

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

**RE: ROSEMERE REALTY, INC.
NOTICE OF VIOLATION OC&I/UST 99-00848**

AAD No. 99-022/WME

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 August 31, 1999. The hearing was held on May 1, 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 August 14, 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 July 7, 2000. At the conference, the parties agreed to the following stipulations of fact:

1. The Respondent is the owner of real property located at 1995 Post Road in the City of Warwick, Rhode Island ("Facility").
2. The Respondent owns and operates the Facility and said Facility is registered with the DEM pursuant to Section 8.00 of the Rhode Island Regulations for Underground Storage Facilities Used for Petroleum Products and Hazardous Materials.
3. The Facility is registered at DEM as Facility No. 00848.
4. Two underground storage tanks at the Facility are registered with the DEM as UST ID No. 001 and 002.
5. New England Petroleum Contractors, Inc. was hired to replace steel piping at the Facility and New England Petroleum Contractors, Inc. did replace steel piping at the Facility in 1994.

A list of the exhibits, marked as they were admitted at the hearing, is attached to this Decision as Appendix A.

HEARING SUMMARY

At the hearing, the OCI called two (2) witnesses: **Kevin Gillen**, a Principal Sanitary Engineer in the Office of Waste Management's Underground Storage Tank Program; and **Tracey Tyrrell**, a Principal Environmental Scientist in the OCI's Underground Storage Tank and Hazardous Waste Section.

Respondent presented one (1) witness: **Robert S. Potter**, President of Rosemere Realty, Inc. and its majority stockholder.

I. The Notice of Violation and Amendment

The NOV issued to Respondent on August 31, 1999 identifies property located at 1995 Post Road in the City of Warwick, Rhode Island (the "Facility") as being owned and operated by Rosemere Realty, Inc. The Facility is registered with the DEM as are two (2) underground storage tanks ("USTs"). The NOV alleges that Respondent failed to conduct precision testing and/or submit documentation of precision testing for the two USTs in 1994, 1995 and 1997. The NOV also alleges that in 1994, Respondent

replaced steel piping at the Facility without the prior written notification to and approval by the Director.

The NOV cites Respondent for having violated Sections 10.06(B) and 13.02(A) of the Regulations for Underground Storage Facilities Used for Petroleum Products and Hazardous Materials (“UST Regulations”) due to the noncompliance with the precision testing requirements. The NOV also cites Respondent for having violated Sections 11.02(C) and 12.01 of the UST Regulations because a substantial modification of the Facility had been accomplished without the required prior written notification and approval.

Section 10.06 provides in pertinent part:

Leak Detection for Existing Tanks: the owners/operators of all existing facilities shall comply with one of the following leak detection requirements:

(A) Continuous Monitoring: ***

(B) Precision Testing:

(1) For USTs for which the date of installation is known and verifiable, perform a precision test of the tank system in accordance with the following schedule:

UST Installed Prior to January 1, 1965:

Initial Precision Test Due Date: May, 1986

Subsequent Precision Test Due Dates: Annually

UST Installed on or after January 1, 1965:

Initial Precision Test Due Date: May, 1987

Subsequent Precision Test Due Dates: 5, 8, 11, and 13 years after installation and annually thereafter

(2) For any UST for which the date of installation is not known, perform a precision test of the tank system no later than May, 1986 and annually thereafter.

(3) ***

(4) ***

(5) ***

(6) ***

(7) ***

(8) ***

- (9) Precision test results required in this section shall be caused to be submitted by the owner/operator to the Director within fifteen (15) calendar days of the date of test completion; or in the event of a leak/release, in accordance with Section 14.00, Leak Response.
- (10) ***

Section 13.02 provides in pertinent part:

Records: All owners/operators of new and existing facilities shall maintain on the facility premises or at an alternate location approved by the Director, for the period of time specified below, records of the following:

