

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

RE: CONCORD OIL OF NEWPORT/JOSEPH TOMAINO
AAD NO. 94-023/SRE NOTICE OF VIOLATION LS 1916

DECISION AND ORDER

This matter came before the Administrative Adjudication Division ("AAD") of the Department of Environmental Management ("Department" or "DEM") on a Notice of Violation ("NOV") issued on August 15, 1994 by the Division of Site Remediation ("Division") of DEM to Joseph M. Tomaino ("Tomaino") and Concord Oil of Newport, Inc. ("Concord Oil"), collectively referred to as "Respondents".

This matter is properly before the Hearing Officer pursuant to R.I.G.L. Chapter 12 of Title 46 entitled "Water Pollution", Chapter 12.5 of Title 46 entitled "Oil Pollution Control", R.I.G.L. Chapter 17.1 of Title 42, R.I.G.L. Chapter 17.6 of Title 42, statutes governing the AAD (R.I.G.L. Sec. 42-17.701 et seq.), the Administrative Procedures Act (R.I.G.L. Sec. 42-35-1 et seq.), the Oil Pollution Control Rules and Regulations ("Oil Regulations"), the Rules and Regulations for Groundwater Quality, the Rules and Regulations for Assessment of Administrative Penalties ("Penalty Regulations"), and the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters. The proceedings were conducted in accordance with the above-noted statutes and regulations.

CONCORD OIL TOMAINO
AAD NO. 94-023/SRE
DECISION AND ORDER
PAGE 2

The NOV alleges that (1) Tomaino is the owner of that certain parcel of property located at 19 West Main Road in Middletown, Rhode Island (the "facility" or "site"); (2) Concord Oil is the owner of certain underground storage tanks ("USTs" or "tanks") located at the facility; and (3) Concord Oil is the operator of a business located at the facility. The NOV cites Respondents for violations of the following statutes and regulations:

1. R.I. Gen. Laws Sections 46-12-5(a) and (b) and 46-12-28, relating to prohibition against pollutants entering waters of the State;
2. R.I. Gen. Laws Section 46-12.5-3, relating to prohibition against oil discharges;
3. Oil Regulations Section 6(a), relating to prohibition against oil or pollutants entering waters of the State;
4. Oil Regulations Section 13, relating to storage and removal of oil spill cleanup debris;
5. UST Regulations Section 10.06(A) and 10.06(B), relating to leak detection for existing tanks;
6. UST Regulations Section 10.06(B)(9), requiring the submission of written verification of compliance with Section 10.06;
7. UST Regulations Section 10.10(A), relating to spill containment basin requirements;
8. UST Regulations Section 10.10(C), requiring the submission of written verification of compliance with Section 10.10;
9. UST Regulations Sections 14.08 and 14.09, relating to a site investigation; and
10. UST Regulations Sections 14.11 and 14.12, relating to corrective action.

CONCORD OIL TOMAINO
AAD NO. 94-023/SRE
DECISION AND ORDER
PAGE 3

The NOV ordered Respondents to properly remove and dispose of the petroleum contaminated soil that was stockpiled at the facility; to submit documentation confirming the disposal of said soil, to conduct a Site Investigation, and if necessary, to design and implement a Corrective Action Plan, and to conduct certain investigatory, sampling and remedial procedures. The NOV also ordered Respondents to comply with the UST Regulations concerning precision testing and spill containment basins, and assessed an administrative penalty of \$24,650.00.¹

Each of the Respondents requested an adjudicatory hearing on the NOV. The Prehearing Conference was held on February 3, 1995 and the Prehearing Conference Record was entered on March 17, 1995. The hearing was conducted on June 10 and 11, 1996. The post-hearing memoranda for Division and Concord Oil were filed on August 2, 1996, and the post-hearing memorandum for Tomaino was filed on August 5, 1996. Brian A. Wagner, Esq. represented Division, Kenneth P. Borden, Esq. represented Concord Oil, and Joseph R. Palumbo, Esq. represented Tomaino.

Counsel agreed to the following stipulations of fact:

¹ The NOV alleged that Respondents failed to precision test the three USTs at the facility in 1987 and 1993 and that Respondents failed to install spill containment basins for said USTs. During the course of the hearing Division voluntarily withdrew the alleged violations regarding the 1987 precision tests and the spill containment basins.

1. Respondent Tomaino is the owner of certain real property located at 19 West Main Road, Middletown Rhode Island, otherwise identified as Middletown Assessor's Plat 108SW, Lot 136 (the "facility" or "site").
2. The facility is registered with the Department as UST Facility ID No. 0501.
3. The following information regarding the UST systems at the facility is registered with the Department:

UST ID#	DATE UST INSTALLED	CAPACITY (gal.)	CONTENT	SPILL CONTAIN.	LEAK DETECT.
001		6,000	Gasoline		
002		4,000	Gasoline		
003		4,000	Gasoline		

4. From 3/23/78 to 3/8/88, the premises at 19 W. Main Road, Middletown, RI were leased by Fox Hill Realty Trust from Newport Oil Corporation.
5. Fox Hill Realty Trust is revocable trust of which Joseph M. Tomaino is settlor.
6. That during the period 3/23/88 until February 1993, Joseph M. Tomaino was President of Concord Oil of Newport, Inc..
7. Spill containment basins were installed on the subject UST's in January, 1987.
8. As of February 3, 1995, neither Respondent has:
 - (a) Performed a site investigation or submitted a site investigation report ("SIR");
 - (b) Submitted a CAP;

Counsel agreed at the prehearing conference that the following issues were to be considered at the hearing:

1. Whether a release of petroleum products has occurred at the facility in violation of:
 - (a) The R.I. Water Pollution Act - R.I. Gen. Laws §46-12-5 and -28;
 - (b) The R.I. Oil Pollution Control Act - R.I. Gen. Laws §46-12.5.3; and
 - (c) The R.I. Oil Pollution Control Regulations (the "Oil Regulations"), Section 6.00.
2. Whether the Respondents have timely acted to remove oil spill clean-up debris (in this case petroleum-contaminated soils) in accordance with §13 of the Oil Regulations.
3. Whether the Respondents have adequately responded to the discovery of petroleum contamination at the facility in accordance with Section 14.00 of the UST Regulations through:
 - (a) The performance of a comprehensive site investigation and the submission of a SIR in accordance with Section 14.08 and 14.09 of the UST Regulations; and
 - (b) The development and successful implementation of a CAP for the remediation of the petroleum-contamination located on and/or emanating from the facility in accordance with §14.11 and 14.12 of the UST Regulations.
4. Whether the Respondents failed to precision test the subject UST systems at the facility in accordance with the UST Regulations in 1993.
5. Whether the Respondents failed to submit the results of precision tests to the Department in accordance with the UST Regulations in 1993.
6. Whether the Respondents failed to install spill containment basins on the subject UST systems at the facility in accordance with the UST Regulations.
7. Whether the Respondents failed to submit documentation of the installation of spill containment basins to the Department in accordance with the UST Regulations.
8. Was spill containment equipment installed in 1987.

