STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

RE: NEUSCHATZ, SANFORD **AAD NO. 00-002/SRE**
NOTICE OF VIOLATION OC&I/LUST 00-3208 & 3238

DECISION AND ORDER

This matter came before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD") pursuant to Respondent's request for hearing on the Notice of Violation and Order ("NOV") issued by the DEM Office of Compliance and Inspection ("OCI") on April 5, 2000. The hearing was held on February 5 and 7, 2001. A visit to the site located at 2528 Kingstown Road in the Town of South Kingstown, Rhode Island was conducted on February 9, 2001.

Following the hearing, both the OCI and Respondent filed post-hearing memoranda; due to extensions for filing the briefs, the hearing was considered closed on May 9, 2001.

The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R.I. GEN. LAWS § 42-17.7-1 *et seq.*); Chapter 17.6 of Title 42 entitled "Administrative Penalties for Environmental Violations"; the Administrative Procedures Act (R.I. GEN. LAWS § 42-35-1 *et seq.*); the Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD Rules"); and the Rules and Regulations for Assessment of Administrative Penalties ("Penalty Regulations").

PREHEARING CONFERENCE

A prehearing conference was conducted on October 12, 2000. At the conference, the parties agreed to the following stipulations of fact:

1. The subject property is located at 2528 Kingstown Road, South Kingstown, Rhode Island (the "Facility") and is owned by Sanford Neuschatz.

2. Mr. Neuschatz acquired title to the Facility in or about August 1997.

3. By letter dated September 24, 1997, DEM required that Mr. Neuschatz prepare and submit a proposal for a Corrective Action Plan ("CAP") for the remediation of the petroleum contamination.

4. By letter dated October 20, 1997, Mr. Neuschatz requested that he be given the opportunity to review the Site Investigation Report ("SIR") for the Facility that was in DEM's files.

5. On October 28, 1998, DEM issued a Notice of Intent to Enforce ("NIE") to Mr. Neuschatz directing him to retain an environmental consultant to submit a timetable for the completion and submission of a CAP.

6. By letter dated November 13, 1998, Mr. Neuschatz responded to the NIE through his attorney, stating that DEM would receive a timetable for the development of a CAP within 30 days.

7. As of the date of issuance of the NOV, DEM had not received a CAP from Mr. Neuschatz to address the contamination at the Facility.

8. As of the date of the Prehearing Conference, September 28, 2000, DEM had not received a CAP from Mr. Neuschatz to address the contamination at the Facility.

9. As of the date of the Prehearing Conference, September 28, 2000, Mr. Neuschatz had not begun any remediation of the contamination located at the Facility.

10. Mr. Neuschatz acquired the abandoned Kingston Hill store property in Kingston, R.I. in August 1997, by virtue of a Land Exchange.

11. Communications between Mr. Neuschatz and DEM commenced in September of 1997 regarding the contamination in and around the Kingston Hill Store and potential strategies to resolve the matter.

The exhibits, marked as they were admitted at the hearing, are attached to this Decision as Appendix A.

The parties separately identified what they considered to be the issue at the hearing. OCI's issue was stated as follows:

> Whether Respondent failed to design, submit and implement a CAP to remediate the known subsurface petroleum contamination as required by § § 14.11 and 14.12 of the UST Regulations.

Respondent's issue reveals his denial of ownership of the source of contamination:

> Whether Respondent is the responsible party required to design, submit and implement a Corrective Action Plan to remediate subsurface contamination, or is the State of Rhode Island responsible as the contamination originated from land owned by it.

HEARING SUMMARY

At the hearing, the OCI called three (3) witnesses: **Tracey Tyrrell**, a Principal Environmental Scientist in the OCI's Underground Storage Tank Section; **Peter Sullivan**, a Project Manager in the Office of Waste Management's Leaking Underground Storage Tank ("LUST") Program, who was qualified at the hearing as an expert in managing and directing the investigation and remediation of LUST sites; and **Sanford Neuschatz**, the Respondent.

Respondent also testified on his own behalf, but called no further witnesses.

I. The Notice of Violation

The NOV issued to Respondent on or about April 5, 2000 identifies property located at 2528 Kingstown Road in the Town of South Kingstown, Rhode Island. According to the NOV, four (4) underground storage tanks ("USTs") had been located on the site; one was permanently closed on February 3, 1988 and the remaining USTs were permanently closed on November 30, 1995. During the earlier closure, petroleum-contaminated soil was excavated. In the later closures, a release of petroleum product had been observed. On behalf of the then-owner

Charles A. Maki, Clean Environment, Inc. ("CEI") submitted to the Department a UST Closure Assessment Report in March 1996 and a Site Investigation Report ("SIR") on September 19, 1996. According to the NOV's recitation of the latter report's findings, the groundwater samples contained excessive concentrations of benzene, ethylbenzene, toluene, and total xylenes. CEI recommended that a Corrective Action Plan ("CAP") be developed for the site.

On or about August 8, 1997, Respondent Sanford Neuschatz obtained title to the property. On September 24, 1997, the Department notified Mr. Neuschatz that he was required to submit a CAP within ten (10) days. A year later, on October 28, 1998, Mr. Neuschatz was issued a Notice of Intent to Enforce ("NIE") for his failure to submit a CAP to address the contamination on the property. The NIE imposed a forty-five (45) day deadline for Mr. Neuschatz to retain an environmental consultant and to submit to the Department a timetable for completion and submission of a CAP.

The NOV states that as of the date of the NOV (April 5, 2000), the Respondent had not submitted a CAP to address the subsurface contamination at the site. He is cited for violating sections 14.11 and 14.12 of the DEM Regulations for Underground Storage Facilities Used for Petroleum Products and Hazardous Materials ("UST Regulations"). Those sections are set forth below.

> 14.11 Corrective Action Plan:
>
> (A) Based upon the site investigation or other data, the Department may require owners/operators to develop a Corrective Action Plan, within a time frame specified by the Director, to address contaminated soils or groundwater or other related environmental or public health impacts. The Corrective Action Plan shall be prepared by a person or persons of appropriate qualifications and relevant professional experience and signed or stamped by a professional engineer or certified professional geologist.
>
> (B) In order to be approved, the Corrective Action Plan must protect human health and the environment in a manner acceptable to the DEM. Where the Director determines that additional investigation work is required to further

assess the nature and extent of the contamination resulting from a release from a UST facility, the Director may require that additional Site Investigation Reports be prepared and submitted prior to the approval of a Corrective Action Plan.