- (A) Permanent Records: The following shall be maintained for three years or for the life of the facility, whichever is greater:
 - (1) ***
 - (2) All repairs, upgrades or modifications to pipes, fittings or other components of underground storage tank systems.
 - (3) Any monitoring, leak detection system, inventory control system and/or UST testing results.
 - (4) ***
 - (5) ***
 - (6) Precision test results including all of the information required in 10.06(B)(6).
 - (7) ***

Sections 11.02(C) and 12.01 concern modifications to a facility:

11.02 Prohibitions:

- (A) ***
- (B) ***
- (C) No person shall commence construction of a new facility or replacement tank system, and no substantial modification (including product piping replacement) may be made to any UST facility for which an application for a certificate of registration is required, without prior written notification to and approval by the Director.

12.01 Prohibition: No substantial modification may be made to any UST facility for which an application for a certificate of registration is required, without prior written notification to and approval by the Director.

At the hearing the OCI represented that subsequent to the issuance of the NOV, Respondent had provided the 1997 tank testing records. Counsel moved to amend the NOV by deleting all references to the alleged violations of tank testing requirements for 1997 and to reduce the penalty accordingly. The Respondent had no objection and the NOV is therefore considered amended.

II. Precision Testing

Kevin Gillen, a Principal Sanitary Engineer in the Office of Waste Management's Underground Storage Tank Program, testified that single wall tanks are required to be tested after installation according to a schedule that is set forth in the UST Regulations. Tr. May 1, 2001 at 8. He stated that when precision test results are submitted to the Department, they are placed in the Facility's file. *Id.* at 11, 15-16. He had reviewed this Facility's file prior to the hearing. There were no precision test results in the file for the two tanks located at the Facility for the years 1994 and 1995. *Id.* at 8-9, 11.

Tracey Tyrrell, a Principal Environmental Scientist in the Office of Compliance and Inspection's Underground Storage Tank and Hazardous Waste Section, testified that she drafts NOVs and reviews those prepared by others for accuracy, and in conjunction with the Facility's file. She also assesses the penalty. *Id.* at 18-19.

In this matter she had reviewed the file to verify that the test results had not been submitted to the Department. There were no precision test results in the file for the two tanks for the years 1994 and 1995. *Id.* at 20-21.

Under cross-examination, the witness conceded that she would not know if test results had been lost or misplaced but stated that, in her experience at OCI, she had not discovered any lost records. *Id.* at 31. The witness was later questioned about the 1997 precision test results for which the Respondent had also been cited in the NOV (prior to its amendment). She stated that she did not know if the 1997 test results had been in the file when she reviewed the NOV prior to its issuance. *Id.* at 54-55.

Respondent's sole witness was Robert S. Potter. Mr. Potter stated that he is President and majority stockholder of Rosemere Realty, Inc. and has been President of the corporation since its inception in 1993 or 1994. He is also President of six other

corporations and a corporate officer of two or three more. He stated that he is the owner of nine (9) gasoline stations and has owned gas stations in Rhode Island since 1978. Mr. Potter testified that he was aware of the Department's requirements for tank testing and filing the documents. *Id.* at 65, 77-78.

In 1994 and 1995, Mr. Potter was in charge of precision testing the tanks located at the Rosemere Realty Facility and hired Precision Testing Company to do the job. *Id.* at 65-66. He stated that he did not have the test results for 1994 and 1995 but, to the best of his knowledge, they were submitted to the Department. Copies of the results had been stored in the basement of his office but water damage from a fire in 1996 or 1997 had destroyed many of the records. *Id.* at 78-80. When he had attempted to obtain copies of the records from Precision Testing Company, he found that the company was going out of business and was unreachable. *Id.* at 101-102.

Mr. Potter also disputed the prior witnesses' assertions that if the test results had been submitted, then they would have been in the Facility's file. He testified that he had sent in a Data Chart for Tank Tightness Test in 1993 but that it was not in the file. *Id.* at 71-72.