CONCORD OIL TOMAINO
AAD NO. 94-023/SRE
DECISION AND ORDER
PAGE 6

Counsel for Tomaino subsequently qualified his agreement as to the above issues as follows:

- Issue 1. Respondent Tomaino admits that this is an issue to be resolved at the hearing.
- Issue 2. Respondent Tomaino objects to the statement of this issue in its present form to the extent that it implies that he, as landowner, is responsible for the discharge of petroleum products at the facility and clean-up of same.
- Issue 3. Respondent Tomaino's objection to the statement of this issue in its present form is the same as in the case of the statement of Issue 2.
- Issue 4. Respondent Tomaino objects to the statement of this issue in the present form to the extent that it implies that he as landowner, had any obligation to precision test the subject UST systems in 1993.
- Issue 5. Respondent Tomaino objects to the statement of this issue in the present form on the same grounds as with respect to Issue 4.
- Issue 6. Respondent Tomaino objects to this as a proposed issue on the grounds that it is indisputable that spill containment basins were installed at the facility by Concord Oil of Newport, Inc..
- Issue 7. Respondent Tomaino objects to the statement of this issue in its present form to the extent that it implies that he, as landowner, had any individual responsibility to submit documentation of the installation of the spill containment basins.

Counsel for Tomaino offered the following as additional issues:

1. Whether Concord Oil failed to timely precision test the subject USTs in 1993.
2. Whether Concord Oil failed to timely submit the results of precision tests to the Department in 1993.
3. Whether Concord Oil failed to submit documentation of the installment of spill containment basins on the

UST's to the Department.

Counsel for Concord Oil offered the following as additional issues:

1. Were precision tests filed for the year 1993?
2. In view of the fact that Concord Oil of Newport, Inc. ceased whatever connection it had with the premises on July 6, 1993, is it responsible?
3. Is Joseph Tomaino, as owner, responsible?
4. Did either Respondent do a site assessment?
5. Whose responsibility is it to do a site assessment in and upon Mr. Tomaino's property?

The exhibits proffered by the parties, marked as they were admitted into evidence, are indicated on Appendix A.

F. Daniel Russell, Jr., an environmental scientist in the UST Program of DEM, was the first witness to testify for Division. He testified that on April 14, 1994 he was present as the designated field person at the facility when the scheduled UST closure was taking place. He noticed upon his arrival at the site that two 4,000 gallon tanks had been removed and were adjacent to their excavations, and that a third tank was uncovered but still in its excavation. He observed that the two 4,000 gallon gasoline tanks had numerous holes; that the odor of gasoline was obvious in the soil; and there was a sheen on the watertable in the excavation.

Mr. Russell filed a Closure Inspection Report

(Division's Exhibit 1) concerning his observations on April 14, 1994, and referred the site to the Leaking UST Program. He explained that the notation in the Closure Inspection Report (which indicates that no petroleum sheen was observed) was an apparent error.

Mr. Kevin Gillen, a Senior Sanitary Engineer with the Leaking UST Program of Division, was the next witness called by Division. He testified that he visited the site shortly after removal of the tanks and observed the excavation pits (from which the tanks had been removed) and the contaminated soil therefrom that was stockpiled at the site. He noticed a strong petroleum odor emanating from the stockpiled soil and a petroleum odor coming from the excavation pits. Based on these observations, he concluded that there was petroleum contamination at the subject site.

Mr. Gillen stated that a Closure Assessment Report for the subject facility was filed with Division's LUST Program as required by the UST Regulations. It was prepared by Triangle Environmental (a consulting firm) for Carey Construction, Inc. (a UST removal firm). It was Mr. Gillen's opinion that additional investigation is required at the subject facility in order to determine if corrective action is necessary. He noted that the stockpiled soil was not removed from the facility until after the issuance of the NOV, and that despite the Division's request, the proper

documentation concerning the disposal of the contaminated soil was not submitted to Division as required by the Regulations.

Mr. Paul Guglielmino, a Senior Sanitary Engineer with the Division of Site Remediation's LUST Program, was the next witness to testify for Division. He testified that he reviewed the LUST Program's files concerning the subject facility and corresponded with the UST Program of the Division of Waste Management to obtain the information for the NOV. He prepared the instant NOV and computed the administrative penalty for the LUST Section. A penalty was assessed for failure to comply with Section 13 of the Oil Pollution Regulations (which requires that the contaminated soil excavated for tank removal must be removed from the site and properly disposed of within 30 days and that documentation of the proper disposal of said soil must be supplied to the Department within 10 days).

It was explained by Mr. Guglielmino that he calculated the proposed penalty for failure to remove soil in accordance with the Administrative Penalty Regulations. He classified it as a Type I Minor Deviation, based on the parameters in the Penalty Regulations. The Penalty matrix establishes the range for the penalty as between \$4,400.00 to \$10,000.00 per day of violation; however, the lowest penalty amount for that violation was chosen for each month

of violation. He noted that as of September 20, 1994 (the date of Division's letters mandating the removal of the contaminated soil), the contaminated soils still remained on the subject property; and that as of the date of the hearing, the requisite documents concerning proper disposal had not been received by Division.

