contact Lynne Caughell at (614) 752-7938 to determine how to best comply with your legal obligations.

Fire Marshal’s Exhibit 24 (emphasis in original).

{¶28} Again, BUSTR received no response from Barber's Ashland.  
Testimony Israel.

{¶29} On June 3, 2008—more than ten years after BUSTR originally informed Mr. Barber of the requirement to conduct a “site assessment”—BUSTR sent a letter to Mr. Barber informing him that the case had been referred to BUSTR's enforcement section. The letter stated in relevant part:

\* \* \* This correspondence is to provide you with formal notification that your facility has been referred to the BUSTR Enforcement Section.

You have failed to perform the requirement assessment and cleanup activities in response to a release of petroleum into the environment that was confirmed on February 12, 1998. Since that date, BUSTR has issued several letters informing you of your legal obligations. As of this date, you remain in violation of Ohio Administrative Code OAC 1301:7-9-13(H)(3) because you have not submitted a Tier 1 Evaluation or a Tier 1 Delineation Notification.

**Please contact BUSTR within 30 days of this correspondence to discuss your options for returning to compliance. Continued non-compliance beyond this deadline may result in the issuance of an Administrative Order by the State Fire Marshal, including the assessment of a maximum penalty of up to \$10,000 per day for each violation, and/or the referral of this matter to the Office of the Attorney General for enforcement seeking injunctive relief and maximum civil penalties of up to \$10,000 per day for each violation.**

Thank you in advance for your cooperation. Please contact Lynne Caughell of the BUSTR Enforcement Section at (614) 752-7938 to determine how to best comply with your legal obligations.

Fire Marshal's Exhibit 25 (emphasis in original).

{¶30} Once again, BUSTR did not receive any response from Appellant.  
Testimony Israel.

{¶31} As a result of Appellant's failure to comply the requirements of Ohio Adm.Code 1309:7-9-13 (both before and after the 2005 rule change), the

State Fire Marshal issued FFOs on March 10, 2009, requiring Appellant to submit a Tier 1 Delineation Notification report within 90 days. The FFOs also required Appellant to pay a \$30,919 civil penalty. Fire Marshal's Exhibit 1.

{¶32} Appellant submitted a Tier 1 Delineation Notification report on April 13, 2009—almost eleven years after the initial order to complete a “site assessment.” Fire Marshal's Exhibit 29.

{¶33} At the hearing, Mr. Israel testified that Barber's Ashland's Tier 1 Delineation Notification report contained several defects. Specifically, Appellant had not resolved the issues regarding the use of a backhoe and the placement of additional monitoring wells. Additionally, BUSTR determined that the report incorrectly stated action levels for the Barber's Ashland site and the laboratory analysis of various soil samples was defective because it did not include results for MTBE. As a result of these defects, BUSTR sent Mr. Barber a request for additional information on June 15, 2009. Fire Marshal's Exhibit 26; Testimony Israel.

{¶34} Appellant submitted a revised Tier 1 Delineation Notification report on May 20, 2010. Fire Marshal's Exhibit 27.

{¶35} After reviewing the revised report, BUSTR identified two additional defects relating to the identification of drinking water wells near the release location. No evidence was presented as to when Barber's Ashland corrected these additional defects. However, BUSTR sent a No Further Action letter on November 22, 2011, which Mr. Barber received on November 28, 2011—the day before the de novo hearing in this appeal. This letter indicated that no further corrective action was required regarding the November 29, 1994 release

of petroleum at the Barber's Ashland site. Testimony Israel, Barber; Fire Marshal's Exhibits 26 and 27; Appellant's Exhibit 9.

{¶36} With respect to the civil penalty in the FFOs, Appellant presented no evidence or testimony at the hearing challenging the amount or calculation of the civil penalty at issue. Nonetheless, Ms. Lori Stevens, in-house legal counsel with BUSTR, explained that the \$30,919 figure was calculated using the method outlined in the United States Environmental Protection Agency's ("U.S. EPA") UST Penalty Worksheet.<sup>5</sup> Testimony Stevens.

{¶37} The UST Penalty Worksheet contains two components: (1) an economic benefit component, which represents the benefit the violator derived from avoiding and delaying costs associated with compliance; and (2) a gravity-based component, which accounts for the potential for harm and the extent to which the violator deviated from the rule. Fire Marshal's Exhibit 3.