14.12 Contents of Corrective Action Plan:

(A) A Corrective Action Plan shall, at minimum, consist of the following:

(1) A summary of findings from the Site Investigation Report and any additional information the Director may require;
(2) A description of the proposed method for remediation, including, but not be limited to, the following:
    (a) Justification of the ability of the chosen remedial method(s) to meet the remediation objectives;
    (b) Design standards and technical specifications for the equipment necessary for the proposed remediation;
    (c) Diagrams of piping routes, instrumentation, and process flows; and
    (d) Proposed plans for the disposal of any products or by-products from the remediation activities;
(3) A proposed schedule for implementation of the corrective action plan; and
(4) A proposed groundwater monitoring program.

(B) The groundwater remediation plan and any associated progress reports shall include the following signed statements:

(1) A statement signed by an authorized representative for the person preparing the groundwater remediation plan certifying, to the best of their knowledge, the accuracy of the information contained in the plan; and
(2) A statement signed by the facility owner/operator responsible for the preparation and submittal of the groundwater remediation plan certifying, to the best of their knowledge, that the plan is complete and accurate.

As a consequence of the above alleged violations, the OCI seeks written verification that a qualified environmental consultant has been retained to prepare a CAP for the remediation and removal of all petroleum products or hazardous materials on site. The OCI also seeks submission of a detailed timetable prepared by the consultant that sets forth dates for the completion of testing required for the development of a CAP, submission of the CAP for DEM's review and approval, and implementation of the CAP. The NOV also sets forth other reports and notifications

that the OCI requires, as well as reimbursement for any funds that the DEM has expended in the investigation and/or remediation of the contamination at the site.

In addition to the above, the OCI seeks the imposition of a Fifteen Thousand ($15,000.00) Dollar administrative penalty against the Respondent.

II. Subsurface Petroleum Contamination at the Kingston Hill Store

At the hearing Peter Sullivan explained his obligations as a project manager in the Office of Waste Management's LUST Program and his particular involvement with this site. Based on his education and experience, Mr. Sullivan was qualified as an expert in managing and directing the investigation and remediation of LUST sites.

Mr. Sullivan's involvement with this site predates Respondent's ownership of the Kingston Hill Store located at 2528 Kingstown Road in the Town of South Kingstown. Tr. February 5, 2001 at 95. Mr. Sullivan was at the property on February 3, 1988 for the removal of a 4,000-gallon underground storage tank. He testified that approximately 20 yards of contaminated soil was removed for disposal. *Id.* at 72. He was again at the site on November 30, 1995 for the removal of three (3) USTs. On that occasion he had noted very strong odors emanating from the tank graves. *Id.* at 82.

The UST Closure Assessment Report (OCI 5), prepared by CEI, was submitted to the Department on March 12, 1996 for Mr. Sullivan's review as the assigned project manager. *Id.* at 87-88. The Report identified a significant release of petroleum product to the soil in the area surrounding where the USTs had been located. The Report noted that although elevated levels of petroleum-contaminated soil remained on site, its excavation had been halted due to space limitations at the site. OCI 5 at 7.

Mr. Sullivan testified that the area's groundwater classification was GA, therefore suitable for drinking purposes. Because of this classification, the levels of total petroleum hydrocarbons ("TPH") and the strong presence of the BTEX compounds (benzene, toluene, ethyl benzene and xylene), he had agreed with the consultant's recommendation that a more thorough investigation was necessary. Tr. February 5, 2001 at 96-101.

CEI prepared the Site Investigation Report (OCI 6) and submitted it to the Department on September 19, 1996. The Report states that four (4) groundwater monitoring wells were installed: three were placed in the area where the former USTs had been (MW-1, MW-2 and MW-3) and the fourth well (MW-4) was installed on the south side of the building in an up-gradient location. Petroleum contaminated soil was encountered during the installation of the three wells in front of the building; none was observed in the samples collected from the fourth up-gradient well at the rear of the building. OCI 6 at 7-9.

Approximately ¼ inch of petroleum product was observed on the surface of the groundwater sample collected from MW-1; petroleum sheen was noted in the samples collected from MW-2 and MW-3; and petroleum odors were detected from all three of those samples. None was observed or detected in the sample collected from MW-4. *Id.* at 11. Laboratory analysis of the samples indicated the presence of volatile organic compounds ("VOCs") in the three suspect wells, but VOCs were "non-detected" in the groundwater sample collected from MW-4. *Id.* at 12.

The Report discussed difficulties in determining the groundwater flow direction at the site but anticipated that the groundwater flow direction in the vicinity of the former USTs would be in a northerly direction toward Kingstown Road. *Id.* at 15. CEI concluded in its Report that elevated levels of VOCs in the soil and groundwater had been found and that the level in the groundwater exceeded that

which was allowable in a groundwater classification of GA. The consultant therefore recommended that a remedial action work plan following DEM protocols should be conducted on the site. *Id.* at 16.

Based upon his review of the Report and on his personal observations at the site, Mr. Sullivan concluded that more monitoring wells should be installed down gradient from the existing wells in order to delineate the outer edge of the contamination plume. Tr. February 5, 2001 at 104-105; 109-110. He agreed that the recommended remedial action work plan, also called a Corrective Action Plan ("CAP") by the DEM, should be developed to address the high levels of gasoline contamination in the groundwater table. *Id.* at 114-115. No plan has yet been submitted. *Id.* at 115.

Under cross examination, the witness asserted his certainty that the source of the contamination was a leak somewhere in the UST system, whether it was from the tanks themselves or from the piping, joints or from overfills. *Id.* at 135-139.

Conclusion

The evidence is overwhelming that petroleum product leaked from somewhere in the tank system, whether from the USTs themselves or from the piping or joints; that contamination remains on site; and that a CAP is required.

