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

RE: GETTY PETROLEUM MARKETING, INC. / POWER TEST REALTY COMPANY LIMITED PARTNERSHIP / GETTY PROPERTIES CORP.
NOTICE OF VIOLATION OC&I/SR 05-01

AAD No. 05-001/SRE

DECISION AND ORDER

This matter came on for Administrative Hearing before Hearing Officer David Kerins on May 5 and 6 of 2008 on the appeal filed by Respondents Getty Petroleum Marketing Inc. ("GPM"), Power Test Realty Company L.P. ("PTRC") and Getty Properties Corp. ("GPC") from a Notice of Violation, Order and Penalty No. OC&I/SR 05-01 ("NOV") filed by the Rhode Island Department of Environmental Management ("RIDEM"), Office of Compliance and Inspection ("OC&I") dated July 28, 2005.

The parties were represented by legal counsel as follows:

OC&I	John Langlois, Esq.
GPM	Richard A. Sherman, Esq.
GPC and PTRC	Jennifer Cervenka, Esq.

A Prehearing Conference was held on March 21, 2007 and a Prehearing Conference Record and Order was issued by Hearing Officer Joseph F. Baffoni on May 8, 2007. On May 22, 2007 an Amended Prehearing Conference Record and Order was issued by Hearing Officer Baffoni. On September 7, 2007 the matter was assigned to Hearing Officer David Kerins upon the retirement of Hearing Officer Baffoni.

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.*), Rules and Regulations for the Investigation and Remediation of Hazardous Material Releases as authorized by R.I.G.L. Chapter 19.14 of Title 23 entitled "Industrial Property Remediation and Reuse Act", 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.

STIPULATIONS OF FACT

The Amended Prehearing Record and Order establishes the following stipulations of fact as agreed to by and between the parties:

1. The subject properties are located at Dunnellen Road and Dexter Road in the City of East Providence, Rhode Island, otherwise identified as East Providence Assessor's Map 204, Block 1, Parcels 9, 11 and 15 (the "Site").

2. Respondent Power Test Realty Company L.P. ("PTRC") is the current owner of Parcels 9 and 11 on Assessor's Plat 204 in East Providence, Rhode Island.

3. Respondent Getty Properties Corp. ("GPC") is the current owner of four petroleum pipelines that are installed in Parcels 9 and 11 (the "Pipelines"). GPC is the general partner of PTRC.

4. Respondent Getty Petroleum Marketing Inc. ("GPM") is the current operator of two of the Pipelines that are installed in Parcels 9 and 11 ("Active Pipelines"). The Active Pipelines were operated by GPM from March, 1997 to April, 2003, when they were shut down and deactivated by GPM. The remaining two Pipelines installed in Parcels 9 and 11 have been shut down, capped off, filled with slurry and thus inactive since 1975 ("Inactive Pipelines"). GPM has never operated the Inactive Pipelines.

5. The Rhode Island Department of Environmental Management ("RIDEM") is an agency organized pursuant to R.L.G.L. § 42-17-17.1-1. *et seq*. and existing under the laws of the State of Rhode Island.

6. On March 22, 2002, LightNon-Aqueous Phase Liquid (LNAPL) was observed in groundwater monitoring well OW-0102A (also known as OW-3) by personnel from Pare Engineering Corporation, consultant to Capital Terminal Company, Inc. ("CTC). Monitoring well OW-0102A (OW-3) is located in Dunellen Road between Parcel 15 to the north and Parcel 11 to the south.

7. On April 4, 5, 6 and 7, 2002, the Tyree Organization Ltd. ("Tyree"), on behalf of GPM, conducted excavation activities along the pipeline easement in Parcel 11 to investigate for a potential release. Excavation was performed for a distance of 46 feet and, on the Seekonk Corporation property adjacent to the south of Parcel 11, for a distance of 30 feet. All Pipelines within Parcel 11 were exposed.

8. During excavation activities performed over the course of the four days, no staining, olfactory or visible evidence of any release beneath any of the Pipelines that were exposed was observed. All Pipelines were found to be in excellent condition with no visible signs of corrosion or pitting.

9. The Active Pipelines passed all appropriate pressure tests conducted by both Clean Harbors and Crompco Corporation on April 8, 10 and 11, 2002.

10. Following the conclusion of such pressure tests, RIDEM granted to GPM approval to recommence the use of the Active Pipelines.

11. On or about April 2, 2002, Tyree personnel collected a LNAPL sample from monitoring well OW-0102A (OW-3) and a gasoline sample from the GPM bulk storage tank (tank 6), the latter being located at the Getty Terminal on Massasoit Road to which the Active Pipelines are connected. Both petroleum samples were analyzed for chemical composition by Worldwide Geosciences, Inc. ("Worldwide").

12. The results of the petroleum fingerprinting analysis by Worldwide indicated that the petroleum in tank 6 was fresh unleaded gasoline.

13. It was the conclusion of Worldwide that: (1) the sample collected from monitoring well OW-0102A (OW-3) is distinctly different from the gasoline sample collected from tank 6; and (2) the sample from OW-0102A (OW-3) is dominated by normal paraffins and cycloparaffins, and its chromatographic signature, as compared with standards from the American Petroleum Institute, is related either to a JP-4 type aviation or jet fuel or a naphtha.

14. On April 8, 2002, a second round of petroleum samples was collected by Tyree from monitoring well OW-0102A (OW-3) and Getty Tank No. 6 and submitted to Freidman & Bruya, Inc. for analysis.

15. It was the conclusion of Freidman & Bruya, Inc. that the petroleum from Getty Tank No. 6 was undegraded automotive gasoline, but that the petroleum sample from monitoring well OW-0102A (OW-3) was not similar to the gasoline sample from tank 6, is indicative of "natural gasoline or a low boiling distillate such as naphtha" and may contain lead additives such as Tetraethyl lead. "Natural gasoline" is distinctly different from automotive gasoline.

16. In September, 2002, Vanasse Hangen Brustlin ("VHB"), a consultant to CTC, submitted to RIDEM its report entitled "Release Investigating Report LightNon-Aqueous Phase Liquid (LNAPL) Occurance *[sic]* Proximate to Dunellen Road." Appendix C to such report contains a draft, unsigned letter report dated April 23, 2002, of Center for Toxicology and Environmental Health, LLC addressed to VHB, which states that its laboratory analysis of the sample of the petroleum product taken by VHB from monitoring well OW-0102A (OW-3) in April, 2002, indicates that such product is a weathered leaded automotive gasoline.

17. On December 2, 2002, RIDEM issued to GPC its Letter of Responsibility Case #2002-086 ("LOR"), in which it alleged, among other things, that there was present in the groundwater of Parcel 15, an abutting property, separate phase petroleum product (identified as light non-aqueous phase liquid having characteristics of weathered, leaded gasoline).

18. Only July 21, 2003, RIDEM issued a Notice of Intent To Enforce to GPC, PTRC and GPM. On August 7, 2003, GPM stated to RIDEM by letter to Frank Gally of the RIDEM Office of Waste Management that it intended to conduct the site investigation required by the LOR.

19. On August 21, 2003, GPM through Tyree submitted to RIDEM a proposed Scope of Work for the site investigation.

20. On September 15, 2003, GPM through Tyree submitted to RIDEM preliminary monitoring well results at the site.

21. On January 9, 2004, GPM through Tyree submitted to RIDEM its proposed Site Investigation Work Plan. On February 9, 2004, RIDEM granted conditional approval to such Site Investigation Work Plan.

22. On April 26, 2004, GPM received permission from CTC for access to its property for the conduct of a portion of the site investigation.