{¶38} Ms. Stevens explained that the first step in calculating the civil penalty was to determine the number of days the violator was not in compliance with BUSTR's rules. To do this, BUSTR initially determined that since the penalty was calculated on March 2, 2009, the five-year statute of limitations period extended back to March 3, 2004. Testimony Stevens; Fire Marshal's Exhibit 3.

{¶39} BUSTR then calculated the number of days within this five-year period during which Appellant was in violation of the 1992 and 2005 rules. Testimony Stevens; Fire Marshal's Exhibit 3.

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<sup>5</sup> Ms. Stevens testified that BUSTR no longer uses this method. Instead, BUSTR now applies those factors set out in *State ex rel. Brown v. Dayton Malleable, Inc.*, 2nd Dist. No. 6722 (April 21, 1981). Testimony Stevens.

{¶40} Because the 2005 rules allowed violators to continue corrective actions under the 1992 rules until September 1, 2005, BUSTR determined that Appellant was not in compliance with the 1992 version of Ohio Adm.Code 1301:7-9-13 (requiring a “site assessment”) between March 3, 2004 and September 1, 2005—a period of 547 days. Fire Marshal’s Exhibit 3.

{¶41} In calculating the number of days Appellant was not in compliance with the 2005 version of Ohio Adm.Code 1301:7-9-13 (requiring a “Tier 1 Delineation Notification”), BUSTR determined that the violation began on December 1, 2005, and continued through March 2, 2009—a period 1,187 days. Although no explanation was given at the hearing, the Fire Marshal’s Proposed Findings of Fact state that BUSTR determined that Appellant was not in non-compliance with any BUSTR rules between September 1, 2009, and December 1, 2009, because “the new 2005 rules gave Appellant Barber a 90-day window in which to come into compliance with the 1992 rules.” Testimony Stevens; Fire Marshal’s Exhibit 3; Case File Item QQ.

{¶42} In total, BUSTR calculated the number of days Appellant was not in compliance to be 1,734 days. Testimony Stevens; Fire Marshal’s Exhibit 3.

{¶43} In order to calculate the economic benefit component of the civil penalty, Ms. Stevens explained that BUSTR calculated both “avoided costs” and “delayed costs.” Avoided costs are those that the violator will simply *never* incur as a result of non-compliance. Avoided costs are calculated using the following formula:<sup>6</sup>

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<sup>6</sup> BUSTR’s UST Penalty Computation Worksheet calculates the interest portion of “avoided costs” by applying the interest rate to “delayed expenditures” rather than to “avoided

$$\text{Avoided Costs} = \text{Avoided Expenditures} + \frac{\text{Avoided Expenditures} \cdot \text{Interest} \cdot \# \text{ of Days}}{365}$$

Testimony Stevens; Fire Marshal's Exhibit 3.

{¶44} In comparison, delayed costs represent the benefit a violator gains by *postponing* certain costs as a result of non-compliance. Delayed costs are calculated using the following formula.

$$\text{Delayed Costs} = \frac{\text{Delayed Expenditures} \cdot \text{Interest} \cdot \# \text{ of Days}}{365}$$

Testimony Stevens; Fire Marshal's Exhibit 3.

{¶45} At hearing, Ms. Stevens testified that the cost of conducting a site assessment was an “avoided expenditure” because Appellant’s obligation to conduct a site assessment ended when the new rules took effect in 2005; therefore, Appellant would *not* be required to complete a site assessment in the future. Ms. Stevens further testified that the cost of performing a Tier 1 Delineation Notification represented a “delayed expenditure” because Appellant’s non-compliance with the 2005 rules simply *postponed* expenditures related to Appellant’s obligation to conduct a Tier 1 Delineation Notification. In other words, the Tier 1 Delineation Notification represented a “delayed expenditure” because Appellant *would* still be required to conduct a Tier 1 Delineation Notification in the future. Testimony Stevens.

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expenditures.” This, however, appears to have been a typographical error. Based on Ms. Stevens’ testimony and the U.S. EPA’s guidance document, it does not appear that “delayed expenditures” factored into BUSTR’s calculation of Appellant’s “avoided costs,” despite being so labeled on BUSTR’s UST Penalty Computation Worksheet. Instead, it appears that BUSTR simply followed the U.S. EPA’s guidance document and applied the interest rate to “avoided expenditures” as a part of its “avoided costs” calculation. *Compare* Fire Marshal’s Exhibit 3 *with* U.S. EPA Penalty Guidance for Violations of UST Regulations, <http://www.epa.gov/oust/directiv/od961012.htm#sec2-2> (last visited July 10, 2012).