To substantiate that the testing had been done, Mr. Potter had directed someone in his office to search for checks in payment of tank testing for the years 1994 and 1995. *Id.* at 85. In 1994, Robert S. Potter was President and owner of Potter Oil, Inc., the operator of the Facility at the Rosemere Realty location. *Id.* at 67. Copies of two checks from Potter Oil, Inc. were marked for identification but not admitted as full exhibits. Resp. 1 for *Id.* and Resp. 2 for *Id.*

He asserted that, since he had only one Facility in 1994 and 1995 with two USTs, a 1994 check for \$400.00 with the reference "Eddy Street, two tanks" was an error, and that it must have been for testing the two tanks located at the Rosemere Realty Post Road Facility. Tr. May 1, 2001 at 70-71. According to Mr. Potter, a check

in 1995 made payable to Precision Testing for \$400.00, was also for testing at the Post Road Facility. *Id.* at 70.

Under cross-examination, the witness agreed that Potter Oil had operated a gas station on Eddy Street in 1994 and that a Tank Tightness Test Certificate (OCI 4 for Id) appeared to show that in June 1994, the Eddy Street Facility had had two tanks precision tested. *Id.* at 88-91.

Conclusion

Section 10.06(B) sets forth two schedules for testing USTs, one when the date of installation is known and the other when the date of installation is unknown. This latter schedule requires that a precision test be performed no later than May 1986 and annually thereafter.

While there was no testimonial evidence regarding the dates the two USTs were installed, the NOV (OCI 2) and a letter from the DEM to Robert S. Potter dated March 10, 1998 (OCI 1) identify both tanks with an “unknown” date of installation. Respondent did not dispute that annual precision testing was required for the two USTs at the Facility.

Section 13.02(A) requires that Facilities maintain certain records for the life of the Facility, including precision test results. Mr. Potter explained that he had maintained copies of the precision test results but that the records were destroyed by water damage from a fire.

The OCI witnesses Gillen and Tyrrell testified that they had reviewed the DEM file for this Facility and precision test records for the years 1994 and 1995 were not in the file. Although Mr. Potter attempted to cast doubt on whether the Department adequately maintains its Facility files, he testified that he had never looked at the DEM file. *Id.* at 102-104. Respondent’s witness cited the two years of test results (in 1993, prior to Rosemere Realty’s ownership of the facility and not the subject of the NOV

against this Respondent, and 1997) that the Department had earlier claimed were missing but have now appeared in the file. The explanation may be that they were always there and overlooked in earlier reviews of the file. It may also be that they were submitted to the Department at some point in time after Robert Potter was initially contacted about missing test results (see the March 10, 1998 letter, marked OCI 1) and after Ms. Tyrrell's review of the file in preparation for issuance of the NOV. Based upon the testimony, I find this latter explanation to be more likely the answer for the later discovered documents.

Test results for 1994 and 1995 are not in the file. I conclude, based upon the evidence, that they were never submitted to the Department. The OCI impeached Mr. Potter's testimony regarding testing in 1994. I conclude that not only were the tests not submitted in 1994, the evidence supports a finding that they were never conducted.

Mr. Potter testified about testing the tanks in 1995. While this testimonial evidence was not substantiated by documentary evidence (the check was not allowed into evidence), neither was it undermined under cross-examination or by other circumstantial evidence. The OCI has argued that the evidence presented at the hearing that the test results were not in the file "lead to the reasonable inference that if the testing was done, then the test results would have been filed. The contrary is also reasonable: because the test results were not filed, then the testing was not done." Response Memorandum of the Office of Compliance and Inspection ("OCI Response"), at 2.

The fact that test results have not been timely filed does not necessarily lead to the conclusion that they have not been conducted. As an example, test results for 1997 were apparently filed subsequent to Ms. Tyrrell's review of the Facility file.

The Rhode Island Supreme Court has stated that positive testimony, which is not discredited either by other positive testimony or by circumstantial evidence,

extrinsic or intrinsic, is ordinarily conclusive upon a trier of fact. The evidence may only be rejected if the trier of fact determines that it contains inherent improbabilities or contradictions or is otherwise unworthy of belief. If the evidence is rejected, the trier of fact is required to specifically state the reasons for its rejection. State v. A. Capuano Bros., Inc., 120 R.I. 58, 63-64 (1978).