III. Disputed Ownership of the Land in Front of the Kingston Hill Store

Sanford Neuschatz testified both in OCI's direct case and on his own behalf when Respondent presented his case. He had attended the University of Rhode Island from 1968 to 1972 and had traveled by the Kingston Hill Store during that period. He recalled the gasoline dispensers that had been located in front of the store. Tr. February 7, 2001 at 5. He also testified that the present wooden Kingston Hill Store sign in front of the building is in the same location where the

Flying "A" Mobil gasoline sign had been in the 1960's when he attended URI. The Flying "A" sign had been situated at the dispensing island where cars could pull up at either side of the island to refuel. *Id.* at 56-57.

Mr. Neuschatz explained his interest in history and that prior to acquiring the property in 1997, he had researched the uses of the property in the Town's Land Evidence records. This research included a review of prior deeds to the property. *Id.* at 7-8, 13.

The witness acknowledged that prior to taking title to the property, he had been informed that there were environmental concerns related to the gasoline tanks formerly located at the station. *Id.* at 23-24. Prior to obtaining title, he had also written a check (dated May 15, 1997) payable to the Rhode Island General Treasurer in payment of a penalty assessed against the then owner of the property, Charles A. Maki. *Id.* at 21-22; see also OCI 21. Although he had reviewed the UST Closure Assessment Report (OCI 5) prior to obtaining title, he did not see a copy of the SIR dated August 1996 (OCI 6) until on or after September 1997. Tr. February 7, 2001 at 38-40.

Respondent testified that when he bought the property, he had intended to remediate the site when he obtained the funds, through loans or otherwise. He considered that over the first two (2) years of his ownership of the property he had negotiated in good faith with the DEM. *Id.* at 68-69.

Mr. Neuschatz testified that he returned to his research of the Town records in late 1999 and 2000. In his research, Mr. Neuschatz discovered an old photograph (Resp 3A Full), newspaper articles (Resp 2 for Id), Zoning Board minutes (Resp 7 Full), and a recorded survey (Resp 1 Full) that according to his testimony, caused him to doubt whether the gasoline tanks and pumps had been located on the property deeded to him by Mr. Maki or whether the pumps and tanks

had been located on property owned by the State of Rhode Island. Tr. February 7, 2001 at 59-62; 68-70.

Conclusion

I have reviewed the testimony and the evidence submitted by the OCI and by Respondent dealing with the issue of ownership of the area where the tanks had been located, and consequently, where the monitoring wells MW-1, MW-2 and MW-3 were installed.

My conclusion as to the ownership of the area where the USTs and pumps were located is based upon my review of the below documents.

The OCI offered into evidence copies or partial copies of deeds to the property dating back to April 10, 1832. See OCI 22. The deeds generally contain the same description of the property over the years. There are no pertinent changes to the description following the time the survey was made (in 1958) or later recorded (in 1984). The following is a chronology of the succession of ownership of the property in conjunction with events that dealt with the boundary issue.

The first deed in the succession presented by the OCI was the April 10, 1832 conveyance from William H. Case to George Clinton Clarke. The deed described property 'three–fourths of an acre, more or less, with a Store, outstore [sic], and Horse Shed thereon, bounded northerly partly on the Highway leading from the village of Kingston to the South Ferry and partly by land of Abigail Watson and Wilkins Updike ' OCI 22 at 10. On June 20, 1919, Matthew W. Clarke conveyed the property to William C. Clarke. The deed explained that Matthew W. Clarke owned the property as sole heir-at-law of his father Elisha C. Clarke, deceased, intestate. OCI 22 at 9.

The next documents deal with the events of August and September 1958 and January 1959. Of particular interest are the activities of Harris Whiting. On August 5, 1958, William C. Clarke and his wife Laura E. Clarke conveyed the property by Warranty Deed to Frederick O. Whiting and Sarah M. C. Whiting. The deed again states that the property consists of three-quarters of an acre, more or less, and that the lot is bounded northerly by a public highway, but this time the deed includes language that the conveyance is "subject to Socony Mobile Oil Company rights in storage tank and pumps located on the premises." (emphasis added). OCI 22 at 8. Later in the same month, on August 20, 1958, Frederick O. Whiting and his wife Sarah M. C. Whiting conveyed the property to Whiting Market Basket, Inc. That deed contained the same language on acreage, the northern boundary and that the conveyance was subject to Socony's rights in the tank and pumps. OCI 22 at 7.

Although the next deed dealing with this property is not until January 2, 1962, it may explain Harris Whiting's participation in some of the events that occurred in August 1958 and January 1959. The 1962 deed conveys the property to Harris E. Whiting and his wife Margaret E. Whiting. It is interesting to note that at the time of the conveyance, Harris E. Whiting signed the document as President of the corporation that granted the property to him and his wife. OCI 22 at 6. The language of this particular deed is further discussed below.

In August 1958 (perhaps while Harris Whiting was President of Whiting Market Basket, Inc.) a survey was done of the property. That survey, entitled "Plan of Land in Kingston, South Kingstown, R.I. Made for Harris Whiting Scale 1"= 20' Aug. 1958 A. E. McGuinness Eng'r" represents certain lot lines for the property and their relationship to Kingstown Road (Resp 1). It depicts measured distances and angles for the corners despite the fact that none of the above-discussed deeds

contained a description of the property with any measured distances or angles. Abutting landowners are identified on the plan except for on the northerly boundary between the subject lot and the gutter line of Kingstown Road. The plan also shows the Kingston Hill Store with the narrow side of the building facing northerly toward the highway and the front of the building extending several feet beyond the lot line into the area between the property line and the gutter line at the edge of Kingstown Road. A granite post, sign and gas pumps are also depicted as being in this area between the Kingston Hill Store lot line and the highway. The plan's depiction of this area between the store and the road is, in large part, the basis for Respondent's argument that the pumps and USTs, and later the monitoring wells, were not located on the Kingston Hill Store property in August 1958 or later when the property was owned by Charles A. Maki and then Sanford Neuschatz. Respondent suggests that this area is the property of the State of Rhode Island and part of the public highway identified as Kingstown Road. Tr. February 7, 2001 at 68-70.

The Plan also contains the following notation: "Plat now owned by Charles A. Maki & Marjorie E. Maki April 4, 1984". Despite the plan having been drawn in August 1958, a stamped area indicates that the plan was recorded in the Town Clerk's office on April 4, 1984. None of the deeds offered into evidence reference this recorded plan.