{¶46} BUSTR determined that the cost of performing either a site assessment or a Tier 1 Delineation Notification was \$9,000. BUSTR arrived at this figure by contacting the Petroleum Underground Storage Tank Compensation Release Compensation Board and by surveying private contractors. Ms. Stevens testified that \$9,000 represented the lowest figure presented by any of the private contractors BUSTR surveyed as a part of this process, and that typical costs range from \$15,000 to \$50,000. Testimony Stevens.

{¶47} Finally, Ms. Stevens explained that she obtained an interest rate of 9.1% by calling U.S. EPA. Testimony Stevens.

{¶48} Using the equations above, BUSTR applied a value of \$9,000 for both “avoided expenditures” and the “delayed expenditures,” 9.1% for the interest rate, and 1,734 days for the number of days in non-compliance. This resulted in \$12,890.81 as “avoided costs” and \$3,891 as “delayed costs.” Added together, BUSTR calculated the economic benefit component of the civil penalty to be \$16,782. Testimony Stevens; Fire Marshal’s Exhibit 3.

{¶49} With respect to the gravity-based component of the civil penalty, Ms. Stevens explained that BUSTR utilizes a “matrix.” Specifically, a default “matrix value” is assigned based on whether the violation is considered “major” or “non-major.” Ms. Stevens testified that “non-major” violations include primarily those violations associated with pre-release requirements, such as registration requirements. Ms. Stevens explained that per U.S. EPA policy, all corrective actions involving an actual release of petroleum product are considered “major.” According to the U.S. EPA’s guidance, “major” violations

carry a default “matrix value” of \$1,500. Because the violation at issue here involved the release of petroleum product, BUSTR concluded that it was a “major” violation and assigned a \$1,500 default matrix value.<sup>7</sup> Testimony Stevens.

{¶150} Once a “default matrix value” is assigned, BUSTR adjusts the matrix value based on four violator-specific factors: (1) the “degree of cooperation/non-cooperation,” (2) the “degree of willfulness or negligence,” (3) the “history of non-compliance,” and (4) other “unique factors.” Testimony Stevens; Fire Marshal’s Exhibit 3.

{¶151} In this case, BUSTR assigned a 15% upward adjustment based on the degree of Appellant’s non-cooperation. Ms. Stevens explained that this upward adjustment was based on the fact that Barber’s Ashland had failed to respond to five letters regarding its obligations under BUSTR regulations. Testimony Stevens; Fire Marshal’s Exhibit 3.

{¶152} Similarly, BUSTR also assessed an additional 15% upward adjustment based on willfulness or negligence.<sup>8</sup> Ms. Stevens explained that BUSTR assessed this upward adjustment because compliance with the site assessment and/or Tier 1 Delineation Notification requirements was fully within Mr. Barber’s control as the owner and operator of Barber’s Ashland. Testimony Stevens; Fire Marshal’s Exhibit 3.

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<sup>7</sup> No testimony was presented with regard to how U.S. EPA derived this \$1,500 “default matrix value.” The Commission, however, notes that Mr. Barber did not challenge this figure. *See* Testimony Stevens, Barber.

<sup>8</sup> No testimony was presented as to whether this adjustment represented “willfulness” or “negligence.” Again, however, Mr. Barber did not challenge this determination. *See* Testimony Stevens, Barber.

{¶53} And finally, BUSTR imposed a third upward adjustment of 15% based on “unique factors.” As Ms. Stevens explained, this upward adjustment was a result of a previous unrelated fine that Mr. Barber had been assessed by Ohio EPA.<sup>9</sup> Testimony Stevens; Fire Marshal’s Exhibit 3.

{¶54} Each of the 15% upward adjustments resulted in an additional \$225 being assessed towards the “matrix value.” In total, Ms. Stevens testified that this amounted to an increase of \$675,<sup>10</sup> bringing the “adjusted matrix value” to \$2,175. Testimony Stevens; Fire Marshal’s Exhibit 3.

{¶55} Finally, two multipliers were applied to the “adjusted matrix value.” First, an “environmental sensitivity multiplier” was assigned based on any specific factors tending to increase the severity of environmental harm associated with the release. Here, BUSTR determined that no additional “environmental sensitivity multiplier” was warranted, and accordingly assigned a multiplier of 1. Testimony Stevens; Fire Marshal’s Exhibit 3.