Mr. Guglielmino also explained that the LUST portion of the penalty was classified as a Type I violation because petroleum-contaminated soil stored on the surface of the ground constitutes a direct impact to the health, safety, welfare and environment. Petroleum products, viz gasoline, contain a compound of benzene, which is a carcinogen. Gasoline is more likely to volatize when it is exposed to air by excavation, and this poses a threat to those inhaling the vapors. The contaminated soil also poses a threat (mostly to children) who might touch the soil and insert their fingers in their mouth. The failure to remove petroleum contaminated soil promptly in accordance with the requirements of Section 13 of the Oil Regulations is considered a failure to act, which is of major importance to the LUST Program.

Mr. Eric Beck, a Principal Sanitary Engineer with the UST Program, was the final witness to testify for Division. He stated that he reviewed the UST files with regard to the subject facility so that he could testify as supervisor of

the UST Program to validate the work done by Susan Cabeceiras, a staff member who was unable to attend the hearing.

It was Mr. Beck's opinion that the administrative penalty assessed for the tank tightness test violations was calculated in accordance with the Penalty Regulations. He explained that one of the components of the UST Program is maintaining leak detection on UST Systems, and precision testing is the primary method to maintain leak detection for this type of tank. Therefore precision testing violations are considered Type II violations since they involve requirements that are important to the program, but indirectly related to the protection of the public health, safety, welfare or environment. The precision test violations are properly characterized as Moderate Deviation from the Standard based upon a consideration of those factors set forth in the Penalty Regulations. Consequently, the UST Penalty Proposed in Ms. Cabeceiras' worksheet is consistent with a Type II Moderate Penalty.

Michael Whaley, vice president of Concord Oil, was the only witness to testify for Concord Oil. He testified that Concord Oil began its gasoline distribution operations in Rhode Island at the time of its formation in 1978; and that Joseph Tomaino became president and was responsible for all of the gasoline operations. Gasoline was supplied primarily

on a commission arrangement to the operators of the subject location, who leased the premises from Mr. Tomaino or Fox Hill Realty Trust. Mr. Tomaino made all decisions and essentially handled all of the gasoline dispensing operations involving the USTs.

It was Mr. Whaley's testimony that in response to Division's letter of September, 1994 (requiring the removal of the stock-piled dirt), that Concord Oil had the dirt removed and disposed of in a safe environmental manner by a licensed removal company in October, 1994. Concord Oil produced documents at the hearing (Concord's Exhibit 17) which demonstrate that approximately 251.88 tons of petroleum contaminated soil was removed from the subject property by Envirotel, Inc. and received by Bardon Trimount Environmental Services for recycling on October 21, 25 and 28, 1994; and that said soil was recycled between October 29 and December 30, 1994.²

The original application (filed in 1985) and the original certificate of registration for the underground tanks at the subject premises issued by DEM were maintained as part of the Concord Oil files since May of 1985. The

²An attempt was made by Respondents during the hearing to enter a stipulation that the removal of the tanks at Mr. Tomaino's expense and the removal of the dirt at Concord Oil's expense should be considered without prejudice or without being considered as an admission of liability by either; however, Division objected to same.

tank tightness tests that were performed at the subject location for the years 1987 through 1992 were performed by or on behalf of Concord Oil during the spring and early summer of those years. Mr Tomaino resigned from Concord Oil in February of 1993; however, Concord Oil continued to supply gasoline to the site until the first week of July 1993. Concord Oil decided not to perform the tests in 1993 since they felt they were no longer involved in the property.

Joseph M. Tomaino was the only witness presented by Tomaino. He testified that he currently was the owner of thirty-two percent of the stock of Concord Oil of Newport, Inc. (i.e. as custodian of stock in his children's name); that he was involved in the formation of Concord Oil in 1978; that Fox Hill Realty Trust, a Massachusetts business trust, leased the subject property from Newport Oil Corporation in 1978; that at the time of the lease, Fox Hill Realty Trust acquired certain improvements on the property, including the USTs; that coincidental with their purchasing of said equipment, Fox Hill Realty Trust sold the USTs and other gasoline marketing equipment that was installed at that location to Concord Oil; that Fox Hill Realty Trust then subleased the gasoline portion of the property to Concord Oil, and sold the USTs and other gasoline marketing equipment at that location to Concord Oil; from then on

Concord Oil ran its gasoline business; and Mr. Tomaino, in his capacity as president of Concord Oil, oversaw and supervised the gasoline operation.

Mr. Tomaino personally purchased the subject property in 1988 and has owned the property since then. Concord Oil notified him that they were going to terminate their occupancy of the premises (and discontinue paying rent) as of the end of July 1993, and they removed their gasoline dispensing equipment and the canopy over the pump island in October of 1993.

It is Tomaino's contention that the owner of the UST systems and not the property owner is liable for any failure to timely remove any contaminated soil or for any failure to take remedial action, and that solely the owner/operator of the USTs is obligated to comply with the precision testing requirements. It is essentially Tomaino's position that the UST Regulations provide that the owner of the UST System is responsible for cleaning up releases of stored materials, and that the owner/operator of the USTs is required to conduct precision testing. Tomaino argues that since Tomaino did not own or operate the USTs, he should not be responsible for Concord Oil's failure to comply with the UST Regulations.

It is Concord Oil's contention the owner of the premises is still responsible for compliance with the UST

Regulations even if he had nothing to do with the operation of the facility. It is essentially Concord Oil's position that the UST Regulations in question apply to all facilities and the owners/operators thereof; and that Tomaino should not be allowed to avoid responsibility for complying with said regulations. Concord Oil argues that the owner of the facility has the responsibility to comply with the UST Regulations despite the presence of an operator on the site, and that the owner of the facility cannot delegate responsibility for purposes of compliance.

It is maintained by Division that the evidence adduced at the hearing establishes by a preponderance of the evidence that the USTs leaked and that the facility is contaminated with petroleum; that the petroleum contaminated soil stockpiled on site during the removal of the USTs was not timely removed from the facility; that the requisite precision testing was not performed in 1993; that the proposed penalties for said violations were properly calculated in accordance with the Penalty Regulations and are not excessive; and that the Respondents are jointly and severally liable for all regulatory compliance at the Facility.