23. On October 19, 2004, GPM through Tyree submitted to RIDEM its Site Investigation Work Plan Status Update.

24. On July 28, 2005, RIDEM issued to the Respondents a Notice of Violation, Order and Penalty OC&I/SR 05-01 ("NOV"), in which it ordered the Respondents, among other things, to submit a Site Investigation Report and "to comply with further DEM requirements to ensure final remediation of the Properties or Site in accordance with the Remediation and OPC Regulations."

25. GPM was incorporated and organized under Maryland Law on October 1, 1996, and first began operations on March 21, 1997, including the operation of the Active Pipelines. GPM is a legal entity entirely independent of GPC or PTRC. GPM operated the Active Pipelines from March, 1997 until April, 2003 when it shut down the operation of such pipelines and removed all product therefrom.

26. During the time that it operated the Active Pipelines, GPM only transported through the pipelines unleaded refined gasoline, No. 2 home heating fuel oil and diesel fuel. No petroleum product similar to that found in the groundwater monitoring well samples from OW-0102A (OW-3) and MW-203 has ever been transported through the Active Pipelines by GPM.

27. PTRC acquired ownership of Parcels 9 and 11 and the Pipelines from Texaco Refining and Marketing, Inc. ("TRMI") on February 1, 1985. TRMI is a corporation that is independent of and not affiliated with PTRC or GPC. At no point in time did PTRC ever transport product through the Pipelines.

28. GPC was formed on December 23, 1997, and through a predecessor-in-interest, acquired all rights, title and interest in the Pipelines in 1985. Between 1985 and 1997, GPC and its predecessors-in-interest operated the Active Pipelines, transporting only unleaded refined gasoline, No. 2 home heating fuel oil and diesel fuel. No petroleum product similar to that found in the groundwater monitoring well samples from OW-0102A (OW-3) and MW-203 has ever been transported through the Active Pipelines by GPC or its predecessors-in-interest. GPC or its predecessors-in-interest has never operated the Inactive Pipelines.

29. Neither GPC nor PTRC had any ownership interest in or operational control of Parcels 9 and 11 or the Pipelines installed thereon prior to February 1, 1985.

30. There is no evidence that there has been a discharge or release of petroleum product from the Active Pipelines on the Site operated by GPM between March 21, 1997 and April, 2003 and operated by GPC and its predecessors in interest between February 1, 1985 and March 21, 1997.

EXHIBITS

The Amended Prehearing Record and Order established a list of exhibits accepted and marked on the agreement of the parties which is attached to the Decision as Appendix A.

ISSUES

The Prehearing Order and Record reflects that the parties submitted the following as Issues to be considered at the hearing:

1. Did GPM, GPC or PTRC cause a discharge or release of the petroleum product that is found in the groundwater under the site?

2. Is the petroleum product found in the groundwater under the site the type of petroleum product that is exempt from the definition of hazardous material/s under Section 3.28 and 3.51 of the Remediation Regulations and Section 23-19.14-3(c) of the Industrial Property Remediation and Reuse Act?

3. If GPM, GPC or PTRC did not cause a discharge or release of petroleum product that is found in the groundwater under the site and if the petroleum product found in the groundwater under the site is exempt from liability under the Remediation Regulations and the Industrial Property Remediation and Reuse Act, do GPM, GPC and/or PTRC have any legal obligation to further investigate or remediate the groundwater under the site?

4. Whether the Respondents were in violation as alleged in the NOV.

5. Whether the penalty was calculated in accordance with R.I.G.L. § 42-17.6-1 *et seq.* and the DEM Rules and Regulations for Assessment of Administrative Penalties.

HEARING SUMMARY

At the hearing, the attorney for OC&I made an opening statement in which he advised that OC&I intended to rely on stipulated facts and exhibits to prove various points in the RIDEM case. Counsel for OC&I distributed copies of the Notice of Violation (NOV), GPM Exhibit 9 Joint and Full, for the purpose of following along with his opening remarks. He went

through the NOV, paragraph by paragraph, and represented that 23 of the 28 facts alleged in the NOV had been stipulated to by the parties. Counsel went through each fact and referenced the specific stipulated fact and/or exhibit which he felt proved it. Upon questioning by the Hearing Officer Counsel for OC&I advised the Hearing Officer that each exhibit referenced in his opening statement were full exhibits.

Counsel represented that facts 25, 26, 27 and 28 from the NOV are conclusions that are drawn from the facts that were presented in 1 through 24. Counsel stated that based on the stipulated facts and exhibits the Department had met its burden of proof by the preponderance of the evidence that the facts alleged in the NOV are accurate. He went on to say that the only issue to prove at this point was that the penalty was calculated in accordance with the penalty regulations and the penalty statue. OC&I would present a witness, Tracey Tyrrell, to show how the penalty was calculated.

Attorney for Respondent GPM made a brief opening statement in which he gave an overview of GPM Exhibit 1 Full which is a site drawing showing the subject properties: Parcel 9, 11 and 15. He reviewed the ownership by Respondent GPC of four pipelines located on Parcels 9 and 11 and their history of use. Counsel referenced several stipulated facts including stipulated fact number 4 and stipulated fact number 30.

Counsel for GPM quoted stipulation number 4 as follows:

"Respondent Getty Petroleum Marketing, Inc., GPM is the current owner of two of the pipelines that are installed in parcels 9 and 11, quote, active pipelines. The active pipelines were operated by GPM from March 1997 to April 2003 when they were shut down and deactivated by GPM. The remaining two pipelines installed in parcels 9 and 11 have been shut

down, capped off, filled with slurry and, thus, inactive since 1975, designated as inactive pipelines. GPM has never operated the inactive pipelines." Counsel for GPM quoted stipulated fact number 30 as follows:

"There is no evidence that there has been a discharge or release of petroleum product from the active pipelines on the site operated by GPM between March 21, 1997 and April 2003 and operated by GPC and its predecessors in interest between February 1, 1985 and March 21, 1997."

Counsel for GPM argues that these stipulated facts prove the point that his client could not have caused the release of any petroleum product and that OC&I cannot prove causation. He goes on to address what he considered the second category of violation under the Industrial Property Remediation and Reuse Act of the Remediation Regulation (IPRRA).

He advised that he would present testimony and evidence that the material discovered in the groundwater of his client's property was unused or virgin petroleum which is excepted from the definition of hazardous materials under IPRRA.

Attorney for Respondents GPC and PTRC made a brief opening statement. She reviewed the status and history of the subject parcels 9, 11 and 15 of Tax Assessor's Plat 204. She also summarized the history and use of the inactive pipelines. Counsel for GPC and PTRC reiterated the arguments of Counsel for GPM that the stipulated facts do not support a finding of causation of discharge so as to impute liability to her clients. She represented that evidence of independent testing will demonstrate that the product found at the site was distinctly different from what was transported and stored by all the respondents from 1985 through 2003.

OC&I WITNESSES

Tracy Tyrrell testified on behalf of OC&I on the issue of the administrative penalties. Ms. Tyrell testified that she is employed by the Department of Environmental Management's Office of Compliance and Inspection and has been so employed since 1989. Her current duties are as a supervising environmental scientist with emphasis on the waste section, including site remediation, solid waste, hazardous waste and underground storage tanks.

Witness Tyrrell testified that she did not draft the NOV but reviewed it for accuracy. She reviewed generally the manner and method of calculating administrative penalties. She testified that she had used the Rules and Regulations of Assessment of Administrative Penalties in the drafting or review of "a hundred or so violations" (May 5, 2008 Trans. pg. 22).