{¶56} Second, a “days of non-compliance multiplier” was assigned based on the number of days the violator has been out of compliance. Ms. Stevens explained that violations increase in severity the longer they continue. For each 90-day period between three months of non-compliance and one year, an additional 0.5 is added to the multiplier. Beyond one year, an additional 0.5 is

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<sup>9</sup> Ms. Stevens stated that this particular upward assessment could alternatively have been included under “history of non-compliance.” Testimony Stevens.

<sup>10</sup> The Commission notes that Ms. Stevens’ testimony on this issue was somewhat inaccurate. As discussed in greater detail below, BUSTR applies two multipliers after calculating the “adjusted matrix value.” Thus, the three 15% upward adjustments did not simply represent a \$675 increase in the civil penalty, as Ms. Stevens testified at hearing. Instead, after the application of the two multipliers, the three 15% upward adjustments actually represented an increase of \$4,387.50 towards the *final* gravity-based component of the civil penalty.

added for each 6-month period. Because Appellant had been in non-compliance for five years, BUSTR assigned a corresponding “days of non-compliance multiplier” of 6.5. Testimony Stevens; Fire Marshal’s Exhibit 3.

{¶57} Multiplying the “adjusted matrix value” of \$2,175 by the “environmental sensitivity multiplier” of 1 and the “days of non-compliance multiplier” of 6.5, BUSTR arrived at a gravity-based component of \$14,138. Testimony Stevens; Fire Marshal’s Exhibit 3.

{¶58} Adding the economic benefit component to the gravity-based component, BUSTR arrived at a total civil penalty of \$30,919. Testimony Stevens; Fire Marshal’s Exhibit 3.

### **CONCLUSIONS OF LAW**

{¶59} Ohio Revised Code 3745.05 sets forth the standard ERAC must employ when reviewing a final action of the State Fire Marshal. The statute provides, in relevant part, that “[i]f, upon completion of the hearing, the commission finds that the action appealed from was lawful and reasonable, it shall make a written order affirming the action, or if the commission finds that the action was unreasonable or unlawful, it shall make a written order vacating or modifying the action appealed from.”

{¶60} The term “unlawful” means “that which is not in accordance with law,” and the term “unreasonable” means “that which is not in accordance with reason, or that which has no factual foundation.” *Citizens Committee to Preserve Lake Logan v. Williams*, 56 Ohio App.2d 61, 70 (10th Dist. 1977). “This standard does not permit ERAC to substitute its judgment for that of the Director as to factual issues.” *CECOS Internatl., Inc. v. Shank*, 79 Ohio App.3d 1, 6 (10th Dist.

1992). It is only where [ERAC] can properly find from the evidence that there is no valid factual foundation for the [Fire Marshal's] action that such action can be found to be unreasonable. Accordingly, the ultimate factual issue to be determined by [ERAC] upon the de novo hearing is whether there is a valid factual foundation for the [Fire Marshal's] action and not whether the [Fire Marshal's] action is the best or most appropriate action, nor whether the board would have taken the same action." *Id.*

{¶61} Further, the Commission is required to grant "due deference to the [Fire Marshal's] 'reasonable interpretation of the legislative scheme governing his Agency.'" *Sandusky Dock Corp. v. Jones*, 106 Ohio St.3d 274 (2005), citing *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St.3d 282 (2001); *State ex rel. Celebrezze v. National Lime & Stone Co.*, 68 Ohio St. 3d 377 (1994); *North Sanitary Landfill, Inc. v. Nichols*, 14 Ohio App. 3d 331 (2nd Dist. 1984). The deference is not, however, without limits. *See e.g., B.P. Exploration and Oil, Inc. v. Jones*, ERAC Nos. 184134-36 (March 21, 2001) (in which the Commission noted that such deference must be granted to the Director's interpretation and application of his statutes and rules, "particularly if the Director's interpretation is not at variance with the explicit language of the regulations").

{¶62} In evaluating the lawfulness and reasonableness of the Fire Marshal's March 11, 2009 FFOs, the Commission will first address BUSTR's determination that Appellant was in non-compliance with the "site assessment" and "Tier 1 Delineation Notification" requirements contained in the 1992 and

2005 versions of Ohio Adm.Code 1301:7-9-13 respectively. The Commission will then address BUSTR's calculation of a \$30,919 civil penalty.