While Mr. Potter's credibility may be suspect as self-serving, I cannot state that his testimony regarding the 1995 precision tank testing was inherently improbable, contradictory, or otherwise unworthy of belief. A fair preponderance of the evidence is supposed to create in the mind of the trier of fact a conviction that the party with the burden of proof has established its case, and not a mere suspicion that it has, however strong that suspicion may be. Jackson Furniture Co. v. Lieberman, 14 A.2d 27, 32 (R.I. 1940). I therefore find that the Department has not proved by a preponderance of the evidence that the tests were not conducted at the Facility in 1995. Although copies of the 1995 precision test results are not available (Mr. Potter asserted they were destroyed by water damage), I find that the Department has also not proved by a preponderance of the evidence that Respondent failed to maintain the records as required by Section 13.02(A) of the UST Regulations.

III. Substantial Modification at the Facility

Respondent had agreed at the prehearing conference that steel piping had been replaced at the Facility in 1994. See Stipulation #5.

In his testimony, Kevin Gillen explained that the UST Regulations require written approval prior to making modifications to the piping. Tr. May 1, 2001 at 15. In his review of the Facility file on the day before the hearing, Mr. Gillen found no notes or written approvals issued by the Department regarding a piping upgrade at the Facility in 1994. *Id.* at 11-13. He testified that if the written notification or approval had been granted, then it should have been in the file. *Id.* at 15.

Under cross-examination, the witness conceded that he had had no knowledge of this case up until his review of the file on the previous day, nor did he know whether the Department had given oral approval to replace the piping in 1994. He did not know whether the Department had ever given oral approval to a Facility for an upgrade. He also admitted that it does not necessarily mean something was not done if it was not in the Facility file. *Id.* at 12-13.

Tracey Tyrrell also testified regarding the modification at the Facility. She stated that the installation of reinforced plastic piping in 1994 was considered a “substantial modification” to the Facility. *Id.* at 23-24. She explained that the UST Regulations specifically require written approval for a substantial modification at a Facility. *Id.* at 60. She found no prior written notification for replacing the steel piping at the Facility in 1994 in the file, nor did she find any written approval from the Director. *Id.* at 22-23.

Robert S. Potter testified on behalf of Respondent on this issue. In 1994, he had hired New England Petroleum to replace the single wall steel piping with double wall fiberglass piping. *Id.* at 74-75. He stated that it was his policy to require the contractors to notify the Department as part of their employment. The contractor had prepared a site diagram as part of the application process for the piping upgrade at the Facility and Mr. Potter had signed a formal application for the modification and given it to the contractor. He had been unaware that the Department had not received the plans. *Id.* at 75-76, 108.

The witness stated that he never had a copy of the plans and never had a copy of the Department’s approval. He doubted whether the Department had ever sent it to him. *Id.* at 75, 105-106.

Under cross-examination, Robert Potter stated that he had contacted Kevin Cantwell, formerly with New England Petroleum, who had told him that he had

obtained written approval from the Department for the work at the Facility. He was also told that New England Petroleum had gone bankrupt and no longer had the records. *Id.* at 105.

Mr. Potter stated that he thought he had fulfilled his obligation to obtain written approval by requiring the contractor to submit the application. *Id.* at 109.

Conclusion

Section 11.02(C) specifies that a “substantial modification” includes product piping replacement. Both sections 11.02(C) and 12.01 require written notification to and approval by the Director before any substantial modification may be made at a Facility.

At the hearing, Mr. Potter acknowledged that it was his obligation to sign the application but argued it was not his responsibility to obtain the specific approval from the Department because he had delegated that responsibility to the contractor. Mr. Potter claimed that the application form with a supporting site diagram was prepared by New England Petroleum but there is no evidence (other than unreliable hearsay from Kevin Cantwell via Mr. Potter) that it was ever submitted as required. Sections 11.02(C) and 12.01 are clear: No substantial modification may be made to any UST Facility without prior written notification to and approval by the Director. Notwithstanding any delegation of that responsibility to a contractor, the ultimate obligation rests with the Facility.