Counsel for OC&I referred witness Tyrrell to GPM Exhibit 9. The witness testified that she had aided in the drafting and calculations contained therein. She explained how she calculated the administrative penalty. She testified that both categories were listed as type one because they directly related to the protection of the public health, safety, welfare or environment. She went on to testify that both categories were listed as major deviations taking into consideration the factors as defined within the rules and regulations for the assessed administrative penalty. Witness Tyrrell testified that the amount of administrative penalty of $25,000 for each category was arrived at by application of the matrix from the administrative penalties regulations. In conclusion of her direct testimony witness Tyrrell testified that the penalties were calculated consistent with the rules and regulations as established by the penalty statute.

Attorney for GPM cross examined witness Tyrrell. She testified that she had reviewed the Letter of Responsibility (LOR) issued in December of 2002 but had not drafted it. She said that she did not review the Vanasse Hangen Brustlin report, Exhibit 1 Joint. Counsel asked witness Tyrrell to explain her conclusions in light of stipulated fact 30 which was read verbatim. Witness Tyrrell responded that the penalty was based on the fact that there was a release and that the respondents cited are the owners and operators of the property.

Witness Tyrrell in response to a question by attorney for Respondents GMC and PTRC, advised that she did not make any independent determination of who was to be cited in the NOV that she helped to draft and review.

Attorney for OC&I next called Paul Stendardi. Mr. Stendardi identified himself as an employee of Respondent GPM. Upon motion of attorney for OC&I and without objection Mr. Stendardi was designated as an adverse party so as to permit the direct examination by the use of leading questions pursuant to Rule 611 (c) of the Rules of Evidence.

Witness Stendardi advised that he was familiar with the history of respondent GPM. Attorney for OC&I directed the witness's attention to stipulated fact 25 which he asked him to read to himself. The witness testified that GPM was incorporated on October 1, 1996 and began operation in 1997. Getty Petroleum Corporation was the parent company of GPM and GPC. The witness did not know when GPC was incorporated. GPC is a general partner of PTRC. The witness testified that GPM was a tenant of landlord GPC but he was not familiar with the lease.

Attorney for OC&I directed witness Stendardi to read and review GPM Exhibit 6. The witness acknowledged having previously reviewed the document. The witness was presented with Exhibits GPM 7, 8, 10 and 11 and acknowledged familiarity with their contents which were briefly reviewed.

Witness Stendardi testified that he first began working for GPM on March 21, 1997 when it was first formed. He testified that he worked for Getty Petroleum Corporation from September of 1988 to March 21 of 1997.

Attorney for OC&I completed his examination of witness Stendardi and rested his case.

The attorney for GPM called as his first witness Michael Carr. Mr. Carr identified himself as an employee of the Tyree Company as senior geologist and compliance manager. Witness Carr was referred to GPM Exhibit 13 which is his resume. After testifying about his educational background and work experience attorney for GPM moved to have witness recognized as an expert witness in environmental investigation and remediation. Attorney for OC&I objected and after additional questioning and argument the witness was recognized as an expert in the area of environmental investigation and remediation generally without specific knowledge of Rhode Island's regulations.

Witness Carr testified that the Tyree Company was retained to conduct testing with regards to samples taken and the integrity of the pipelines on parcel 9 and 11. Tyree conducted helium tests of the two recently active pipelines. Witness Carr reviewed GPM Exhibit 2 which was certificates of tests on the pipelines which indicated that the pipelines passed. He testified that no testimony that no testing was made on the two inactive pipelines because they were

filled with a slurry mix comprised of concrete with some bentonite clay. Witness Carr testified that after completion of testing DEM allowed GPM to continue use of the pipelines.

Witness Carr testified as to the testing of any petroleum products from monitoring well OW–0102A as well as from a bulk storage tank 6 that takes fuel from the pipelines. He testified that the samples were sent to two separate laboratories for analysis: Worldwide Geosciences of Houston, Texas and Friedman & Bruya of Seattle, Washington.

Witness Carr testified generally about the contents of Joint Exhibit 1, which is the report of Vanasse, Hagen Brustlin. He testified that the Tyree Company prepared a site investigation work plan. Witness Carr was shown Exhibits GPM 10 and 11 for identification in which he acknowledged as the site investigation report. Typee installed additional monitoring wells from which samples were taken. Attorney for GPM moved to have Exhibits GPM 10 and 11 marked as a Full Exhibits. OC&I objected on the grounds that these were post NOV. After argument the Exhibits GPM 10 and 11 were admitted as Full Exhibits. Witness Carr concluded his direct testimony by stating that there were numerous other potential sources of the petroleum hydrocarbons that were detected in the subsurface of the facility including prior owners.

Attorney for OC&I cross examined witness Carr. Mr. Carr acknowledged that he had not personally reviewed the DEM file. He testified regarding the groundwater flow. Witness Carr's attention was directed to GPM Exhibit 6 and 8 and explained the meaning of the term "gauging". The witness described that the reports indicate the depth of the petroleum product floating on the water.

Attorney for OC&I referred witness Carr to GPM Exhibit 9 specifically paragraph 25. The witness testified that he was not familiar with the DEM site remedial regulations. He testified that he didn't know if it was probable that the previous operators of the pipeline caused the release.

Witness Carr testified that the petroleum product is floating on the groundwater (May 5, 2008 Trans. pg. 107). The depth at which the product was found varied between 20 feet to 31 feet. The product was found in the deep aquifer which was flowing in a northwesterly direction towards the Seekonk River. The thickness of the petroleum product floating on the groundwater varies from 2.57 to .09 feet (May 5, 2008 Trans. pg. 108). He testified that the thickness of the petroleum product increased as you go down gradient (May 5, 2008 Trans. pg. 111).

Attorney for GPM on redirect directing the witness's attention to GPM Exhibit 10. The witness read from the VHB report reflecting possible sources of contamination under the site. Under recross witness Carr stated that the VHB report at page 27 concluded that some of those previously identified were ruled out as potential sources.

Attorney for GPM called his next witness, Neil F. Petersen from Worldwide Geosciences of Houston, Texas. Witness Petersen was brought through his resume. He stated that he is a registered professional geologist and has testified as an expert witness in roughly twenty states. Attorney for GPM move to have witness Petersen qualified as an expert in petroleum geochemistry and petroleum product identification. After brief voir dire, attorney for OC&I advised that he had no objection. Witness Petersen was qualified as an expert on the subject of geochemistry and petroleum identification.

Attorney for GPM referred the witness to GPM Exhibits 3 and 11 which he acknowledged having prepared. Upon motion and without objection, judicial notice was taken of the Industrial Property Remediation and Reuse Act § 23-19.14-3, (c) "hazardous material does not include petroleum for the purposes of this chapter". Witness Petersen went on when requested to read the definition of petroleum from§ 23-19.14-3 (i). He went on to read verbatim definitions from the Remedial Regulations.

Attorney for GPM questioned witness Petersen regarding the methods and process of testing which resulted in the report marked GPM Exhibit 3. He went on to review the conclusions arrived at as a result of the testing done in 2002. Witness Petersen testified that the sample from tank 6 had a chromatographic signature consistent with fresh unleaded gasoline. The sample from monitoring well (OW-3) bore no resemblance except for a similar carbon number range. He testified that the sample from OW-3 was not a recent unleaded gasoline.

Attorney for GPM next questioned witness Petersen about GPM Exhibit 11. This was a report from the testing done in 2005 of samples identified as OW-3 and MW-203. He testified that these samples were identical to those taken from OW-3 in 2002. They all differ from the 2002 tank 6 sample which was indicated as recent unleaded gasoline. Witness Petersen reviewed the conclusion of the VHB Report, Joint Exhibit 1, and pointed out that the conclusion of their analysis was that the sample taken from monitoring well OW-3 was a "weathered" leaded gasoline containing Tetraethyl lead (May 5, 2002 Trans. pg. 142).