On September 15, 1958 the Zoning Board of Review of the Town of South Kingstown met to consider the petition of Whiting Market Basket, Inc. for a permit of relocation and/or extension of the store and to make minor alterations to two (2) existing gasoline pumps. Resp 7 at 1-2 (pages are numbered 199 and 201). The minutes of the meeting throughout, refer to "Mr. Whiting" but do not distinguish whether it was Frederick or Harris Whiting although both are mentioned earlier in

the minutes as having jointly withdrawn a previous petition. The minutes state that a letter was read to the Board from Mr. Streb of the State Traffic Division, "addressed to Mr. Whiting regarding the front boundary line on Kingstown Road." No further specifics are provided in the minutes. *Id.* at 2 (201). Other issues were also discussed. Finally, the Board unanimously voted to grant the petition with three (3) stipulations dealing with the side yard, signage and fencing. The petitioner withdrew the portion of the petition dealing with gasoline storage and pumps. *Id.*

On January 19, 1959 the Zoning Board of Review of the Town of South Kingstown again met to consider a petition of Whiting Market Basket, Inc. This time the corporation sought a permit to make minor alterations to an existing gasoline pump island, relocation of a sign and installation of adequate lighting. *Id.* at 3 (page numbered 205).

The minutes set forth the following:

> A letter from Philip Mancini, Chief of the State Division of Traffic was read by the clerk. Discussion was held regarding the boundary line between State highway land and Whiting's deed of the land. Mrs. Schock questioned Whiting about his deed and why no definite boundaries could be given. John Whalen and Edson Schock spoke regarding ownership of property where the gasoline tanks are located, and said they would like to have a final settlement of the property ownership question. *Id.*

After further questioning and comments from the Board and the public, the Board voted to take the petition "under advisement" until all members could visit the site. *Id.*

The Board resumed its consideration of the petition on January 26, 1959. As the minutes state, "[a]fter discussion by the Board based on their visit to the site, the petition was granted" unanimously, with a stipulation only as to lighting restrictions. *Id.* at 4 (page numbered 207).

Photographs introduced into evidence by the Respondent (Respondent's exhibits 3A and 6) demonstrate that the building was relocated. The old photograph (Resp 3A), which Mr. Neuschatz speculated was taken in the 1930's, shows the building with its narrow side facing Kingstown Road. Tr. February 7, 2001 at 51-52. The later photograph (Resp 6), taken by Mr. Neuschatz in 1999, is of the Kingston Hill Store's longer side and different roofline facing Kingstown Road. Tr. February 7, 2001 at 52-53. Clearly the building was lifted and rotated, presumably after the Zoning Board of Review approved Whiting Market Basket, Inc.'s permit for relocation and/or extension of the store on September 15, 1958.

I find the Zoning Board's action to approve the permit and the actions of Harris Whiting and/or Whiting Market Basket, Inc. to commit financial resources in raising and rotating the building to be significant. The "Plan of Land" (Resp 1) had been drafted for Harris Whiting and he would have known what conclusions to draw from the survey more than someone reviewing the document forty years later. Questions had been raised at the September hearing and at the subsequent hearing conducted on January 19, 1959 regarding the front boundary line on Kingstown Road. Letters from the State Traffic Division regarding the front boundary line had been publicly read, but the contents of the letters were not set forth in the record. The actions of the principal participants, however, indicate that any question regarding the boundary was resolved in favor of the pumps being located on the petitioner's property.

The conclusion that the pumps and underground storage tanks were located on petitioner's lot and not on state land is also supported by later deeds and by the actions of Charles Maki and PierBank. None of the subsequent deeds reference the "Plan of Land" prepared for Harris Whiting. The 1962 deed from Whiting Market Basket, Inc., signed by Harris E. Whiting as President, conveyed

the property to Harris E. Whiting and Margaret E. Whiting. It described property consisting of three-quarters of an acre, more or less, bounded northerly by a public highway, and made reference to the right of Socony Mobile Oil Company, if any, as to the storage tanks. OCI 22 at 6.

On December 29, 1962, the Whitings deeded the property to themselves and to George R. S. Lindsay and Natalie A. Lindsay. OCI 22 at 5. On that same day, the four individuals conveyed the property to Kingston Hill Associates, Inc. OCI 22 at 4. Both deeds contained the above description. Signing as officers of Kingston Hill Associates, Inc., Margaret E. Whiting and George R. S. Lindsay conveyed the property to Charles A. Maki and Marjorie E. Maki on February 20, 1969. The deed describes the property as three-fourths of an acre, more or less, bounded northerly by Kingstown Road, and conveyed "subject to storage tank and pump rights, if any, held by Socony Mobile Oil Company and lease to Robert Shaw." OCI 22 at 3.

During the period that Charles and Marjorie Maki owned the property, the "Plan of Land" that had been prepared for Harris Whiting was recorded on April 4, 1984. Resp 1. On April 9, 1985 an Application for Underground Storage Facilities was filed with the Department of Environmental Management Division of Water Resources. The Application identified the facility as the Kingston Hill Store, in operation since 1917, with three (3) underground storage tanks. OCI 1 at 1. Despite only three tanks having been identified, one was removed on February 3, 1988 and three others were removed after Charles A. Maki and Marjorie E. Maki conveyed the property to Charles A. Maki. Tr. February 5, 2001 at 72; OCI 2; OCI 3.

On December 7, 1989 Charles A. Maki became the sole owner of the property. While the deed again specifies the lot as three-fourths of an acre, more

or less, bounded northerly by Kingstown Road, it no longer refers to Socony Mobile Oil Company's rights to the tank and pumps. OCI 22 at 2.

Three USTs were removed on November 30, 1995. Tr. February 5, 2001 at 74-77; OCI 3. Clean Environment, Inc. subsequently prepared the UST Closure Assessment Report and submitted it to the Department on March 12, 1996. Tr. February 5, 2001 at 87; OCI 5. CEI also prepared a Site Investigation Report and submitted it to the Department on September 19, 1996. The SIR indicates that the report was prepared for PierBank. Tr. February 5, 2001 at 103; OCI 6 at numbered page 17.

On July 17, 1997 Charles A. Maki conveyed the property by Warranty Deed to Sanford Neuschatz. The deed identified the lot as three-fourths of an acre, more or less, and bounded northerly by Kingstown Road. The conveyance was subject to existing mortgages of record and to certain real estate taxes. OCI 22 at 1.