Respondent has no records, the contractor has no records, and the Department’s file contains neither written notification from the Facility nor approval from the Director. There is no evidence that any approval from the Director was ever issued. I therefore conclude that the Department has met its burden to prove that Respondent has not complied with Sections 11.02(C) and 12.01 of the UST Regulations.

IV. Assessment of an Administrative Penalty

As indicated in the NOV, the OCI originally sought the assessment of an administrative penalty in the amount of \$11,200.00 against Respondent for violations of sections 10.06(B), 13.02(A), 11.02(C) and 12.01 of the UST Regulations. Due to OCI's amendment of the NOV, that sum was reduced to \$8,300.00. 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.

Section 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, Administrative Adjudication Division No. 93-014/GWE, Final Decision and Order issued by the Director on December 9, 1995, at 7-8.

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 NOV with the attached Penalty Summary and Worksheet (OCI 2

at 6-8) and the testimony of Tracey Tyrrell. Ms. Tyrrell testified that she had prepared the penalty worksheets and calculated the penalties. Tr. May 1, 2001 at 24-25.

The three-page Penalty Summary and Worksheet established in evidence that the violations of UST Regulations sections 10.06(B) and 13.02(A) were identified as Type II violations: “INDIRECTLY 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 Moderate Deviation from Standard: the extent to which the act or failure to act was out of compliance; environmental conditions; 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 II, Moderate Deviation from Standard from the Water Pollution Penalty Matrix as ranging from \$1,000 to \$5,000. OCI 2 at 7. Respondent was assessed a \$1,000 penalty for each missing test. *Id.* at 6.

The Penalty Summary and Worksheet also identified the economic benefit from non-compliance with the precision test requirements. The avoided cost of precision testing was calculated at \$450.00 for each missing test. *Id.*

Ms. Tyrrell was questioned about the factors used in determining the Deviation from Standard and whether the violation is a Type I, Type II or Type III violation. She explained that the precision test violation was considered a Type II violation because it posed an indirect threat to the public. Tr. May 1, 2001 at 47. She stated that the missing tests in this matter were considered a Moderate Deviation from Standard, but that if there had been only one year’s missing tests, that would have been identified as “Minor” and ten or more years would have been deemed a Major Deviation from

Standard. *Id.* at 26, 48. She also testified that even with the NOV amended to remove the 1997 alleged violations, the Deviation from Standard would still have been “Moderate”. *Id.* at 58.

Ms. Tyrrell testified that the economic benefit portion of the penalty had been calculated based upon the results of yearly surveys (for 1994 and 1995) of what Facilities were charged for precision testing of USTs. Tr. May 1, 2001 at 27-29. Under cross-examination, the witness acknowledged that the cost for precision testing may vary and that factors such as an operator owning a number of Facilities and utilizing one company to conduct the testing could affect the price per tank test. *Id.* at 39.

Under further questioning, Ms. Tyrrell stated that she had not had documentation showing Respondent’s actual costs for precision testing when she calculated economic benefit but that if she had had that information, she would have used those numbers to determine the economic benefit. *Id.* at 57-58, 61.

Robert Potter testified several times that a check in the amount of \$400.00 to Precision Testing was for testing two tanks in 1995. He continued to pay this same amount in 1997 for two tank tests. He also testified that he used the same company for tank testing in 1994 and 1995. *Id.* at 70, 73, 86.

As for the remaining violation, the three-page Penalty Summary and Worksheet also established in evidence that the violation of sections 11.02(C) and 12.01 of the UST Regulations was identified as a Type II violation. The same factors that were considered in the precision test violations were listed as having been considered in determining that this violation was a Moderate Deviation from Standard. OCI 2 at 6, 8. The Worksheet identified the penalty for a Type II, Moderate Deviation from Standard from the Water Pollution Penalty Matrix as ranging from \$1,000 to \$5,000. Respondent was assessed a \$2,500.00 penalty for replacing product piping at the Facility without

providing prior written notification to and receiving the approval of the Director. *Id.* at 8.