Witness Petersen testified about the meaning of the term "weathered" when used with petroleum. He described in detail the meaning of the terms LNAPL and DNAPL.

Witness Petersen testified that in his opinion the sample from the OW-3 sample was an unused petroleum product. He testified that his opinion to a degree of scientific certainty was that the OW-3 and MW 203 samples analyzed in 2005 were unused petroleum products.

On cross examination by attorney for OC&I witness Petersen testified that he did not know where OW-3, MW 203 or tank six were located. The witness was questioned about the volatilizing of the samples. The witness disagreed with a line of questioning and said that he did not characterize the sample a "weathered" but that others had. The witness testified that leaded gasoline was not made after 1996. Witness Petersen was asked about holding times for the testing of samples and he testified that there are no holding times for product samples. The witness testified that he had not tested any samples other than those marked OW-3, MW 203 and OW-102A.

Respondent GPM called as its next witness, James Bruya who is president of Friedman and Bruya, Incorporated. OC&I stipulated to Mr. Bruya as being an expert in chemistry and petroleum identification. Witness Bruya testified that he conducted tests on two samples that were submitted by Tyree. He testified that they characterized the product and determined what type of material was present in the sample. They next prepared a report comparing the two samples to each other.

Attorney for GPM directed witness Bruya's attention to GPM Exhibit 4 which was a report signed by Friedman and Bruya dated May 10, 2002. He testified that he had prepared the report. Witness Bruya testified that the tests he performed were on samples identified by Tyree as taken from monitor well OW-3 and tank 6. His tests concluded that the sample from

tank 6 was unleaded gasoline which was unweathered. The analysis of the sample from monitor well OW-3 was determined to be leaded gasoline containing Tetraethyl lead. Witness Bruya testified that the sample from OW-3 was "natural gasoline" which he went on to describe as gasoline manufactured before 1960. (May 6, 2008 Trans. pg. 13)

Attorney for GPM referred witness Bruya to Joint Exhibit 1, the VHB report and more specifically to the CTEH report contained in Appendix C thereof. The witness testified that the report concluded that all samples were the same leaded gasoline containing Tetraethyl lead. The CTCH report was consistent with his findings. He testified that the petroleum product was weathered which indicates exposure.

Witness Bruya testified that it was his opinion, within a reasonable degree of scientific certainty, that the sample from OW-3 was an unused petroleum product, leaded gasoline. He also expressed his opinion, within a reasonable degree of scientific certainty, that the samples analyzed by CTEH in 2002 were an unused petroleum product based on the presence of Tetraethyl lead and the boiling range of the material.

Attorney for OC&I cross-examined witness Bruya on the meaning of the term "virgin petroleum" which he described as unused petroleum. Counsel questioned the witness as to whether he had tested the sample from tank 6 for lead. He stated that they did not because it was an active tank and it is against the law to produce or sell leaded gasoline.

Attorney for OC&I questioned witness Bruya on the fact that the CTEH letter was an unsigned "draft". The witness testified that he relied on the analytical testing data attached to the report whether it was signed or not. Attorney for OC&I questioned the witness on the issue of field testing verses laboratory testing and the witness responded that the two cannot be

compared. The attorney for OC&I next questioned the witness on articles and presentations which he may have authored. OC&I concluded its cross examination.

Attorney for GPM conducted a brief redirect. The witness testified that he was not aware of any combustion of product at the site or in the pipeline. He testified that the "holding time" for product samples is indefinite.

Attorney for OC&I conducted a brief recross regarding an article the witness wrote on the Exxon Valdez and Prince William Sound. Upon the conclusion of the recross the Respondents rested.

The parties made brief final arguments. Attorney for OC&I reiterated the points made in his opening statement. He argued that the department had met its burden of proof. He asserted that by virtue of stipulated facts and admitted exhibits, facts numbered 1-24 alleged in the NOV had been proven. Counsel for OC&I argued that fact 25 had been proven by the testimony of Respondent's witness Petersen.

Counsel for OC&I argued that no one knows when the release occurred but that the release is ongoing. There is still petroleum on the ground. It went back to the 1960's or before when leaded gasoline was used. Attorney for OC&I in response to a question from the Hearing Officer stated that, under the Oil Pollution Control Act and the Clean Water Act, the discharge is continuing because it is still out there. He stated proof of causation is impossible and that they do not know when the lead occurred or from where. He alleged that the conclusion is that the leak came from the pipelines

Attorney for OC&I next argues that the Brownfields Statute, the Industrial Property Remediation and Reuse Statute applies to petroleum notwithstanding what the Respondents

have argued. Counsel argued that the containment is nonvirgin so it doesn't fit into that category of exempt petroleum.

Attorney for OC&I argued that the Respondents were related companies to their predecessors in title and should not be allowed to avoid liability by the "spin off".

Attorney for GPM argued that the fact that there is contamination at the site is undisputed. It is residual contamination and the source is unknown. The un-refuted expert testimony is that the product in the ground is an unused and virgin petroleum product. Attorney for GPM asserted that DEM has not attempted to bring an action against prior owners. Attorney for GPM responded to OC&I's argument that the remediation statute included petroleum. He cited § 23-19.14-6.1.

Attorney for GPC and PTRC referred the contents of stipulated fact 28 and 4 and argued that the Respondents did not transport product matching the containment. She also argued that there is no evidence of an interrelationship between the Respondents and the party from which the property was purchased.

The parties submitted post hearing memoranda in a timely manner. The Respondents submitted "Proposed Findings of Fact".

ANALYSIS

In the NOV dated July 8, 2005 OC&I charged the Respondents with the following violations:

1. Sections 46-12-5 (a) and (b) and 46-12-28 of the General Laws of Rhode Island prohibiting the discharge of pollutants to waters of the State.
2. Section 46-12.5.1-3 of the General Laws of Rhode Island prohibiting discharges of oil and/or petroleum products.

3. Rule 6(a) of the Rhode Island Oil Pollution Control Regulations prohibiting releases and/or discharges of oil or pollutants to waters or land of the State.

4. Rules 8.1, 8.2 and 8.3 of the Rhode Island Rules and Regulations for Groundwater Quality requiring the maintenance of groundwater quality, prohibiting the discharge of pollutants to groundwater and prohibiting the operation or-maintenance of any facility in a manner that may result in the discharge of pollutants to groundwater.

5. Rules 11(B), 11 (E) and 13(A) of the Water Quality Regulations prohibiting the discharge of pollutants and petroleum products to the waters of the State.

6. Rule 4.01 of the Remediation Regulations prohibiting the release of any hazardous material in any manner which may impact the classification or uses of the land, groundwater or face water without complying with all applicable rules and regulations.

7. Section 12(b) of the Oil Pollution Control Regulations pertaining to oil and waste release response.

8. Rule 4.02 of the Remediation Regulations requiring responsible parties to immediately initiate investigation and remedial action activities in accordance with Rule 5 through Rule 11 of the Remediation Regulations.

9. Rules 7.01 and 7.08 of the Remediation Regulations pertaining to site investigation requirements and submittal of Site Investigation Reports.

The violations alleged in the NOV will be reviewed in three categories:

1. Violations of Water Quality and Groundwater (R.I.G.L. Sections 46-12-5 (a) and (6), Section 46-12-28 and Rules 8.1, 8.2 and 8.4 of the Rhode Island Rules and Regulations for Groundwater Quality);

2. Violations for Release of Hazardous Waste (R.I.G.L. Section 23-19.14 *et seq.* and Rules 4.01, 4.02, 7.01 and 7.08 of the Rules and Regulations for the investigation and Remediation of Hazardous Material Releases) "Remediation Regulations"; and

3. Violations for Oil Contamination (R.I.G.L. Section 46-12.5.1-3 and Rules 6 (a) and 12 (6) of the Oil Pollution Control Regulations.)