Division asserts that the method and manner of the calculation of the administrative penalties was clearly delineated in the NOV; and that the final penalty for

CONCORD OIL TOMAINO
AAD NO. 94-023/SRE
DECISION AND ORDER
PAGE 16

Respondent's violation of Section 13 of the Oil Pollution Control Regulations should be recalculated to include Respondents' continuing violation following the issuance of the NOV.

Division in its Post-Hearing Memorandum argued that, although it presented ample evidence and testimony regarding the amount and calculation of the proposed penalty in this matter, the conclusion of law in a prior matter (In Re: Richard Fickett, AAD No. 93-014/FWE, Final Decision and Order, December 9, 1995) placing the evidentiary burden on Division to establish the penalty amount and its calculation, should not be followed. Assuming that this question was appropriately raised and should be considered herein, I find that the pertinent conclusion of law in Fickett is consistent with R.I.G.L. §42-17.6-4(a) and §12(c) of the Penalty Regulations and is based on sound legal principles.

The hearing in the instant matter was conducted in accordance with the customary burdens of proof (as established in Fickett), and there appears no valid reason for departing from same. Accordingly, the Division bears the burden of proving the alleged violations by a preponderance of the evidence. Once a violation is established and the Division has discharged its initial duty of establishing in evidence the penalty amount and its

calculation thereof, the burden then shifts to Respondents to prove by a preponderance of the evidence that the penalty and/or the economic benefit portion of the penalty was not assessed in accordance with the Penalty Regulations, or that the penalty is excessive.

The documentary and testimonial evidence introduced by Division clearly establishes that Division has met its burden of proving the alleged violations by a preponderance of the evidence, and that Division more than satisfied its initial duty of establishing in evidence the penalty amount and its calculation thereof. The evidence introduced by Respondents was insufficient to meet their burden of proving by a preponderance of the evidence that the penalty or the economic benefit portion of the penalty was not assessed in accordance with the Penalty Regulations, or that the penalty is excessive.

The administrative penalties as set forth in the NOV were calculated properly in accordance with the pertinent statutes and penalty regulations. The Precision Testing violation should be considered Type II/Moderate; the failure to timely remove contaminated soil should be considered Type I/Minor; and the economic benefit portion of the Precision Testing violation is proper and should be upheld.

The only issues that require further consideration are (1) whether the final penalty for Respondent's violation of

§13 of the Oil Pollution Control Regulations (relating to storage and removal of oil spill cleanup debris) should be recalculated to include Respondent's continuing violation following the issuance of the NOV? and (2) who should be liable for the violations and/or who should be responsible for the requisite investigatory sampling and remedial measures?

The NOV mandated the proper removal and disposal of the stockpiled soil and notified Respondents that additional penalties continued to accrue for the period that Respondents remained in violation. Respondents were also notified by letter dated September 20, 1994 that Division was commencing procedures for the removal and disposal of the material, and that action would be taken against Respondents to recover the costs incurred.

Paragraph F(3) of the NOV provides that pursuant to R.I.G.L. 42-17.6.3, if reasonable efforts are not made to comply with the NOV, each day of non-compliance shall be considered a separate offense and shall be subject to a separate penalty. Paragraph F(4) of the NOV provides that violation of No. (4) in Section D (Oil Regulation Section 13, relating to storage and removal of oil spill clean-up debris) constitutes an ongoing violation for which penalties shall continue to accrue for the period that the Respondents remain in violation; and that the accrual of additional

penalties shall be calculated in the manner set forth in the attached Penalty Worksheets. Consequently, the final penalty for violation of Section 13 of the Oil Pollution Control Regulations should be recalculated to include the continuing violation following the issuance of the NOV.

Pursuant to §13(a)(6) of the Oil Regulations, the stockpiled soil should have been removed from the Facility within thirty days (by May 15, 1994). The \$11,000.00 penalty proposed in the NOV for this violation was calculated based on the lowest available Type I/Minor penalty, \$4,400.00; for noncompliance for the period from May 15, 1994 to August 1, 1994 (2.5 months). The evidence demonstrates that the petroleum contaminated stockpiled soil remained at the facility from April 15, 1994 (when the tanks were removed) until its removal was completed on October 28, 1994. The contaminated soil was not removed from the site for almost three months after issuance of the NOV despite the notice given by the NOV that additional penalties shall continue to accrue for the period that the Respondents remained in violation. The required documentation confirming the disposal of the soil was not provided to Division until the date of the hearing (approximately nineteen months after the removal of said soil); however no additional penalty was requested by Division for the failure to file the required documentation for this extended period

beyond the date of removal of said soil.

The Respondents remained in noncompliance concerning the failure to remove contaminated soil for 6.25 months (May 15, 1994 to October 25, 1994): Since the NOV provided the manner of calculation of the penalty for the continuing violation at the rate of \$4,400.00 per month, the penalty for this violation should be recalculated using the expanded period of noncompliance (6.25 months) and the same \$4,400.00, Type I/Minor penalty calculation set forth in the LUST Penalty Worksheet. Applying the appropriate mathematical computation, the total penalty assessed for this violation should be Twenty-seven Thousand Five Hundred Dollars ($\$4,400.00 \times 6.25 = \$27,500.00$). Such adjustments of administrative penalties to reflect continuing noncompliance following the issuance of a NOV have been upheld in previous matters. In Re: Town of Jamestown, AAD No. 94-005/WRE, Final Agency Decision and Order dated January 23, 1996; In Re: Warren Sewer Commission/Wastewater Treatment Facility; AAD No. 93-005/WRE, Final Agency Decision and Order dated April 26, 1994.

The recalculated penalty is substantially higher than the penalty originally proposed; however, the recalculated amount is reasonable and warranted under the circumstances in this matter. The \$4,400.00 LUST penalty is the lowest available penalty for a Type I violation in site remediation

matters, and the penalty is calculated on a monthly rather than a daily basis. In addition to the foregoing, no penalty was imposed for the nineteen month delay in submitting the requisite documentation regarding where the contaminated soil was taken.

Each of the Respondents sought to avoid liability for the violations and/or responsibility for the requisite investigatory sampling and remedial measures. A review of the pertinent statutes and regulations demonstrates that the Respondents are jointly and severally liable for the violations for which they were cited in the NOV; and that they are jointly and severally responsible for compliance with the UST Regulations, including the requisite investigation and remediation of the contamination located at the facility.