I conclude from the above review, that all the prior owners considered the area where the pumps were located to be part of their deeded land. Owners who were aware of the "Plan of Land" prepared for Harris Whiting apparently did not consider that the survey posed any concern for their ownership of the area where the pumps were located. They leased the area to Socony Mobile Oil Company and perhaps others; they moved the building and performed other improvements to the area; and they never referenced the plan in any of the deeds.

The Zoning Board of Review for the Town of South Kingstown, hearing the debate about the property line, did not consider it an impediment to granting petitions for the private landowner to alter the land, including improvements in the pump area. The State Traffic Division, through its correspondence, participated in the zoning debate but apparently did not dispute the private landowner's ownership of the pump area since it appears that the State took no action to assert any

ownership rights. UST forms were filed with the Department of Environmental Management by at least one property owner who would have been aware of the property dimensions set forth in the "Plan of Land"; work was done to remove tanks and contaminated soil in the pump area that certainly was costly; and monitoring wells were installed in that area and testing was done and reports were issued that were either commissioned by Charles A. Maki or by PierBank.

Based on the activities of the succession of owners, the lessee(s) of the pump area, the Zoning Board, the State Traffic Division, and PierBank and recognizing the volume of evidence supporting the conclusion that the area where the USTs and pumps had been located was indeed part of the property deeded to Sanford Neuschatz, I conclude that the “Plan of Land” prepared for Harris Whiting in August 1958 should be given no weight in determining ownership of that area.

Mr. Neuschatz became the owner of the property knowing there were concerns about the contamination on site and expecting that he would have to clean up the problem. I conclude that, based on the evidence presented at the hearing, the land where the USTs and pumps had been located, and where monitoring wells MW-1, MW-2 and MW-3 were installed, is owned by Sanford Neuschatz.

IV. Assessment of an Administrative Penalty

As indicated in the NOV, the OCI seeks the assessment of an administrative penalty in the amount of Fifteen Thousand ($15,000.00) Dollars against Respondent for violations of UST Regulations § § 14.11 and 14.12. The NOV states that the penalty was assessed against Respondent pursuant to R.I. GEN. LAWS § 42-17.6-2 and was calculated pursuant to the Penalty Regulations.

§ 12(c) of the Penalty Regulations provides the following:

> In an enforcement hearing the Director must prove the alleged violation by a preponderance of the evidence. Once a violation is established, the violator bears the burden of proving by a preponderance of the evidence that the Director failed to assess the penalty and/or the economic benefit portion of the penalty in accordance with these regulations.

The Department's interpretation of this provision requires the OCI to prove the alleged violation by a preponderance of the evidence and "includes establishing, in evidence, the penalty amount and its calculation." The violator then bears the burden of proving that the penalty and/or economic benefit portion of the penalty was not assessed in accordance with the Penalty Regulations. In Re: Richard Fickett, AAD No. 93-014/GWE, Final Decision and Order issued by the Director on December 9, 1995.

Section 10 of the Penalty Regulations provides for the calculation of the penalty through the determination of whether a violation is a Type I, Type II or Type III violation and whether the Deviation from Standard is Minor, Moderate or Major. Once the Type and Deviation from Standard are known, a penalty range for the violation can be determined by reference to the appropriate penalty matrix.

The penalty amount and its calculation were established in evidence through the introduction of the Penalty Summary and Worksheet (OCI 17) and the testimony of Tracey Tyrrell, a Principal Environmental Scientist in the OCI's Underground Storage Tank Section. Ms. Tyrrell testified that she had reviewed the Facility file and the LUST file from the Office of Waste Management, drafted the NOV and assessed the administrative penalty in this matter. Tr. February 5, 2001 at 10.

The two-page Penalty Summary and Worksheet established in evidence the $15,000.00 proposed administrative penalty for Respondent's failure to submit a CAP at the request of the Director. OCI 17 at 1 (numbered page 9). The Worksheet identified the violation as a Type I violation: "DIRECTLY related to the

protection of the public health, safety, welfare or environment." Several factors were listed as having been considered in determining that the violation was a Major Deviation from Standard: the extent to which the act or failure to act was out of compliance; environmental conditions; the amount of the pollutant; the toxicity or nature of the pollutant; the duration of the violation; whether the person took reasonable and appropriate steps to prevent and/or mitigate the non-compliance; and the degree of willfulness or negligence, including but not limited to, how much control the violator had over the occurrence of the violation and whether the violation was foreseeable. The Worksheet identified the penalty for a Type I, Major Deviation from Standard from the Water Pollution Penalty Matrix as ranging from $10,000 to $25,000. OCI 17 at 2 (numbered page 10).

Under cross examination, Ms. Tyrrell confirmed that one of the factors she had considered in calculating the penalty were the environmental conditions in the area. The facility was located in a GA groundwater classification zone and on the border of a community water supply wellhead protection area. Tr. February 5, 2001 at 33, 48-49. She had also considered the degree of willfulness or negligence, including how much control Respondent had over the occurrence of the violation. She particularly noted that Respondent had been notified more than once that corrective action was required. *Id.* at 50-51.

The witness acknowledged under Respondent's questioning, that financial ability to perform the corrective action plan would not have been a consideration in determining the assessment of an administrative penalty. Financial ability to pay the assessment, however, would be a consideration. *Id.* at 53.

Notwithstanding counsel's inquiry into whether financial ability had been considered, Ms. Tyrrell testified that she had not received any documentation regarding Respondent's ability to pay the penalty or to perform the corrective action

work at the site. She clarified that this not only encompassed the period before the NOV was issued but also since the DEM enforcement action had commenced. *Id.* at 54-57. She had only been told that week of Mr. Neushatz' bankruptcy filing. *Id.* at 57.

Sanford Neuschatz testified regarding his financial inability to pay for the corrective action plan. He stated that he had tried to sell the property in 1999; he had attempted to find government funding to address the problems on site but without success; could not afford the $5,000 retainer fee sought by SAGE Environmental; and had had a difficult three years financially, "leading to a bankruptcy petition in the year 2000." Tr. February 7, 2001 at 71-75.