1. Violations of Water Quality and Groundwater

The language of R.I.G.L. § 46-12-28 (i) prohibits "Discharge of pollutants onto or beneath the land surface; in a location where it is likely for the pollutants to enter the ground waters of the site".

The legislature does not provide a definition or alternative meaning to the word "discharge". The Stipulations of Fact admit that there is no evidence that the Respondents transported leaded petroleum through the pipelines or by any other means on the subject premises. OC&I acknowledges that "No one knows when the release occurred and who caused the release. It's impossible to know that. I can submit though that the release is ongoing." (Trans. May 6, 2008 pg. 39).

Counsel for OC&I relies on an interpretation of the statute and regulations that reads "discharge" to include a meaning to include a release which is "ongoing". This argument is made on the theory that failure to act has caused a continuing release.

The issue is the interpretation of the language of the Water Pollution Act more specifically the word "discharge" under Section 46-12-28 (i). "Where language is clear on its face, the **plain meaning** of the statute must be given effect". Retirement Board of Employees Retirement System of State v. DiPrete 845 2d 270, 297. "Where a statutory provision is unambiguous, there is no room for statutory construction and [this court] must apply the statute as written". Id.

The meaning of the word "discharge" is clear and unambiguous. OC&I has not proven by preponderance that the Respondents have "discharged" pollutants into the waters of the State. "Discharge" under the Water Pollution Act is not proven by the mere presence of the pollutant in the groundwater. I cannot extend the meaning by statutory construction to mean something else and cannot impose liability on the Respondents for their failure to act or passive conduct. I find by a reading of the clear language of the statute that the Respondents are not subject to enforcement for violation of Water Quality and Groundwater pursuant to R.I.G.L. Sections 46-16-5 (a) and (b), or Sections 46-12-28.

2. Violations for the Release of Hazardous Material (R.I.G.L. Sections 23-19.14 *et seq.* and Rules 4.01, 4.02, 7.01 and 7.08 of the Rules and Regulations for the Investigation and Remediation of Hazardous Material Releases) "Remediation Regulations".

OC&I argues that the material in the groundwater under the subject premises is a hazardous material and Respondents argue that the material is exempted. The evidence accepted by the parties is that the material is a petroleum product. Some experts and reports have identified it as leaded petroleum. Some experts and reports identify the material as "virgin" petroleum and "weathered" leaded petroleum.

R.I.G.L. Section 23-19.14-3 (c) in defining "Hazardous Materials" specifically states ". . . Hazardous material does not include petroleum for the purposes of this chapter". The Remediation Regulations Rule 3.28 states "Hazardous Material . . . does not include Petroleum as defined in these Regulations (i.e. virgin petroleum products)." The language of the statute is clear and unambiguous and cannot be limited or defined more narrowly by regulation. I find

that the Material in the groundwater is some form of petroleum and therefore is not a "Hazardous Material" under IPRRA.

OC&I has not met its burden by a preponderance of the evidence that the Respondents have violated IPRRA or any regulation flowing there from. OC&I cannot prove a violation of IPRRA if it cannot prove the material was hazardous.

I also find that the Respondents are not in violation of the Remediation Regulations for failure to comply with Rule 4.01, 4.02, 7.01 and 7.08. The Remediation Regulations of IPRRA do not apply to instances where the contamination in question does not meet the definition of "Hazardous Materials".

3. Violations for Oil Contamination (R.I.G.L. Section 46-12.5.1-3 and Rules 6 (a) and 12 (b) of the Oil Pollution Control Regulations.)

R.I.G.L. Section 46-12.5.1-3 "Prohibition against Oil Pollution – (a) No person shall discharge, cause to be discharged, or permit the discharge of oil into, or upon the waters or land of the state except by regulation or by permit from the director. (b) Any person who violates any provision of this chapter of any rule or regulation or order of the director issued pursuant to this chapter shall be strictly liable to the state."

R.I.G.L. Section 46-12.5.1-1 Definitions (i) "Discharge means any spilling leaking, pumping, pouring, emitting, emptying, releasing, injection, escaping, leaching, dumping, or disposing into the environment".

R.I.G.L. Section 46-12.5.1 entitled "Oil Pollution Control" was enacted in Public Laws 1997 Chapter 32. It replaced the "Oil Spill Pollution Prevention and Control Act". In Section 46-12.5.1-6 (a) (2) the legislature indicated the following finding: "The citizens of the state

should not have to bear the burdens of the cleanup and the losses of economic livelihood that result from the discharge of oil in any degree."

The position of OC&I is that the petroleum is in the groundwater and has been there since before the Respondents became involved with the property. When questioned by the Hearing Officer, Counsel for OC&I advised that the term "discharge" should not be too narrowly interpreted. OC&I contends that until the contaminants are removed it is an ongoing discharge and it continues to migrate in the groundwater.

Respondents take the position that the word "discharge" requires proof that the Respondents actively caused the discharge. They argue that the mere presence of petroleum in the groundwater is not enough to constitute a violation of the Oil Pollution Control Act and the regulations promulgated pursuant there to. The Respondents cite cases from other jurisdictions to support their position. OC&I provides no case law from any jurisdiction to assist the Hearing Officer in accepting their interpretation of the terms "discharge".

The Respondents cite the case of L. B. Foster Co. v. State 106 S.W. 3d 194.204-207 to stand for the proposition that the term discharging "requires more than the passive migration of waste through the soil unaided by affirmative human conduct". The Foster case does not lend much assistance since the statute interpreted is not comparable to the Rhode Island Statute. In addition Foster involves a criminal prosecution where the theory of strict liability has difference ramification.

The Hearing Officer is faced with the task of determining if the passive conduct of the Respondents violates the terms of the Oil Pollution Control Act or the Regulations which were promulgated to carry out its purpose. In looking for precedent in the State of Rhode Island, the Hearing Officer found two AAD cases on point; Re: Anthony J. Connetta et als AAD No. 94-

020/SRE, Re: Arpad Merva AAD No. 93-024/GWE and its appeal to the Superior Court in Arpad Merva v. Department of Environmental Management. (A copy of the Superior Court decision is annexed hereto as Appendix B.)

The Merva administrative appeal involved a factual pattern in which a property owner was being held responsible for petroleum contamination on his property which was caused by a prior owner. Merva was being held liable for his failure to attempt to remediate the contamination which he did not cause.

The Hearing Officer found that Merva was properly held responsible for the fact that the petroleum contamination is migrating into the groundwater and waters of the State. The Hearing Officer interpreted the Water Pollution Act (RIGL 46-12-1) and the Oil Spill Pollution Prevention and Control Act (RIGL 46-12.5-.1 *et seq.*). The Hearing Officer in attempting to determine the intent of the legislature referenced § 46-12.5-6 (a) (2) "The citizens of this state should not have to bear the burdens of the cleanup and losses of economic livelihood that result from the discharge of oil in any degree."

In Merva the Hearing Officer found that a property owner was liable for his "willful refusal to remove or otherwise prevent the migration of known, substantial, petroleum contamination to leak, emit, discharge, escape and/or leach from his property onto the surface and groundwater of the State". Re: Anthony J. Connetta was decided on August 8, 1997 subsequent to Merva and adopted the language and logic contained therein.