It has previously been determined that the precision testing requirement is applicable to the owner of a facility as well as the operator, and that penalties for violations thereof may be assessed against both for violation of this requirement. Re: Barbara D'Allesandro, AAD No. 91-006/GWE, Decision and Order as to Liability, which became a Final Order on August 6, 1993; and which was upheld by the Rhode Island Superior Court in a decision issued by Mr. Justice Needham. D'Allesandro v. Michael Annarummo, C.A. 93-4913 (R.I. Super Ct. August 21, 1995).

The D'Allesandro decisions involved the 1985 Regulations, which did not specifically state which party must comply with the precision testing requirements. The rationale involved in D'Allesandro is that an owner of real property housing USTs cannot contract-away the obligation to the state to maintain property in compliance with the law. Unlike the precision testing requirements at issue in D'Allesandro (under the 1985 Regulations), Section 10.05 of the 1992 UST Regulations as well as Section 10.06 of the 1993 UST Regulations (August & December) provide that the owners/operators of all existing facilities shall comply with the leak detection (i.e. precision testing) requirements.

The Respondents were also cited for violations of statutes and regulations relating to oil discharges, oil or pollutants entering waters of the State, storage and removal of oil spill cleanup debris, site investigation and corrective action. There was no genuine dispute and the evidence clearly established that oil was discharged, that oil/pollutant entered the waters of the State, that the oil-spilled cleanup debris was improperly stored and removed, and that the requisite site investigation and corrective action has not been accomplished.

Tomaino's argument that he should not be liable for the cleanup lacks merit. A review of the UST Regulations in

their entirety clearly demonstrates that the property owner and the owner of the UST system should be jointly and severally responsible for the requisite site investigation and corrective action.

Section 5.00 of the UST Regulations is entitled "General Applicability". Section 5.01 provides that said regulations apply to all proposed, new and existing UST facilities, and to persons who owned or operated such facilities. Section 5.02 provides that "Section 14.00, Leak and Spill Response, shall apply to all facilities and the owners/operators thereof, and any person having actual knowledge of a confirmed leak, spill and other release. There are no exemptions to the responsibility to report a suspected or confirmed leak or spill."

Section 14.00 of the UST Regulations deals with Leak and Spill Response. Section 14.01 provides that these regulations shall apply to all new, existing, and abandoned facilities.

Section 9.00 of the UST Regulations provides that the "owners/operators of UST systems" are required to register and to demonstrate financial responsibility, and Section 14.02 requires that "owners/operators of UST systems" report, investigate, and clean up spills; however, Respondents were not cited for violations concerning these sections. The fact that these specific burdens were imposed

on the "owner/operator of UST systems" by said sections does not support the conclusion (as suggested by Tomaino) that no liability attaches to the owner of the premises for the alleged violations.

Respondents were cited for violations of Sections 14.08, 14.09, 14.11 and 14.12 of the UST Regulations. Sections 14.08 and 14.09 deal with Site Investigation and Site Investigation Reports, and Sections 14.11 and 14.12 deal with Corrective Action Plans. These Sections are all directed generically at all "owners/operators" as defined in the regulations. "Owner" is defined as "any person who holds exclusive or joint title to or lawful possession of a facility or part of a facility." "Operator" is defined as "any person in control of or having responsibility for the daily operation of a facility." "Facility" as defined as "any parcel of real estate or contiguous parcels of real estate owned and/or operated by the same person(s), which together with all land, structures, facility, components, improvements, fixtures and other appurtenances located therein form a distinct geographic unit and at which petroleum products or hazardous materials are or have been stored in underground tanks."

"Owner/operator" as used in Section 14.08 through 14.12 is clearly intended to apply to Tomaino as title holder of the subject facility as well as Concord Oil as the

owner of the USTs and the party who was in control of and had responsibility for the daily operation of said facility. Consequently, the failure to comply with the subject requirements is an obvious breach of the Regulations by both Respondents.

Concord Oil's claim that it never "operated" the Facility, is not supported by the evidence. The utilization of "commission agents" to dispense gasoline does not relieve Concord Oil of its responsibilities as operator of the facility. Certainly Concord Oil wielded extensive control over the daily operations relating to the business conducted at the Facility, including the retail sale of gasoline and related products. The evidence clearly demonstrates that Concord Oil was in control of and had responsibility for the daily operation of the subject facility.

A review of the evidence establishes that Tomaino (as owner of the facility) and Concord Oil (as owner of the USTs and operator of the facility) are jointly and severally liable for the violations alleged in the NOV; that they are jointly and severally responsible for the requisite investigatory sampling and remedial measures; and that the penalties and the economic benefit portion of the penalties as recalculated herein are assessed in accordance with the pertinent Penalty Regulations and that said penalties are not excessive.

FINDINGS OF FACT:

After reviewing the documentary and testimonial evidence of record, I find as a fact the following:

The stipulated facts (1 through 8) as previously recited are incorporated herein as findings of fact; and after review and consideration of the testimonial and documentary evidence of record, I find as additional facts the following:

9. The Application for Underground Storage Facilities Certificate of Registration submitted for the subject Facility includes the following information:

UST ID#	DATE UST INSTALLED	CAPACITY (gal.)	CONTENT	SPILL CONTAIN.	LEAK DETECT.
001	1974	6,000	Gasoline	No	n/a
002	1974	4,000	Gasoline	No	n/a
003	1974	4,000	Gasoline	No	n/a

10. The Respondent, Concord Oil of Newport, Inc., was the owner of the UST systems that were removed from the Facility on or about April 15, 1994.
11. Respondent, Concord Oil of Newport, Inc., was the operator of the UST systems located at the Facility prior to their removal on or about April 15, 1994.
12. Respondent, Joseph M. Tomaino, during his tenure as President of Concord Oil of Newport, Inc. from 1978 to 1993, exercised virtually exclusive control over the daily gasoline operations at the Facility, including but not limited to all UST regulatory compliance.
13. The three (3) UST systems located at the Facility were removed on or about April 15, 1994.
14. Two (2) of the three (3) USTs removed from the Facility were perforated with holes.