There was no additional assessment for economic benefit from non-compliance.

At the hearing, Ms. Tyrrell explained that the failure to obtain approval from the Director for the modification at the Facility was a Type II violation because it eliminated the opportunity for the Department to view where the old piping had been located. The Department therefore was unable to determine if there had been any problem with the old piping prior to its replacement and, consequently, was unable to determine if there was any direct threat to the public. Tr. May 1, 2001 at 47-48.

Conclusion

The OCI proved by a preponderance of the evidence that Respondent violated Section 10.06(B) of the UST Regulations by not submitting to the Department precision test results for two USTs in 1994 and 1995. The penalty for those violations (four missing test results) was established in evidence to be \$4,000.00. The Type and Deviation from Standard were also established in evidence and applied to both the failure to precision test in 1994 (and the alleged failure in 1995) and the failure to submit the test results in both years. Respondent has failed to prove that this portion of the administrative penalty was not assessed in accordance with the Penalty Regulations. I will therefore not disturb the determination that the failure to submit results and the proven failure to test in 1994 are properly a Type II Moderate Deviation from Standard. Test results must be submitted to the Department so personnel may have the opportunity to review the results, and so further testing may be accomplished if a tank system fails the precision test.

In my discussion above, I found that although the OCI met its burden to prove that tests had not been conducted in 1994, it did not prove that Respondent had failed to test the tanks in 1995. This distinction is important because it bears on the economic benefit portion of the penalty applying to only one year. In addition, Mr.

Potter testified about the company's actual cost for tank tests over a period of years as being \$200.00 for each tank test.

The OCI has argued that any evidence of a different calculation of economic benefit from non-compliance is irrelevant as to whether the penalty was properly calculated since it was not provided to the Department prior to the issuance of the NOV. OCI Response, at 3. At the time the economic benefit portion of the penalty was calculated, Ms. Tyrrell did not have information regarding Respondent's actual costs for precision testing in 1994. When the NOV was issued, based upon the information available for the average cost per test in 1994, the economic benefit portion of the penalty was properly calculated.

As stated in several AAD Decisions and as recognized by Ms. Tyrrell, the actual cost can be considered in calculating economic benefit. This 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. In Re: Sanford Neuschatz, AAD No. 00-002/SRE, Final Agency Order entered on March 4, 2002, at 23, *appeal pending sub nom.*, Neuschatz v. Reitsma, C.A. PC02-1589 (R.I. Super. Ct.); In Re: Anthony J., Joseph F., Thomas R. Connetta/Marguerite Sweeney, AAD No. 94-020/SRE, Final Agency Order entered on August 21, 1997, at 30.

Although the economic benefit portion of the penalty was properly calculated when the NOV was issued, with the evidence presented at the hearing, the amount is excessive. I therefore find that the economic benefit portion of the penalty for failure to test two USTs in 1994 is \$200.00 per avoided tank test, for a total economic benefit from non-compliance of \$400.00.

The OCI also proved by a preponderance of the evidence that Respondent violated Sections 11.02(C) and 12.01 of the UST Regulations. Although the penalty

was assessed in the middle range of the penalty matrix, Respondent failed to prove by a preponderance of the evidence that the penalty was not assessed in accordance with the Penalty Regulations. That penalty therefore stands at \$2,500.00.

IV. Respondent's Motion to Dismiss

At the hearing, Respondent's counsel moved to dismiss this matter with respect to the alleged failure to precision test the USTs. Counsel argued that the fact that the test results were not located in the file did not mean that the OCI had proved by a preponderance of the evidence that the tests had not been conducted. Tr. May 1, 2001 at 62, 64.