{¶63} With respect to BUSTR's determination that Barber's Ashland failed to comply with the "site assessment" and "Tier 1 Delineation Notification" requirements, Appellant argues that the Fire Marshal acted unreasonably because the SIR satisfied both requirements. Specifically, Appellant argues that BUSTR gave oral approval for use of a backhoe and that the installation of additional monitoring wells would have posed an unnecessary risk of hitting utility lines.

{¶64} Additionally, Appellant also advances two mitigating factors. First, Appellant argues that BUSTR's letters did not provide sufficient detail or explanation regarding why the SIR was insufficient to satisfy the "site assessment" requirement. And second, Appellant argues that he hired Mr. Stewart to perform the environmental work at the Barber's Ashland site on the basis of a recommendation by BUSTR personnel. Appellant contends that both of these factors made the issuance of a civil penalty unreasonable. The Commission disagrees.

{¶65} As an initial matter, the Commission notes that each of the five letters sent to Mr. Barber between May 8, 1998, and June 15, 2004, specifically referenced the applicable regulations and guidance documents, and provided a telephone number that Appellant could call with questions. Further, each of the three letters sent to Mr. Barber between April 8, 2005, and June 3, 2008, invited Mr. Barber to contact BUSTR to develop a compliance plan. Appellant provided

no evidence to demonstrate that Mr. Barber even attempted to access any of these resources.

{¶66} Further, with respect to the recommendation of Mr. Stewart as an environmental consultant, the Commission recognizes that while owners and operators frequently hire consultants to complete required work, doing so does not relieve them of their obligation to comply with the law.

{¶67} Regarding the specific requirement to complete a “site assessment” and/or “Tier 1 Delineation Notification” report, Mr. Israel explained that both requirements exist for the purpose of delineating the lateral and vertical extent of contamination present at a site. Thus, while BUSTR could have given approval for the use of a backhoe pursuant to the “site check” requirement, it would not have done so pursuant to either the “site assessment” or “Tier 1 Delineation Notification” requirement because its use disrupts the soil such that an accurate delineation of the extent of contamination is not possible. Accordingly, the Commission rejects Appellant’s contention that it received oral approval for the use of a backhoe with respect to the “site assessment” and/or “Tier 1 Delineation Notification” requirement.

{¶68} Finally, the Commission rejects Appellant’s argument relating to the placement of monitoring wells. Again, the purpose of both the “site assessment” and “Tier 1 Delineation Notification” requirements is to fully delineate the lateral and vertical extent of contamination. Appellant did not present any testimony or evidence establishing that the original selection of well locations, as detailed in the SIR, was sufficient to accomplish this purpose.

{¶69} Thus, the Commission finds that BUSTR had a valid factual foundation for rejecting the SIR for purposes of the “site assessment” and “Tier 1 Delineation Notification” requirements. Accordingly, the Commission finds that Fire Marshal acted lawfully and reasonably in that respect.

{¶70} With respect to the assessment of the \$30,919 civil penalty, the Commission notes that the Fire Marshal derives his authority to impose civil penalties from R.C. 3737.882(C)(2). That provision provides as follows:

Whoever violates division (C)(1) of this section or division (F) of section 3737.881 of the Revised Code shall pay a civil penalty of not more than ten thousand dollars for each day that the violation continues.

As Ms. Stevens explained at the hearing, because Appellant was not in compliance for 1,734 days, pursuant to R.C. 3737.882, the maximum penalty that the Fire Marshal was statutorily authorized to assess was more than \$17,000,000. The Fire Marshal’s imposition of \$30,919 penalty is well below the maximum authorized by statute. Accordingly, the Commission finds that the Fire Marshal acted lawfully in imposing the civil penalty at issue here.

{¶71} However, this does not end the Commission’s inquiry. Instead, the Commission must also determine whether the Fire Marshal acted reasonably. Specifically, the Commission must determine whether the Fire Marshal possessed a valid factual foundation for each component of the civil penalty. Although calculation of a civil penalty is within the broad discretion of the Fire Marshal, such discretion is not unlimited. Even when the civil penalty assessed is below the statutory maximum, factual determinations made in connection with the assessment of a civil penalty must be supported by a valid factual foundation and the application of a particular method of calculation must be consistent with the

purpose of the regulatory scheme under which the penalty is issued. *State ex rel. Cordray v. Shelly Holding Co.*, 191 Ohio App.3d 421, 2010-Ohio-6526, 946 N.E.2d 295 (10th Dist.) (finding that although the trial court was within its discretion in choosing a particular method for calculating the civil penalty, it applied that method unreasonably).