Conclusion

No testimony was elicited to explain why a $15,000 penalty was proposed when the Type I Major Deviation from Standard penalty ranged from $10,000 to $25,000. The Worksheet's calculation of the Deviation from Standard lists the factors that were considered in determining that the deviation was major. OCI 17 at 2. I can only conclude that the mid range penalty was selected because several of the factors cite Respondent's two year delay from the time he was notified a CAP was required.

I found Respondent's testimony about the delay over this two year period of his self-described "good faith" negotiating with DEM to be suspect and frankly, not credible. Sanford Neuschatz acquired the property on July 17, 1997. OCI 22 at 1. By letter dated September 24, 1997, DEM informed Mr. Neuschatz that a CAP was required and, if not filed within ten (10) days of receipt of the letter, an enforcement action may be initiated. OCI 7. On October 20, 1997 Mr. Neuschatz sent a letter to Peter Sullivan stating that he had understood that the previous owner and PierBank had corrected any serious problems at the site. He requested a copy of the SIR

and any other reports and stated that, following their review, he would discuss with the Department "potential solutions if any problems still exist." OCI 8.

Approximately one year later, Mr. Neuschatz was issued a Notice of Intent to Enforce ("NIE") for failure to submit the CAP to the Department as required in the September 24, 1997 correspondence. The NIE, dated October 28, 1998, required Mr. Neuschatz to submit to the Department within thirty (30) days verification that an environmental consultant had been retained to prepare the CAP; to submit within forty-five (45) days a detailed timetable for completion of preliminary testing necessary to develop the CAP, for submission of the CAP and for implementation of the approved CAP; and to provide certain additional information. OCI 9 at numbered page 5.

Respondent testified at the hearing that by 1998 he had met with an individual at the UST Financial Responsibility Fund Review Board ("Review Board"). He also checked into some other programs but stated that "[e]very time I'd get to one step, the program would be ended " Tr. February 7, 2001 at 72-72. He testified that at the same time he was checking with the Review Board, through his attorney's office he had contacted SAGE Environmental to prepare a proposal "to rectify the problem." *Id.* at 73-74. He testified that he had complained to the Review Board that he could not afford the $5,000 retainer fee for SAGE. *Id.* at 74.

Mr. Neuschatz' attorney sent a letter to DEM dated November 13, 1998 representing that contact had been made with SAGE Environmental and that

> "[w]ithin 30 days, I would expect that we will have a plan for testing and be able to submit a corrective action plan for the property in compliance with the actions which you have requested in the Notice of Intent to Enforce." OCI 10.

The next correspondence in evidence was dated May 20, 1999 from SAGE Environmental addressed to Bruce Catterall at DEM, marked "Draft". OCI 12. The

record is unclear when OCI received this letter. Then, on August 30, 1999, SAGE Environmental sent Mr. Neuschatz a letter specifying the scope of work to develop preliminary information necessary to prepare a CAP. That letter requested a $4,000 retainer prior to commencing the project. OCI 13 at 3.

On September 7, 1999, Mr. Neuschatz sent a letter to Mr. Catterall apologizing for the delay. He wrote that he had received a copy of the "Draft" letter and believed that in May 1999 SAGE had begun the process to alleviate the problems at the site. OCI 11 at 1-2. According to the September 7, 1999 letter, he then discovered that the DEM had never received the letter from SAGE. "Apparently, Sage was awaiting a retainer from me, which they never requested or indicated was required at this time." *Id.* at 2. He then reiterated his intent to resolve the problems on the site and to be "directly involved with all issues until a CAP is developed and approved." *Id.* at 2.

I find it difficult to believe that Mr. Neuschatz was unaware that a retainer was needed prior to SAGE Environmental commencing the work at the site. Mr. Neuschatz' own testimony undercut the representation in the letter (that SAGE had not indicated that a retainer was necessary), when he stated that in 1998 he was complaining to the Review Board about the cost of the retainer. I also note that Mr. Neuschatz' financial circumstances and the cost of the retainer were not mentioned in the letter.

Following Mr. Neuschatz' representation on September 7, 1999 that he would be cooperating with DEM and developing a CAP, again none was forthcoming.

Pursuant to § 12(c) of the Penalty Regulations, Respondent had the burden to prove by a preponderance of the evidence that the administrative penalty was not assessed in accordance with the Penalty Regulations. Although Respondent's

counsel had questioned Ms. Tyrrell about the factors considered in determining the Deviation from Standard and presented some testimonial evidence of Respondent's financial circumstances prior to the issuance of the NOV, I conclude that Respondent has failed to meet his burden to prove that the proposed administrative penalty was not assessed in accordance with the Penalty Regulations.

While I agree with Ms. Tyrrell's application of the Penalty Regulations in this instance, I disagree with any implication that financial limitations to perform the CAP cannot be considered in determining that the amount of an administrative penalty is excessive. This issue was addressed in the matter In Re: Anthony J., Joseph F., Thomas R. Connetta/Marguerite Sweeney, AAD No. 94-020/SRE, Final Agency Order entered on August 21, 1997. In that matter, the NOV had proposed the maximum penalty in the penalty range. At the time the NOV was issued, the then Division of Site Remediation ("Division") had not evaluated Respondents' financial conditions and their abilities to pay an administrative penalty because it was not practicable to do so. The Division had suggested in its Response to Respondents' Post Hearing Memorandum that the financial information was in the exclusive possession and control of the violator and could only be effectively considered when provided in settlement negotiations or when presented at the hearing itself. Connetta/Sweeney at 30 (citing Division's Response at 11-12). All of the Respondents in the Connetta/Sweeney matter provided fairly detailed information to demonstrate their modest financial means. *Id.* at 30-31.

Although the Connetta/Sweeney decision found that the penalty had been properly calculated when the NOV was issued, it also found that with the evidence presented at the hearing, the maximum penalty was excessive. *Id.* at 32. Financial circumstances were taken into account not only in Respondents' ability to pay the

penalty but also in their failure to control secondary contamination. In that matter, Respondents had made some effort to conduct a site assessment and perform testing but at an estimated cost of $62,640.00, were financially powerless to exert control over the secondary contamination and remediate the site. *Id.* at 33. Not only was their financial ability considered in their ability to pay the penalty, it was also considered in how it affected the willfulness of the violation and how much control the violator had over the occurrence of the violation. *Id.* at 38, Conclusions of Law 9 through 13. Due to the evidence presented in that case, the Type of Violation and Deviation from Standard remained unchanged, but the penalty was reduced to the minimum amount in the penalty range. *Id.* at 39, Conclusion of Law 14.