The OCI objected to Respondent's motion to dismiss. Its attorney argued that two basic conclusions could be drawn from the fact that the test results were not in the file: that the test results had not been submitted; and that the tests presumably had not been conducted, otherwise they would have been submitted and would have been in the file. *Id.* at 62-63.

My ruling on the motion was reserved for this Decision. The arguments were considered in the above discussion of the evidence presented at the hearing and in the below findings of fact and conclusions of law.

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

FINDINGS OF FACT

1. Rosemere Realty, Inc. ("Respondent") is the owner of real property located at 1995 Post Road in the City of Warwick, Rhode Island ("Facility").
2. The Respondent owns and operates the Facility and said Facility is registered with the Department pursuant to Section 8.00 of the UST Regulations.
3. The Facility is registered at the Department as Facility No. 00848.
4. Two USTs at the Facility are registered with the Department as UST ID No. 001 and 002.

5. The two USTs are required to be tested annually.
6. No precision test results were submitted to the Department for the two USTs for the years 1994 and 1995.
7. Water damage from a fire destroyed copies of many precision test records that had been stored in the office basement.
8. No precision tests were conducted on the two USTs at the Facility in 1994.
9. The OCI established in evidence that the failure to conduct precision tests and/or submit precision test results for the two USTs in 1994 and 1995 was determined to be a Type II Moderate Deviation from Standard.
10. The OCI established in evidence that the amount of the penalty for the failure to conduct precision tests and/or submit precision test results for the two USTs in 1994 and 1995 was \$1,000.00 for each missing test.
11. The Four Thousand (\$4,000.00) Dollar administrative penalty assessed for the failure to conduct precision tests and/or submit precision test results for the two USTs in 1994 and 1995 is not excessive.
12. The OCI established in evidence that the economic benefit portion of the penalty was calculated at \$450.00 for each missing test.
13. The economic benefit portion of the penalty set forth in the NOV was based upon the average cost for precision testing a UST in 1994 and 1995.
14. Respondent's actual cost for precision testing a UST in 1994 was \$200.00 for each tank.
15. The economic benefit portion of the penalty as set forth in the NOV is excessive.
16. An assessment of the economic benefit portion of the penalty in the amount of \$200.00 for each missing test is not excessive.
17. New England Petroleum Contractors, Inc. was hired by Respondent to replace steel piping at the Facility and New England Petroleum Contractors, Inc. did replace steel piping at the Facility in 1994.
18. Respondent failed to provide written notification to the Department prior to replacing the piping at the Facility.
19. Respondent did not receive written approval from the Department prior to replacing the piping at the Facility.
20. The OCI established in evidence that the failure to provide written notification to and obtain approval from the Department prior to replacing the piping at the Facility was determined to be a Type II Moderate Deviation from Standard.

21. The OCI established in evidence that the failure to provide written notification to and obtain approval from the Department prior to replacing the piping at the Facility was assessed an administrative penalty in the amount of \$2500.00.
22. The Two Thousand Five Hundred (\$2,500.00) Dollar administrative penalty assessed for the failure to provide written notification to and obtain approval from the Department prior to replacing piping at the Facility 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 failed to submit precision test results for two USTs in 1994 and 1995 in violation of the UST Regulations.
2. The OCI has proved by a preponderance of the evidence that Respondent failed to conduct precision tests on two USTs in 1994 in violation of the UST Regulations.
3. The OCI has failed to prove by a preponderance of the evidence that Respondent did not conduct precision tests on two USTs in 1995.
4. The OCI has failed to prove by a preponderance of the evidence that Respondent had not maintained copies of the 1995 precision test results as required by the UST Regulations.
5. The OCI established in evidence the penalty amount and its calculation for failure to conduct precision tests and/or submit precision test results for two USTs in 1994 and 1995.
6. Respondent has failed to prove by a preponderance of the evidence that the OCI's determination of the failure to conduct precision tests and/or submit precision test results as a Type II Moderate Deviation from Standard was not in accordance with the Penalty Regulations.
7. Respondent has failed to prove by a preponderance of the evidence that OCI's assessment of an administrative penalty in the amount of \$4,000.00 for the failure to conduct precision tests and/or submit precision test results was not in accordance with the Penalty Regulations.
8. The OCI established in evidence the economic benefit portion of the penalty for failure to precision test the USTs.
9. Respondent has proved by a preponderance of the evidence that the economic benefit portion of the penalty for failure to precision test two USTs in 1994, as set forth in the NOV, is excessive.