The AAD Merva decision was appealed to the Superior Court in Arpad Merva vs. Department of Environmental Management C.A. 97-0115. On October 28, 1997 Judge Patricia A. Hurst issued a bench decision reversing the AAD decision. Counsel for DEM argued prior

to the issuance of Judge Hurst's decision that she should rule based on the newly enacted statute, Public Laws 1997 Chapter 32. In that legislation R.I.G.L. Section 46-12.5 entitled the "Oil Spill Pollution Prevention and Control Act" was repealed and R.I.G.L and Section 46-12.5.1 entitled the "Oil Pollution Control Act" was enacted. In Public Laws 1997 Chapter 32 the legislative act also enacted R.I.G.L. Section 46-12.6.1 entitled the "Tank Vessel Safety Act". Judge Hurst declined to apply the terms of the new statute in her decision but provided a helpful analysis of the state of the law before and after 1997 Public Laws Chapter 32.

Judge Hurst found that the prior statute was modeled after the Federal Act 33 U.S.C. 1321 which does not include in the definition of "discharge" the terms "leach" or "escape". Judge Hurst indicated a violator under the federal act would not include a person of Merva's status. She pointed out that the term "discharge" was not defined in the R.I.G.L. Section 46-12.5. Judge Hurst found in Merva that the intent of the prior act was to deal with spills from vessels and storage facilities. Judge Hurst reversed the AAD decision in Merva finding that the DEM in the formulation of its regulations exceeded the legislative authority and intent.

Judge Hurst states on page 20 of her decision that under the Oil Spill Act "the legislative intent with regard to passive conduct is far from clear here. It would have been quite easy to make liability clear. The legislature was able to do so in the recent enactment of Public Law 97-032." She went on to say, "In enacting this new Oil Pollution Control Act, the legislature defined discharge to mean any spilling, leaking, pumping, pouring, emitting, emptying, releasing, injecting, escaping, leaching or dumping or disposing of oil into the environment. Strict liability for clean up on account of passive conduct is now definitively and clearly imposed." Id.

The testimony, stipulated facts and exhibits provide ample evidence that the petroleum product is present in groundwater. The testimony of Respondent's witness Michael Carr was very helpful to the Hearing Officer in understanding the status of the petroleum product in the groundwater. Witness Carr testified that the petroleum product is present in the deep aquifer and that the deep aquifer is flowing in a northwesterly direction towards the Seekonk River (May 5, 2008 Trans. pg. 108). The depth of the petroleum on the surface of the groundwater varies between 2.57 and .09 feet. The level of the petroleum in the groundwater increases in the downgradient. The petroleum has migrated and continues to migrate in what is described as a plume. I find that the condition that currently exists and has existed since Respondent PTRC took ownership of the property is in the nature of a leaching.

Black's Legal Dictionary (8th ed. 2004) defines "Leaching" as "The process by which moving fluid separates the soluble components of a material. Under CERCLA, leaching is considered a release of contaminants. The term is sometimes used to describe the migration of contaminating materials, by rain or groundwater, from a fixed source, such as a landfill. 42 USCA § 9601 (22)."

The Oil Pollution Control Regulations as authorized by the Oil Pollution Control Act, R.I.G.L. 46-12.5.1 *et seq.* provide a definition of discharge which encompasses the Respondent's failure to act. I find that the Respondent's liability can be imputed to a property owner for passive conduct for failure to remove petroleum contaminants from the groundwater under its property once discovered. This liability is not excused by the fact that the petroleum was released by a prior owner.

I find that the leaching of petroleum in the groundwater of Respondent PTRC is a "discharge" under the Oil Pollution Control Act. Respondent PTRC is responsible for the mitigation and remediation of the contamination once having been made aware of its presence.

Liability for the failure to remove contaminants from the groundwater rests with the property owner. In the pending case the property owner, Respondent P.T.R.C., is determined to be responsible for the violation of R.I.G.L. 46-12.5.1-3. Respondent G.P.C., the owner of the pipelines on Parcels 9 and 11, is not found liable for the violation. Respondent GPM, the operator of two pipelines that are installed in Parcels 9 and 11 (Active Pipelines) is not found to be liable for the violation.

ADMINISTRATIVE PENALTIES

Based on a finding of liability against Respondent P.T.R.C. for violations of R.I.G.L. Section 46-12.5.1-3 the Oil Pollution Control Act, I now must turn my attention to the appropriateness of the Administrative Penalties assessed. The NOV issued July 28, 2005 (GPM Exhibit 9) establishes two categories of violations in its Administrative Penalty Summary (Page 9). One set of violations Numbered 1, 2, 3, 4, 5 and 6 assesses a penalty of Twenty-five Thousand ($25,000) Dollars. The second set of violations numbered 7, 8 and 9 asses a penalty of Twenty-five Thousand ($25,000) Dollars. I have found Respondent P.T.R.C. liable for violations numbered 2, 3 and 7 and not liable for violations numbered 1, 4, 5, 6, 8 and 9.

I am unable to determine the appropriate administrative penalty for violation of the Oil Pollution Control Act because of the merger of unrelated violations into groups on the summary sheet. I find that, in order to properly decide the amount of the administrative penalty to be assessed, I must remand the matter to OC&I for reevaluation. Once the matter has been reevaluated based on my finding of liability, I will reconsider the issue. Respondent P.T.R.C. will be given the opportunity to examine witnesses and both sides will be heard prior to issuance of a revised decision.

REMEDIATION

The NOV at page 5 section D, subsections 1 through 5, orders the Respondents to follow certain requirements which are prescribed by in IPPRA and the Rules and Regulations for the Investigation and Remediation of Hazardous Material Releases. I have found that under IPRRA and the Regulations Rule 3.28 petroleum is not a Hazardous Material and that none of the Respondents are liable for release of hazardous materials. Subsection 6 of section D states that the Respondents "Comply with further DEM requirements to insure final remediation of the Properties or Site in accordance with the Remediation and the OPC Regulations."

I find that it is inappropriate to require Respondent PTRC to comply with the requirements of IPRRA or the related Remediation Regulations. I find that Respondent is required to follow the requirements for remediation and costs for removal as required by the Director as established in R.I.G.L. Section 46-12.5.1 *et seq.* the Oil Pollution Control Act and the Oil Pollution Control Regulations.

FINDINGS OF FACT

The parties stipulated to facts listed below as 1 through 30 which I adopt and incorporate as fact in this decision. I make the findings of fact contained in 31 through 50 based on the testimony and evidence.

1. The subject properties are located at Dunnellen Road and Dexter Road in the City of East Providence, Rhode Island, otherwise identified as East Providence Assessor's Map 204, Block 1, Parcels 9, 11 and 15 (the "Site").

2. Respondent Power Test Realty Company L.P. ("PTRC") is the current owner of Parcels 9 and 11 on Assessor's Plat 204 in East Providence, Rhode Island.

3. Respondent Getty Properties Corp. ("GPC") is the current owner of four petroleum pipelines that are installed in Parcels 9 and 11 (the "Pipelines"). GPC is the general partner of PTRC.

4. Respondent Getty Petroleum Marketing Inc. ("GPM") is the current operator of two of the Pipelines that are installed in Parcels 9 and 11 (""Active Pipelines"). The Active Pipelines were operated by GPM from March, 1997 to April; 2003, when they were shut down and deactivated by GPM. The remaining two Pipelines installed in Parcels 9 and 11 have been shut down, capped off, filled with slurry and thus inactive since 1975 ("Inactive Pipelines"). GPM has never operated the Inactive Pipelines.

5. The Rhode Island Department of Environmental Management ("RIDEM") is an agency organized pursuant to R.LG.L. S 42-17,1-1. *et seq.* and existing under the laws of the State of Rhode Island.