{¶72} Here, although Appellant did not specifically challenge the amount at the de novo hearing, the Commission finds that the Fire Marshal lacked a valid factual foundation for both its calculation of the number of days in non-compliance and for its assessment of “avoided costs” towards the civil penalty. Therefore, to the extent noted below, the Commission finds that the Fire Marshal acted unreasonably in his assessment of the \$30,919 civil penalty.

{¶73} With respect to the number of days in non-compliance, the Commission finds that the Fire Marshal lacked a valid factual foundation for his determination that Appellant was fully in compliance with Ohio’s UST regulations between September 1, 2005 and December 1, 2005. Although the Fire Marshall correctly notes that the 2005 rules included a 90-day period to complete Tier 1 reports, the 90-day period did not begin on September 1, 2005. Instead the rule provides that the period begins to run upon the occurrence any of the following events:

- i. Receiving analytical results, which exceed action levels, pursuant to paragraph (F)(3)(c) of this rule;
- ii. Electing to conduct corrective actions pursuant to paragraph (B)(2) of this rule;
- iii. Electing to conduct a tier 1 source investigation pursuant to (F)(3)(b)(i) of this rule;

- iv. Receiving analytical results, which exceed action levels, from a closure assessment conducted pursuant to paragraph (F) of rule 1301:7-9-12 of the Administrative Code; or
- v. Conducting corrective action activities pursuant to paragraph (B)(3) of this rule.

Ohio Adm.Code 1301:7-9-13(H)(3)(a)(i)-(v).

{¶74} Here, Appellant’s February 12, 1998 SIR revealed analytical results in excess of action levels pursuant to Ohio Adm.Code 1301:7-9-13(F)(3)(c) (requiring a “site check”). Thus, Appellant’s 90-day period began to run when Appellant submitted his SIR on February 12, 1998. The 90-day period therefore ended on May 13, 1998—more than seven years before September 1, 2005.

{¶75} Accordingly, the Commission finds that the Fire Marshal lacked a valid factual foundation for his determination that Appellant failed to comply for a total of 1,734 days. Instead, the Fire Marshal should have included the period between September 1, 2005, and December 1, 2005, in his calculation of the days in non-compliance.

{¶76} Further, the Commission finds that the Fire Marshal lacked a valid factual foundation for assessing “avoided costs” towards his calculation of the civil penalty. As Ms. Stevens testified, the purpose of the economic benefit component of the civil penalty is to ensure that violators do not gain a competitive advantage by failing to comply with the law. Thus, BUSTR reasonably assesses a penalty representative of both those costs that the violator will *never* have to incur as a result of non-compliance (“avoided costs”) and those costs that the violator is able to *postpone* as a result of non-compliance (“delayed costs”).

{¶77} Here, however, the Commission finds that the cost to perform a “site assessment” should *not* have represented an “avoided cost.” Although Appellant was no longer required to perform a “site assessment” after September 1, 2005, he *was* required to perform an *equivalent* evaluation known as a “Tier 1 Delineation Notification.” As Mr. Israel explained, both a “site assessment” and a “Tier 1 Delineation Notification” serve the same purpose; namely, to delineate the lateral and vertical extent of contamination. Significantly, there was no circumstance under which Appellant would have been required to perform *both* a “site assessment” *and* a “Tier 1 Delineation Notification.”

{¶78} Put another way, the “site assessment” and “Tier 1 Delineation Notification” requirements were not, in fact, two separate requirements. Instead, the “Tier 1 Delineation Notification” requirement only applied *in lieu of* a “site assessment.” Therefore, Appellant’s obligation to perform an analysis to determine the lateral and vertical extent of the contamination—whether titled “site assessment” or “Tier 1 Delineation Notification”—did *not* end on September 1, 2005. Instead, it simply continued, albeit under a different set of regulations. Barber’s Ashland did not “avoid” the cost of performing a “site assessment;” rather, it merely “delayed” the cost until he eventually submitted a satisfactory Tier 1 Delineation Notification.

{¶79} Accordingly, the Commission finds that the Fire Marshal lacked a valid factual foundation in assessing “avoided costs” towards the civil penalty.

{¶80} In all other respects, the Commission finds that the Fire Marshal acted lawfully and reasonably in issuing the civil penalty. Specifically, the Commission finds that BUSTR had a valid factual foundation for assessing

“delayed” costs representative of the cost of performing a Tier 1 Delineation, as well as for assessing a gravity-based component of \$14,138.