10. An assessment of the economic benefit portion of the administrative penalty in the amount of \$400.00 for failure to precision test two USTs in 1994 is not excessive.
11. The OCI has proved by a preponderance of the evidence that Respondent made a substantial modification to the Facility in 1994.
12. The OCI has proved by a preponderance of the evidence that Respondent did not provide written notification to and obtain approval from the Department prior to making a substantial modification to the Facility in violation of the UST Regulations.
13. The OCI established in evidence the penalty amount and its calculation for failure to provide written notification to and obtain approval from the Department prior to making a substantial modification to the Facility.
14. Respondent has failed to prove by a preponderance of the evidence that the OCI's determination of the failure to provide written notification to and obtain approval from the Department prior to making a substantial modification to the Facility as a Type II Moderate Deviation from Standard was not in accordance with the Penalty Regulations.
15. Respondent has failed to prove by a preponderance of the evidence that OCI's assessment of an administrative penalty in the amount of \$2,500.00 for the failure to provide written notification to and obtain approval from the Department prior to making a substantial modification to the Facility was not in accordance with the Penalty Regulations.
16. The assessment of a total administrative penalty, including the economic benefit portion of the penalty, against Respondent in the amount of Six Thousand Nine Hundred (\$6,900.00) Dollars is in accordance with the Penalty Regulations.

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

ORDERED

1. Respondent's motion to dismiss is DENIED.
2. An administrative penalty in the amount of Six Thousand Nine Hundred (\$6,900.00) Dollars is hereby ASSESSED against the Respondent.
3. 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

**RE: ROSEMERE REALTY, INC.
NOTICE OF VIOLATION OC&I/UST 99-00848
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AAD No. 99-022/WME

"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 24th day of April, 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 1st day of May, 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 Christian C. Potter, Esquire, Shakespeare Hall, 128 Dorrance Street, Suite 200, Providence, RI 02903; and via interoffice mail to John A. Langlois, Esquire, DEM Office of Legal Services, and Dean H. Albro, Chief, Office of Compliance and Inspection, 235 Promenade St., Providence, RI 02908; on this _____ day of April, 2002.

APPENDIX A

LIST OF EXHIBITS

OCI'S EXHIBITS:

OCI 1 Full	Copy of the March 10, 1998 letter from the DEM to Respondent.
OCI 2 Full	Copy of Notice of Violation dated August 31, 1999.
OCI 3 Full	Copy of Respondent's Request for Hearing.
OCI 4 For ID	Tank Tightness Test Certificate stamped "Received Jun 28, 1994 R.I. DEM Waste Mgt. Div."

RESPONDENT'S EXHIBITS:

Resp. 1 For ID	A copy of a check in the amount of \$400.00 to Precision Testing Company dated November 14, 1995.
Resp. 2 For ID	A copy of a check in the amount of \$400.00 to Precision Testing Company dated July 14, 1994.
Resp. 3 For ID	A letter from Thomas Baccala to Christian C. Potter, Esq. dated April 18, 2000.
Resp. 4 For ID	Precision Testing results from Precision Testing Company for the year 1997.
Resp 5 For ID	Data Chart for Tank System Tightness test dated 10-06-93.

If you are aggrieved by this final agency order, you may appeal this final order to the Rhode Island Superior Court within thirty (30) days from the date of mailing of

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this notice of final decision pursuant to the provisions for judicial review established by the Rhode Island Administrative Procedures Act, specifically, R.I. Gen. Laws §42-35-15.