6. On March 22, 2002, LightNon-Aqueous Phase Liquid (LNAPL) was observed in groundwater monitoring well OW-0102A (also known as OW-3) by personnel from Pare Engineering Corporation, consultant to Capital Terminal Company, Inc. ("CTC"). Monitoring well OW-1012A (OW-3) is located in Dunellen Road between Parcel 15 to the north and Parcel 11 to the south.

7. On April 4, 5, 6 and 7, 2002, the Tyree Organization Ltd. ("Tyree"), on behalf of GPM, conducted excavation activities along the pipeline easement in Parcel 11 to investigate for a potential release. Excavation was performed for a distance of 46 feet and, on the Seekonk Corporation property adjacent to the south of Parcel 11, for a distance of 30 feet. All Pipelines within Parcel 11 were exposed.

8. During excavation activities performed over the course of the four days, no staining, olfactory or visible evidence of any release beneath any of the Pipelines that were exposed was observed. All Pipelines were found to be in excellent condition with no visible signs of corrosion or pitting.

9. The Active Pipelines passed all appropriate pressure tests conducted by both Clean Harbors and Crompco Corporation on April 8, 10 and 11, 2002.

10. Following the conclusion of such pressure tests. RIDEM granted to GPM approval to recommence the use of the Active Pipelines.

11. On or about April 2, 2002, Tyree personnel collected a LNAPL sample from monitoring well OW-0102A (OW-3) and a gasoline sample from the GPM bulk storage tank (Tank 6), the latter being located at the Getty Terminal on Massasoit Road to which the Active Pipelines are connected. Both petroleum samples were analyzed for chemical composition by Worldwide Geosciences, Inc. ("Worldwide").

12. The results of the petroleum fingerprinting analysis by Worldwide indicate that the petroleum in Tank 6 was fresh unleaded gasoline.

13. It was the conclusion of Worldwide that: (1) the sample collected from monitoring well OW-0102A (OW-3) is distinctly different from the gasoline sample collected from Tank 6; and (2) the sample from OW-0102A (OW-3) is dominated by normal paraffins and cycloparaffins, and its chromatographic signature, as compared with standards from the American Petroleum Institute, is related either to a JP-4 type aviation or jet fuel or a naphtha.

14. On April 8, 2002, a second round of petroleum samples was collected by Tyree from monitoring well OW-0102A (OW-3) and Getty Tank No. 6 and submitted to Freidman & Bruya, Inc. for analysis.

15. It was the conclusion of Freidman & Bruya, Inc. that the petroleum from Getty Tank No. 6 was undegraded automotive gasoline, but that the petroleum sample from monitoring well OW-0102A (OW-3) was not similar to the gasoline sample from Tank 6, is indicative of "natural gasoline or a low boiling distillate such as naphtha" and may contain lead additives such as tetraethyl lead. "Natural gasoline" is distinctly different from automotive Gasoline.

16. In September, 2002,Vanasse Hangen Brustlin ("VHB"), a consultant to CTC, submitted to RIDEM its report entitled "Release Investigation Report LightNon-Aqueous Phase Liquid (LNAPL) Occurrence [sic] Proximate to Dunellen Road."

Appendix C to such report contains a draft, unsigned letter report dated April 23, 2002, of Center for Toxicology and Environmental Health, LLC addressed to VHB, which states that its laboratory analysis of the sample of the petroleum product taken by VHB from monitoring well OW-0102A (OW-3) in April, 2002, indicates that such product is a weathered leaded automotive gasoline.

17. On December 2, 2002, RIDEM issued to GPC its Letter of Responsibility Case #2002-086 ("LOR"), in which it alleged, among other things, that there was present in the groundwater of Parcel 15, an abutting property, separate phase petroleum product (identified as light non-aqueous phase liquid having characteristics of weathered, leaded gasoline).

18. On July 21, 2003, RIDEM issued a Notice of Intent To Enforce to GPC, PTRC and GPM. On August 7, 2003, GPM stated to RIDEM by letter to Frank Gally of the RIDEM Office of Waste Management that it intended to conduct the site investigation required by the LOR.

19. On August 21, 2003, GPM through Tyree submitted to RIDEM a proposed Scope of Work for the site investigation.

20. On September 15, 2003, GPM through Tyree submitted to RIDEM preliminary monitoring well results at the site.

21. On January 9, 2004, GPM through Tyree submitted to RIDEM its proposed Site Investigation Work Plan. On February 9, 2004, RIDEM granted conditional approval to such Site Investigation Work Plan.

22. On April 26, 2004, GPM received permission from CTC for access to its property for the conduct of a portion of the site investigation.

23. On October 19, 2004, GPM through Tyree submitted to RIDEM its Site Investigation Work Plan Status Update.

24. On July 28, 2005, RIDEM issued to the Respondents a Notice of Violation, Order and Penalty OC&I/SR 05-01 ("NOV"), in which it ordered the Respondents, among other things,, to submit a Site Investigation Report and "to comply with further DEM requirements to ensure final remediation of the Properties or Site in accordance with the Remediation and OPC Regulations."

25. GPM was incorporated and organized under Maryland law on October 1, 1996, and first began operations on March 21, 1997, including the operation of the Active Pipelines. GPM is a legal entity entirely independent of GPC or PTRC. GPM

operated the Active Pipelines from March, 1997 until April, 2003 when it shut down the operation of such pipelines and removed all products there from.

26. During the time that it operated the Active Pipelines, GPM only transported through the pipelines unleaded refined gasoline, No. 2 home heating fuel oil and diesel fuel. No petroleum product similar to that found in the groundwater monitoring well samples from OW-0102A (OW-3) and MW-203 has ever been transported through the Active Pipelines by GPM.

27. PTRC acquired ownership of Parcels 9 and 11 and the Pipelines from Texaco Refining and Marketing, Inc. ("TRMI") on February 1, 1985. TRMI is a corporation that is independent of and not affiliated with PTRC or GPC. At no point in time did PTRC ever transport product through the Pipelines.

28. GPC was formed on December 23, 1997, and through a predecessor-in-interest; acquired all rights, title and interest in the Pipelines in 1985. Between 1985 and 1997, GPC and its predecessors-in-interest operated the Active Pipelines transporting only unleaded refined gasoline, No. 2 home heating fuel oil and diesel fuel. No petroleum product similar to that found in the, groundwater monitoring well samples from OW-0102A (OW-3) and MW-203 has ever been transported through the Active Pipelines by GPC or its predecessors-in-interest. GPC or its predecessors-interest has never operated the Inactive Pipelines.

29. Neither GPC nor PTRC had any ownership interesting operational control of Parcels 9 and 11 or the Pipelines installed thereon prior to February 1, 1985.

30. There is no evidence that there has been a discharge or release of petroleum product from the Active Pipelines on the Site operated by GPM between March 21, 1997 and April, 2003 and operated by GPC and its predecessors in interest between February 1, 1985 and March 21, 1997.

31. The Respondents did not cause the petroleum product to be initially released onto the subject premises.

32. The petroleum product is present in the groundwater in the deep aquifer which is between 20 and 31 feet below ground. Waters of the state include groundwater as per R.I.G.L. Section 46-12.5.1-1 (k).

33. The depth of the petroleum product in the groundwater varies between 2.57 feet and .09 feet.

34. The depth of the petroleum product increases as it goes down gradient.

35. The deep aquifer flows to the Northwest towards the Seekonk River.

36. The petroleum product is leaching through the deep aquifer in and below the property owned by Respondent PTRC.

37. The presence of the petroleum product in the groundwater was made know to the Respondents on or after March 22, 2002.

38. The leaching of petroleum onto and throughout the deep aquifer constitutes a continuing discharge under R.I.G.L. Section 46-12.5.1-3 and Rule 6 (a) of the Rhode Island Oil Pollution Control Regulations.