{¶81} With respect to the delayed costs, the Commission finds that BUSTR had a valid factual foundation for determining that the cost of performing a Tier 1 Delineation Notification was \$9,000. In particular, the evidence demonstrates that \$9,000 represents the low-end of estimates for performing the analysis. Further, the Commission finds that 9.1% interest rate obtained from U.S. EPA is reasonable.

{¶82} With respect to the gravity-based component, the Commission also finds that the Fire Marshal had a valid factual foundation for each of the constituent parts comprising the \$14,138 figure.

{¶83} As Ms. Stevens explained, the first step in calculating the gravity-based component is to evaluate the potential for harm and the extent of the deviation. Here, BUSTR determined that Appellant’s violation was “major” because it involved a release of petroleum as opposed to a pre-release administrative error. The Commission finds that this distinction provides a valid factual foundation for BUSTR’s determination that the violation at issue was “major.”

{¶84} Moreover, the evidence established that the “default matrix value” of \$1,500 was taken directly from a U.S. EPA guidance document. Although Appellant did not present any evidence challenging reliance on the U.S.EPA guidance, the Commission notes that mere citation to U.S. EPA policy provides little as far as substantive evidence of reasonableness. Nonetheless, because Appellant provided no evidence indicating that \$1,500 did not represent a

reasonable “default matrix value” to achieve a deterrent effect,<sup>11</sup> the Commission finds that BUSTR had a valid factual foundation for determining that \$1,500 was an appropriate figure for the “default matrix value.”

{¶85} Similarly, the Commission finds that BUSTR had a valid factual foundation for each of the three 15% upward adjustments. Specifically, the Commission finds that BUSTR could reasonably assess 15% upward adjustments based on the number of letters that had been sent to Appellant, the level of control the Appellant had to correct the deficiencies, and Appellant’s previous history of non-compliance.

{¶86} Finally, the Commission finds that BUSTR reasonably applied a “days of non-compliance multiplier” of 6.5. Appellant neither disputed the premise that violations become more severe the longer they continue, nor the multipliers themselves.

{¶87} Having found that BUSTR had a valid factual foundation for the default matrix value, the three 15% upward adjustments, and the days of non-compliance multiplier, the Commission finds that the Fire Marshal acted reasonably with respect to the \$14,138 gravity-based component of the civil penalty.

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<sup>11</sup> The U.S. EPA UST Penalty Policy states that the gravity-based component “serves to deter potential violators.” U.S. EPA Penalty Guidance for Violations of UST Regulations, <http://www.epa.gov/oust/directiv/od961012.htm#chapter3> (last visited July 10, 2012).

**FINAL ORDER**

{¶88} For the foregoing reasons, the Commission hereby AFFIRMS the State Fire Marshal's March 11, 2009 Final Findings and Orders with respect to the determination that Appellant had failed to comply with the "site assessment" and "Tier 1 Delineation Notification" requirements.

{¶89} The Commission hereby VACATES AND REMANDS the March 11, 2009 Final Findings and Orders with respect to the imposition of the \$30,919 civil penalty. Specifically, the Commission vacates the economic benefit component of the civil penalty with respect to the "avoided costs" calculation and with respect to the number of days in non-compliance.

{¶90} The Commission ORDERS the State Fire Marshal to re-calculate the civil penalty in a manner consistent with this Decision.

{¶91} The Commission, in accordance with Ohio Adm.Code 3746-13-01,  
informs the parties that:

Any party adversely affected by an order of the commission may appeal to the court of appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. The party so appealing shall file with the commission a notice of appeal designating the order from which an appeal is being taken. A copy of such notice shall also be filed by the appellant with the court, and a copy shall be sent by certified mail to the director or other statutory agency. Such notices shall be filed and mailed within thirty days after the date upon which appellant received notice from the commission of the issuance of the order. No appeal bond shall be required to make an appeal effective.

**The Environmental Review  
Appeals Commission**

Entered into the Journal of the  
Commission this \_\_\_\_\_ day  
of July 2012. July 2012

\_\_\_\_\_  
Lisa L. Eschleman, Chair

\_\_\_\_\_  
Melissa M. Shilling, Vice Chair

\_\_\_\_\_  
Shaun K. Petersen, Member

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BARBER'S ASHLAND

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