Unlike Connetta/Sweeney, I find that Respondent in this matter has failed to present sufficient evidence to prove that his financial circumstances prevented him from complying with the requirement to submit a CAP. Such evidence may have warranted a reduction of the penalty (because of the factor dealing with willfulness and control over the violation) since the assessment in this case was more than the minimum specified in the penalty matrix. Respondent's lack of specificity regarding his financial state prior to the issuance of the NOV and the absence of evidence regarding his present ability to pay the proposed administrative penalty fail to persuade me that the penalty was excessive.

Wherefore, after considering the stipulations of the parties and the testimonial and documentary evidence of record, I make the following:

FINDINGS OF FACT

1. The subject property is located at 2528 Kingstown Road, South Kingstown, Rhode Island.

2. The subject property contains a building that is commonly referred to as the Kingston Hill Store.

3. The Kingston Hill Store had been operated as a gasoline service station with dispenser island and underground storage tanks ("USTs").

4. Charles A. Maki was the owner of the subject property from on or about December 7, 1989 to on or about July 17, 1997.

5. Three (3) UST had been located in the area between the front of the Kingston Hill Store and the dispenser island prior to their removal by Charles A. Maki on November 30, 1995.

6. Evidence of petroleum contamination was observed and documented during the removal of the USTs in November 1995 and during a site investigation in July 1996.

7. The source of the contamination was from a leaking tank, a leak somewhere else in the UST system, or from overfills.

8. A UST Closure Assessment Report prepared by Clean Environment, Inc. ("CEI") was submitted to the Department on March 12, 1996.

9. A Site Investigation Report ("SIR") dated August 1996 was prepared by CEI and submitted to the Department on September 19, 1996.

10. Monitoring wells MW-1, MW-2 and MW-3 were installed in the areas where the three (3) USTs had been located in front of the Kingston Hill Store.

11. The SIR contains test results of the soil and groundwater and establishes that the soils and groundwater are contaminated with petroleum product.

12. The subject property is located in an area with a groundwater classification GA, suitable for drinking purposes.

13. CEI found elevated levels of volatile organic compounds in the groundwater that exceeded that which is allowed in a groundwater classification of GA.

14. CEI recommended that a Corrective Action Plan ("CAP") following DEM protocols should be conducted on the site.

15. On or about July 17, 1997 Charles A. Maki conveyed the subject property to Sanford Neuschatz.

16. The property at 2528 Kingstown Road, South Kingstown, Rhode Island is currently owned by Sanford Neuschatz ("Respondent").

17. The deed conveying the property to the Respondent described the property as follows:

> "That certain lot or parcel of land, together with all buildings and improvements thereon, situated on the southerly side of Kingstown Road in the Village of Kingston, in said Town of South Kingstown, containing three-fourths of an acre, more or less, bounded northerly by said Kingstown Road, a public highway ."

18. At the time that Respondent acquired title, he was aware of environmental concerns involving gasoline contamination on the property.

19. By letter dated September 24, 1997, DEM required Respondent to prepare and submit a proposal for a CAP for the remediation of the petroleum contamination on the property.

20. On October 28, 1998, DEM issued a Notice of Intent to Enforce ("NIE") to Respondent directing him to retain an environmental consultant to submit a timetable for the completion and submission of a CAP.

21. By letter dated November 13, 1998, Respondent responded to the NIE through his attorney, stating that DEM would receive a timetable for the development of a CAP within 30 days.

22. As of the date of issuance of the NOV, DEM had not received a CAP from Respondent to address the contamination on the property.

23. As of the date of the hearing, DEM had not received a CAP from Respondent to address the contamination on the property.

24. As of the date of the hearing, Respondent had not begun any remediation of the contamination on the property.

25. The OCI established in evidence that Respondent's violation of the UST Regulations was determined to be a Type 1 Major Deviation from Standard.

26. The OCI established in evidence that Respondent was assessed an administrative penalty in the amount of Fifteen Thousand ("$15,000.00) Dollars.

27. The Fifteen Thousand ($15,000.00) Dollar administrative penalty assessed against Respondent is not excessive.

CONCLUSIONS OF LAW

After due consideration of the documentary and testimonial evidence of record and based upon the above findings of fact, I conclude the following as a matter of law:

1. The OCI has proved by a preponderance of the evidence that Respondent is the owner of the property where three (3) USTs had formerly been located and were removed on November 30, 1995.

2. The OCI has proved by a preponderance of the evidence that Respondent is the owner of the property where monitoring wells MW-1, MW-2 and MW-3 were installed.

3. The OCI has proved by a preponderance of the evidence that petroleum-contaminated soil and groundwater are located on Respondent's property.

4. Pursuant to sections 14.11 and 14.12 of the UST Regulations, Respondent was required to develop and submit a Corrective Action Plan for the Department's approval.

5. The OCI has proved by a preponderance of the evidence that Respondent has failed to develop or submit a CAP as required by sections 14.11 and 14.12 of the UST Regulations.

6. The OCI established in evidence the penalty amount and its calculation.

7. Respondent has failed to prove by a preponderance of the evidence that the OCI's determination of the violation as a Type 1 Major Deviation from Standard was not in accordance with the Penalty Regulations.

8. Respondent has failed to prove by a preponderance of the evidence that the OCI's assessment of an administrative penalty in the amount of $15,000.00 is not in accordance with the Penalty Regulations.

Wherefore, based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED

1. Respondent shall, within 30 days from the date of entry of the Final Agency Order in this matter, submit written verification that a qualified environmental consultant has been retained to prepare a CAP (as described in Sections 14.11 and 14.12 of the UST Regulations) for the remediation and removal of all petroleum products or hazardous materials that exist at the site and are contaminating, or threatening to contaminate, the waters of the State.

2. Respondent shall, within 45 days from the date of entry of the Final Agency Order in this matter, submit for DEM's review and approval a detailed, written timetable prepared by the environmental consultant, listing specific dates for the completion of the following:

   (a) The completion of any other groundwater, aquifer, and other testing required for the development and submission of a CAP; and for the implementation of the CAP, prepared as described in Sections 14.11 and 14.12 of the UST Regulations;

(b) The submission of a CAP for the review and approval of DEM; and

(c) The implementation of the approved CAP.