15. Distinct petroleum odors were present in the excavations from which the perforated tanks were removed.
16. A petroleum sheen was present on the surface of the groundwater in the excavation from which one of the perforated USTs was removed.
17. During the removal of the USTs (on or about April 15, 1994), approximately 125 cubic yards of petroleum contaminated soil was removed and stockpiled at the Facility for future, off-site disposal.
18. The petroleum contaminated soil remained on-site at the Facility following removal of the USTs.
19. The removal of the petroleum contaminated soil to an off-site disposal location was accomplished between October 21, 1994 and October 28, 1994.
20. Respondents did not provide Division with any documentation showing when the contaminated soil was removed from the Facility and/or where it was taken to for disposal until on or about June 11, 1996.
21. Respondents have not conducted an investigation of the Facility to determine the nature and extent of the petroleum contamination observed during the removal of the USTs in 1994.
22. Respondents have not performed any corrective action at the Facility to remediate the petroleum contamination that remains on-site following the removal of the USTs in 1994.
23. The three (3) USTs that were removed from the Facility in 1994 (Nos. 001, 002 and 003) were installed in 1974.
24. The USTs Nos. 001, 002 and 003 (that were removed from the Facility in 1994) were not precision tested during 1993.
25. Respondents have not submitted to the Department any precision test results for UST Nos. 001, 002 and 003 for the year 1993.
26. Precision testing for UST Nos. 001, 002 and 003 had been performed for the year 1987, but the written verification for same was not submitted until after the

NOV was issued.

27. Division has voluntarily withdrawn the alleged violations, and the associated penalties, relating to precision testing for the year 1987, and spill containment basins.

CONCLUSIONS OF LAW:

Based on the foregoing facts and testimonial and documentary evidence of record, I conclude the following as a matter of law:

1. Joseph Tomaino is the owner of the subject Facility as defined by the Regulations.
2. Concord Oil of Newport, Inc. was the owner of three (3) UST systems located at the subject facility and the operator of the subject Facility as defined by the Regulations.
3. DEM has jurisdiction in this matter.
4. Division proved by a preponderance of the evidence that the Respondents violated R.I.G.L. Sections 46-12-5(a) and (b) and 46-12-28, relating to prohibition against pollutants entering waters of the State.
5. Division proved by a preponderance of the evidence that the Respondents violated R.I.G.L. Section 46-12.5-3, relating to prohibition against oil discharges.
6. Division proved by a preponderance of the evidence that the Respondents violated Oil Regulations Section 6(a), relating to prohibition against oil or pollutants entering waters of the State.
7. Division proved by a preponderance of the evidence that the Respondents violated Oil Regulations Section 13(a)(6) relating to the temporary storage of oil spill cleanup debris at the subject site for a period exceeding thirty (30) days.
8. Division proved by a preponderance of the evidence that the Respondents violated Oil Regulations Section 13(d)

relating to the failure to provide Division with documentation verifying the date of removal and final disposal point of the petroleum contaminated soil within ten (10) days of its removal from the subject Facility.

9. The three (3) gasoline UST systems located at the Facility were required by the UST Regulations to be precision tested in 1987 and annually thereafter.
10. Division proved by a preponderance of the evidence that Respondents violated UST Regulations Sections 10.06(A) and 10.06(B), regarding precision testing requirements for UST Nos. 001, 002 and 003 for the year 1993.
11. Division proved by a preponderance of the evidence that Respondents violated UST Regulations Section 10.06(B)(9) requiring the submission of written verification of compliance with the precision testing requirements of Section 10.06 for UST Nos. 001, 002 and 003 for the year 1993.
12. Division proved by a preponderance of the evidence that Respondents violated UST Regulations Section 14.08 and 14.09 relating to a site investigation.
13. Division proved by a preponderance of the evidence that Respondents violated UST Regulations Sections 14.11 and 14.12, relating to corrective action.
14. Respondent Joseph Tomaino, as owner of the Facility, and Concord Oil of Newport, Inc., as owner of the UST systems and operator of the Facility, are jointly and severally responsible for investigating and remediating the petroleum contamination located at the subject Facility in accordance with Section 14.08 through 14.12 of the UST Regulations.
15. A mathematical recomputation of the administrative penalty for the Precision Testing and Spill Containment violations is warranted based upon the voluntary withdrawal of the alleged precision testing violations for UST Nos. 001, 002 and 003 for the year 1987, and the alleged spill containment basin violations.³

³The original assessment of UST penalties contained in the NOV totaled \$13,650.00. Division withdrew three of the alleged precision testing violations (for the year 1987) and

16. The assessment of the UST administrative penalty for each of the violations established in Conclusions of Law Nos. 10 and 11 above (the "UST" penalty), was properly calculated in accordance with the Rules and Regulations for the Assessment of Administrative Penalties and the recalculated penalty for said violations properly totals \$4,350.00.
17. The Division properly classified Respondents' violations for failing to timely remove petroleum contaminated soil from the Facility as a Type I violation in accordance with the Rules and Regulations for Assessment of Administrative Penalties.
18. The Division properly classified Respondents' violations for failing to timely remove petroleum contaminated soil from the Facility as having a Minor Deviation from the Standard in accordance with the Rules and Regulations for Assessment of Administrative Penalties.
19. The Division properly classified Respondents' violations for failing to precision test the subject USTs as Type II violations in accordance with the Rules and Regulations for Assessment of Administrative Penalties.
20. The Division properly classified Respondents' violations for failing to precision test the subject USTs as having a Moderate Deviation from the Standard in accordance with the Rules and Regulations for Assessment of Administrative Penalties.
21. The Division properly calculated Respondents' economic benefit from noncompliance as a result of their failure to precision test the subject USTs in accordance with

the spill containment violation. Accordingly, based on the purely mechanical computation, the UST penalty amount is reduced by \$9,300.00 (3 missed tests x \$1000.00 = \$3,000.00 and 3 economic advantage calculations x \$450.00 = \$1,350.00; 3 spill containment basins x \$1000.00 = \$3,000.00 and 3 economic advantage calculations x \$650.00 = \$1,950.00; for a total reduction of \$9,300.00).

22. The assessment of the administrative penalty for the violations established in Conclusions of Law Nos. 7 and 8 above (the "LUST" penalty) was properly calculated in accordance with the Rules and Regulations for the Assessment of Administrative Penalties.
23. Paragraph F(3) of the NOV properly provides that each day of non-compliance shall be considered a separate offense and shall be subject to a separate administrative penalty.
24. Paragraph F(4) of the NOV provides that failure to timely remove the oil spill cleanup debris constitutes an ongoing violation for which penalties continue to accrue for the period that Respondents remain in violation; and that the administrative penalties for the continuing violation shall be calculated in the manner set forth in the attached Administrative Penalty Worksheets.
25. Division proved by a preponderance of the evidence that the oil spill cleanup debris violation continued unabated after the NOV in that the cleanup debris remained at the Facility after the issuance of the NOV until its removal to an off-site disposal location between October 24, 1994 and October 28, 1994.
26. The LUST administrative penalty for Respondents' failure to timely remove petroleum contaminated materials from the Facility should be adjusted to reflect Respondents' continuing noncompliance with Oil Regulations Section 13(a)(6).
27. The LUST administrative penalty should be adjusted to reflect the Respondents' continuing noncompliance for the period following the issuance of the NOV at the same rate (\$4,400.00 per month) as assessed in the LUST Administrative Penalty Worksheet attached to the NOV.
28. A recalculation of the LUST administrative penalty using the expanded period of noncompliance (i.e. May 15, 1994 to October 25, 1994 = 6.25 months) at the same \$4,400.00 rate set forth in the LUST Administrative Penalty Worksheet (i.e. \$4,400.00 x 6.25 months = \$27,500.00) conforms with the pertinent statutes and regulations and the recalculated penalty properly totals \$27,500.00.
29. The Department is entitled to the relief requested in

the Order as set forth in the NOV.

30. The Respondents jointly and severally owe administrative penalties totalling Thirty-One Thousand, Eight Hundred and Fifty Dollars (\$31,850.00) comprised of the following:

LUST Penalty §13(a) Oil Regulation \$4,400 x 6.25 months noncompliance....\$27,500.00

UST Penalty §10.06 UST Regulation \$1000 x 3 missed precision tests - 1993....\$3000.
\$450 x 3 economic benefit from missed 1993 tests...\$1350.

31. Respondents failed to prove by a preponderance of the evidence that the administrative penalty and/or the economic benefit portion of the penalty was not assessed in accordance with the Penalty Regulations or that it was excessive.
32. The penalty assessment as recalculated herein is within the parameters and guidelines of the Penalty Regulations, and is reasonable and warranted.

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED

1. That the Notice of Violation and Order No. LS1916 issued to the Respondents dated August 15, 1994 as recalculated herein is SUSTAINED.
2. Respondents, Joseph Tomaino and Concord Oil of Newport, Inc., shall jointly and severally comply with the following:
 - A. With fifteen (15) days of the date of the Final Decision and Order, submit to the Department written documentation verifying that a qualified environmental consultant has been retained to prepare a detailed SIR and, at the discretion of the Department, a CAP for the remediation and removal of all petroleum products or hazardous materials that exist at the facility and are contaminating, or threatening to contaminate, the water of the State, as described in Sections 14.08

through 14.12 of the UST regulations.

- B. Within thirty (30) days of the date of the Final Decision and Order, bring the facility into full compliance with all UST Regulations.
- C. Within thirty (30) days of the date of the Final Decision and Order, submit to the Department for its review and approval a DETAILED, WRITTEN TIMETABLE prepared by your named environmental consultant listing specific dates for the completion of:
 - (a) The installation of one or more groundwater pump-and-treat systems for the purpose of maintaining hydraulic containment of the contamination that has been discovered at the facility. The location, size and pumping capacity of the system shall be sufficient to prevent further migration of any contamination located on or emanating from the facility. Both the system and the handling of its discharge shall be subject to review and approval by the Department;
 - (b) The installation of all monitor wells necessary to delineate the full extent of any contamination both on and emanating from the facility;
 - (c) A proposed groundwater and soil sampling schedule that identifies the chemical parameter sampling methodologies to be used at all existing and proposed monitor wells;
 - (d) The submission of a full SIR prepared as required by Section 14.09 of the UST Regulations. The SIR must be completed and forwarded to the Department within forty-five (45) days of the date the timetable is submitted;
 - (e) The completion of any other groundwater, aquifer and other testing required for the development and implementation of a CAP;
 - (f) The submission of a final CAP, including a schedule for its implementation, prepared as described in Sections 14.11 and 14.12 of the

UST Regulations.

- D. Notify the Department's Division of Site Remediation, Leaking Underground Storage Tank Program, at least forty-eight (48) hours prior to any excavation, well installation, repair or replacement of equipment at the facility so that a representative of the Department may be present.
 - E. Submit monthly status reports of all investigatory, sampling and remedial activities which take place at the facility.
 - F. Submit additional information within fifteen (15) days of any such request by the Department for the purposes of supplementing a SIR or substantiating the basis for a CAP.
 - G. Continue operation of all remediation procedures specified in the CAP until such time as the Director may determine that the soils and/or groundwater located on and around the facility have been adequately treated.
3. The Respondents shall jointly and severally pay to the Department the total sum of Thirty-one Thousand, Eight Hundred and Fifty Dollars (\$31,850.00) in administrative and economic benefit penalties as set forth herein. Said Penalty shall be paid within ten (10) days of the date of the Final Decision and Order, and shall be in the form of a certified check made payable to the General Treasurer, State of RI, for deposit in the Air and Water Protection Fund", and shall be forwarded to:

Office of Management Services
RI Department of Environmental Management
235 Promenade Street, Third Floor
Providence, Rhode Island 02908
Attention: Glenn Miller

CONCORD OIL TOMAINO
AAD NO. 94-023/SRE
DECISION AND ORDER
PAGE 35

Entered as a Recommended Decision and Order this 14th
day of January, 1997.

Joseph F. Baffoni
Joseph F. Baffoni
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
235 Promenade Street
Providence, RI 02908

Entered as a Final Agency Order this 6th day of _____
February, 1997.