3. Respondent shall submit additional information within 15 days of any such request by DEM for the purposes of supplementing the SIR or substantiating the basis for a CAP.

4. Respondent shall have until sixty (60) days from the date of entry of the Final Agency Order in this matter to obtain DEM's Order of Approval and begin implementation of the CAP in accordance with the provisions of the Order of Approval.

5. Respondent shall notify the DEM Office of Waste Management's LUST Program at least 48 hours before any excavation, well installation, repair or replacement of equipment at the site so that a representative of DEM may be present.

6. Respondent shall submit quarterly status reports of all investigatory, sampling and remedial activities that take place at the site.

7. Respondent shall continue operation of all remediation procedures specified in the CAP and continue submission of required status reports until such time as the Director may determine that the soils and/or groundwater located on and around the site have been adequately treated.

8. Respondent shall reimburse DEM for all funds that it has expended or may expend in the investigation and/or remediation of the contamination located at the site in accordance with R.I. GEN. LAWS § 46-12.5-7.

9. An administrative penalty in the amount of Fifteen Thousand ($15,000.00) Dollars is hereby ASSESSED against the Respondent.

10. Respondent shall make payment of the administrative penalty within twenty (20) days from the date of entry of the Final Agency Order in this matter. Payment shall be in the form of a certified check or money order made payable to the "General Treasurer -- Water and Air Protection Program Account," and shall be forwarded to:

R.I. Department of Environmental Management
Office of Management Services
235 Promenade Street, Room 340
Providence, RI 02908
Attn: Glenn Miller

Entered as an Administrative Order this 1st day of March, 2002 and herewith recommended to the Director for issuance as a Final Agency Order.

_____
Mary F. McMahon
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
235 Promenade Street, Third Floor
Providence, RI 02908
(401) 222-1357

Entered as a Final Agency Order this 4th day of March, 2002.

_____
Jan H. Reitsma
Director
Department of Environmental Management
235 Promenade Street, Fourth Floor
Providence, Rhode Island 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded by first-class mail, postage prepaid, to Thomas N. Tarzwell, Esquire, 490 Woodruff Avenue, Wakefield, RI 02879; via interoffice mail to Brian Wagner, Esquire, Office of Legal Services and Dean H. Albro, Chief, Office of Compliance and Inspection, 235 Promenade Street, Providence, RI 02908 on this _____ day of _____, 2002.

_____

APPENDIX A

LIST OF EXHIBITS

OCI'S EXHIBITS:

OCI 1 Full	Copy of Application for Underground Storage Facilities - dated 3/5/85 (3 pages).
OCI 2 Full	Copy of Certificate of Closure - dated 2/3/88 (1 page).
OCI 3 Full	Copy of Closure Inspection Sheet - dated 11/30/95 (1 page).
OCI 4 Full	Copy of Closure Inspection Checklist - dated 11/30/95 (1 page).
OCI 5 Full	Copy of UST Closure Assessment Report - March 1996, received by DEM 3/12/96 (9 page report + appendices).
OCI 6 Full	Copy of Site Investigation Report - dated August 1996, received by DEM 9/19/96 (21 pages + appendices).
OCI 7 Full	Copy of Correspondence - dated 9/24/97 from Peter Sullivan, DEM, to Sanford Neuschatz (1 page).
OCI 8 Full	Copy of Correspondence - dated 10/20/97 from Sanford Neuschatz to Peter Sullivan, DEM (1 page).
OCI 9 Full	Copy of Notice of Intent to Enforce - dated 10/28/98 from DEM to Sanford Neuschatz (6 pages + cover letter and return receipt).
OCI 10 Full	Copy of Correspondence - dated 11/13/98 from Attorney Thomas Tarzwell to Bruce Catterall, DEM (1 page).
OCI 11 Full	Copy of Correspondence - dated 9/7/99 from Sanford Neuschatz to Bruce Catterall, DEM (2 pages + 2 attached letters dated).
OCI 12 Full	Copy of Draft Correspondence - dated 5/20/99 from Sage Environmental, addressed but not mailed to Bruce Catterall, DEM (4 pages).
OCI 13 Full	Copy of Correspondence - dated 8/30/99, from Sage Environmental to Sanford Neuschatz (8 pages).

OCI 14 Full	Copy of Inter-Office Memo - dated 12/14/99, Peter Sullivan, DEM, Paula Therrien, DEM (1 page).
OCI 15 Full	Copy of Fax Transmission - dated 12/16/99, from John Lavoie, CEI, to Peter Sullivan, DEM (2 pages including cover).
OCI 16 for Id	Copy of Telephone Conversation Memorandum - dated 12/17/99, from Peter Sullivan, DEM, to John Lavoie, CEI (1 page).
OCI 17 Full	Copy of Penalty Summary & Worksheet(s) - from NOV dated 4/5/2000 (2 pages).
OCI 18 Full	Partial copy of Warranty Deed from Charles A. Maki to Sanford Neuschatz.
OCI 19 Full	First page of NOV issued to Charles A. Maki.
OCI 20 Full	Release of Violation issued to Charles A. Maki.
OCI 21 Full	Copy of letter from Attorney Thomas N. Tarzwell to Glenn Miller with copy of check.
OCI 22 Full	Copies and partial copies of deeds.

RESPONDENT'S EXHIBITS:

Resp 1 Full	Certified Copy of Plan of Land in Kingston, South Kingstown, R.I. Made for Harris Whiting - Dated August, 1958 (1 page).
Resp 2 For ID	Narragansett Times: two (2) articles dated August 21, 1958 and September 18, 1958
Resp 3 a + b Full	Photographs: Kingston Hill Store: Photo circa 1930 (Exhibit 3A); photo 1997 (Exhibit 3B)
Resp 4 Full	Deed for Kingston Hill Store property
Resp 5 For ID	Town of South Kingstown Portion of Assessor's Map 23-3
Resp 6 Full	1999 Photo of Kingston Hill Store
Resp 7 Full	Zoning Board of Review records, Town of S. Kingstown

JOINT EXHIBIT:

JT 1 Full State Highway Drainage Map from 1921 (2 pages).