Timothy R. E. Keeney
Timothy R. E. Keeney
Commissioner
Department of Environmental Management
235 Promenade Street
Providence, RI 02908

CERTIFICATION

I hereby certify that I caused a true copy of the
within order to be forwarded, via regular mail, postage
prepaid to Kenneth P. Borden, Esq., HIGGINS, CAVANAGH &
COONEY, 123 Dyer Street, Providence, RI 02903-3987; Joseph
R. Palumbo, Esq., 294 Valley Road, Middletown, RI 02842 and
via interoffice mail to Brian A. Wagner, Esq., Office of
Legal Services, 235 Promenade Street, Providence, Rhode
Island 02908 on this 6th day of February, 1997

APPENDIX A

JOINT EXHIBIT:

- Jt. 1 Copy of Quitclaim Deed dated 3/8/88 with attached "Subordination, Non-Disturbance and Attornment Agreement" (2 pp.).

DIVISION'S EXHIBITS:

- Div. 1 Full Copy of Closure Inspection Report for Underground Storage Facilities - 4/14/94 (2 pp.).
- Div. 2 Full Copy of UST Closure Assessment - dated 6/14/94, received 6/21/94, prepared by Triangle Environmental, 8 pages plus cover, cover letter and appendices.
- Div. 3 Full Copy of Correspondence from T.D. Gray, to J.M. Tomaino - dated 9/20/94, with attached return receipt (2 pp.).
- Div. 4 Full Copy of Correspondence from T.D. Gray, to J.M. Hall - dated 9/20/94, with attached return receipt (2 pp.).
- Div. 5 for Id Resume of Bruce Catterall
- Div. 6 for Id Resume of David Sheldon
- Div. 7 Full Copy of the Notice of Violation and Order ("NOV") issued in this matter, dated August 15, 1995 (14 pp.).
- Div. 8 Full Copy of "Interrogatories to Jury" in the matter of Joseph M. Tomaino, et al, v. Concord Oil of Newport, Inc., CA No. NC94-

- 0037 (R.I. Super. Ct., June 23, 1995) (1 p.).
- Div. 9 Full Copy of witness's field note book.(1 p.)
- Div. 10 Full Job description of Joe Tomaino, Vice President of Concord Oil Company or Concord Oil of Newport, Inc. (2 pp.).
- Div. 11 Full Copy of Permanent Closure Application for Underground Storage Facilities for UST Facility ID #00501, dated 3/24/94 .

TOMAINO'S EXHIBITS:

- Tomaino 1 Full Copy of lease of real estate between Newport Oil Corporation and Fox Hill Realty Trust dated March 23, 1978.
- Tomaino 2 Full Copy of Declaration of Trust establishing Fox Hill Realty Trust.
- Tomaino 3 Full Copy of Purchase and Sale Agreement regarding buildings, improvements, and gasoline marketing equipment at the subject location between Newport Oil Corporation and Fox Hill Realty Trust dated March 23, 1978.
- Tomaino 4 for Id Copy of Bill of Sale from Newport Oil Corporation transferring certain gasoline marketing equipment to Fox Hill Realty Trust dated March 23, 1978.
- Tomaino 5 for Id Copy of Bill of Sale from Fox Hill Realty Trust transferring the gasoline marketing equipment including the UST's to Concord dated June 12, 1978.
- Tomaino 6 for Id Copy of check of Concord Oil in payment for the gasoline marketing equipment, including the UST's, dated June 12, 1978.

CONCORD OIL TOMAINO
AAD NO. 94-023/SRE
DECISION AND ORDER
PAGE 38

Tomaino 7A/B Full Copies of Applications of Concord Oil for Underground Storage Facilities dated March 20, 1985.

Tomaino 8 for Id Copy of Tank Test Tightness Reports prepared on behalf of Concord Oil in or about the spring of 1987, 1988, 1989, 1990, 1991 and 1992.

Tomaino 9 for Id Copy of correspondence from Joseph M. Tomaino to DEM dated May 12, 1994.

Tomaino 10 Full Copy of records of improvement to the gasoline marketing equipment at the subject location made by Concord Oil in January 1987, including installation of spill containment basins.

CONCORD OIL'S EXHIBITS:

Concord 1 for Id Copy of By-laws.

Concord 2 for Id Copy of Action of Sole Incorporator.

Concord 3 for Id Copy of special meeting of the Board of Directors, 3/18/78.

Concord 4 Full Copies of three DEM Certificates of Registration for UST Facility, One Mile Corner-Sunnybrook Farms, dated April 6, 1992, December 4, 1990 and June 16, 1987.

Concord 5 Full Copies of six System Tightness Tank Tests ordered by Joseph Tomaino, 1987 through 1992.

Concord 6 for Id Copy of lease - FHRT (Tomaino) to Benard, 1/24/85 - 1/31/88, One Mile Corner location 115' x 120'.

Concord 7 for Id Copy of Agency Agreement - One Mile Corner, Sunnybrook Farms, 4/1/87 -

CONCORD OIL TOMAINO
AAD NO. 94-023/SRE
DECISION AND ORDER
PAGE 39

4/1/92, signed by Tomaino.

Concord 8 Full Copy of Lease, One-Mile-FHRT (Tomaino) to Linda Georges, 3/23/92 -3/31/98, Property - 115' x 120'.

Concord 9 Full Copy of Lease, 6/24/94 Tomaino to FHRT, 3/1/88 - 6/24/94 and continuing.

Concord 10 Full Copy of Purchase and Sale Agreement, 3/23/78.

Concord 11 Full Copy of Bill of Sale-Newport Oil Corporation to FHRT.

Concord 12 Full Copy of FHRT-Declaration of Trust 4/12/78.

Concord 13 Full Copy of Lease, 3/23/78-Newport Oil Corporation to FHRT.

Concord 14 for Id Copy of letter - Tomaino, 3/8/88

Concord 15 Full Copy of Amendment of Lease, 3/23/78.

Concord 16 Full Copy of Certificate of Registration for Underground Storage Facilities dated May 15, 1985.

Concord 17 Full Copy of letter from Envirotel, Inc. to Kevin Gillen dated October 17, 1994.

Concord 18 Full Copy of documents relating to removal of soil from One Mile Corner, Newport, RI.