39. Respondent PTRC has not taken any action since its discovery to mitigate or remediate the contamination caused by the petroleum product.

40. Respondents GPM and GPC are not responsible for the continuing discharge.

41. Failure of Respondent PTRC to mitigate or remediate the containment once discovered renders it liable for the continuing discharge.

42. The material present in the groundwater under the subject premises is a petroleum product which is not a hazardous material under IPRRA.

43. Having found as a fact that petroleum is not a hazardous material under IPRRA, the Respondents are not held responsible for investigation and remediation under the terms of IPRRA.

44. The conduct of the Respondents in the case of a passive continuing discharge does not come within the definition of discharge as contained in R.I.G.L. Sections 46-12-5 (a) and (b) and 46-12-28 The Water Pollution Act which requires active conduct.

45. The conduct of the Respondents in the case of a passive continuing discharge does not violate the Rules of the Water Quality Regulations or Groundwater Quality which both require active conduct by definition.

46. The administrative penalty assessed by OC&I on Respondent PTRC in the NOV merges violations numbered 1, 2, 3, 4, 5 and 6 as one group and violations numbered 1, 7, 8 and 9 as another group.

47. In so far as I am finding as a fact that Respondent PTRC is liable for violations numbered 2, 3 and 7 and not violations 1, 4, 5, 6, 8 and 9, I am unable to determine if the administrative penalty has been appropriately assessed.

48. The Administrative Penalties listed in the NOV combine unrelated violations and it is not possible to determine the appropriate penalty for violation of R.I.G.L. Section 46-12.5.1 *et seq*. and the related regulations.

49. In order to arrive at the proper administrative penalty for the violation of R.I.G.L. Section 46-12.5.1 *et seq*., it is necessary to remand the matter to OC&I for reassessment.

50. Respondent PTRC is responsible for remediation and costs of removal of the petroleum as required by the Director of DEM pursuant to R.I.G.L. Section 46-12.5.1 *et seq*. and not for remediation under the requirements of IPRRA.

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. OC&I has proven by a preponderance of the evidence that Respondent PTRC violated R.I.G.L. Section 46-12.5.1-3 the Oil Pollution Control Act prohibiting the discharge of oil and/or petroleum products into the waters of the State.

2. OC&I has proven by a preponderance of the evidence that Respondent PTRC violated Rules 6 (a) and 12 (b) of the Rhode Island Oil Pollution Control Regulations prohibiting releases and/or discharges of oil or pollutants into waters of the State.

3. OC&I has failed to prove by a preponderance of the evidence that Respondents, GPM and GPC has violated R.I.G.L. § 46-12.5.1-3 or Rule 6 (a) of the Rhode Island Oil Pollution Control Regulations.

4. OC&I has failed to prove by a preponderance of the evidence that Respondents, PTRC, GPM or GPC have violated R.I.G.L. Sections 46-12-5 (a) and (b) and 46-12-28 prohibiting the discharge of pollutants to waters of the State.

5. OC&I has failed to prove by a preponderance of the evidence that Respondents PTRC, GPM or GPC have violated the terms of Rules 8.1, 8.2 and 8.3 of the Rhode Island Rules and Regulations for Groundwater Quality which prohibit discharge of pollutants into the groundwater of the State.

6. OC&I has failed to prove by a preponderance of the evidence that Respondents PTRC, GPM or GPC violated the terms of Rules 11 (b), 11 (e) and 13 (a) of the Water Quality Regulations prohibiting the discharge of pollutants and petroleum products into the waters of the State.

7. OC&I has failed to prove by a preponderance of the evidence that Respondents PTRC, GPM or GPC violated the terms of Rules 4.01, 4.02, 7.01 and 7.08 of the Remedial Regulations prohibiting release of any hazardous material and the requirements for investigation or remediation that flows therefrom.

8. OC&I has failed to prove by a preponderance of the evidence the correct administrative penalties for the violations for which Respondent PTRC has been found liable. In order to arrive at the correct administrative penalty the matter must be remanded to OC&I for reassessment.

9. The Respondent PTRC, having been found liable for violation of the Oil Pollution Control Act R.I.G.L. Section 46-12.5.1 *et seq.*, is responsible for remediation and cost of removal as may be required by the Director of DEM.

10. The Respondent PTRC, having not been found liable for violation of IPRRA, is not required to perform remediation as required by IPRRA.

11. Respondents GPM and GPC, having not been found liable for any of the violations contained in the NOV, are not required to perform remediation or pay administrative penalties as ordered in the NOV and the matter against them is dismissed.

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

ORDERED

1. The Notice of Violation is SUSTAINED in part and DISMISSED in part as follows:

   a. The Notice of Violation is DISMISSED against Respondent GPM;

   b. The Notice of Violation is DISMISSED against Respondent GPC;

c. The Notice of Violation against Respondent PTRC is SUSTAINED for violation of R.I.G.L. Section 46-12.5.1 the Oil Pollution Control Act and Rules 6 (a) and 12 (b) of the Rhode Island Oil Pollution Control Regulations prohibiting discharge of oil or petroleum into waters of the State. (violations numbered 2, 3, and 7);

d. The Notice of Violation against Respondent PTRC for violations of the R.I.G.L. § 46-12-5 (a) and (b) and 46-12-28 prohibiting the discharge of pollutants to waters of the State is DISMISSED. (violation numbered 1);

e. The Notice of Violation against Respondent PTRC for violation of Rules 8.1, 8.2 and 8.3 of the Rhode Island Rules and Regulations for Groundwater Quality is DISMISSED. (violation numbered 4);

f. The Notice of Violation against Respondent PTRC for violations of Rules 11 (b), 11 (e) and 13 (a) of the Water Quality Regulations is DISMISSED. (violation numbered 5);

g. The Notice of Violation against Respondent PTRC for violation of Rules 4.01, 4.02, 7.01 and 7.08 of the Remedial Regulations is DISMISSED. (violations numbered 6, 8 and 9).

2. Respondent PTRC is ordered to comply with all remedial measures required by the Director of DEM pursuant to R.I.G.L. 46-12.5.1 *et seq.* and the Oil Pollution Control Regulations including payment of costs for removal and remediation as provided for therein.

3. OC&I is directed to recalculate the administrative penalty to reflect the violations for which Respondent PTRC has been found liable.

4. OC&I shall advise attorney for Respondent PTRC and the Hearing Officer of the amount of the recalculated administrative penalty. Within fourteen (14) days of receipt of the Notice of recalculated administrative penalty Respondent PTRC shall advise the Hearing Officer if it wants a hearing on the appropriateness of the penalty.

5. In absence of a request for hearing, Respondent shall make payment of the administrative penalty within forty-five (45) days of the receipt of the recalculated administrative penalty.

Entered as an Administrative Order this 15th day of October, 2008 and herewith recommended to the Director for issuance as a Final Agency Order.

David Kerins
Acting Chief 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 _____ day of _____, 2008.

W. Michael Sullivan, Ph.D., Director
Department of Environmental Management
235 Promenade Street, 4th Floor
Providence, Rhode Island 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within Decision and Order to be forwarded by first-class mail, postage prepaid to: Richard A. Sherman, Esquire, Edwards & Angell LLP, 2800 Financial Plaza, Providence, RI 02903; Jennifer R. Cervenka, Esquire, James W. Ryan, Esquire and Robert K. Taylor, Esquire, Partridge, Snow & Hahn, 180 South Main Street, Providence, RI 02903; Raymond M. Ripple, Esq., Edwards Angell Palmer & Dodge LLP, 2800 Financial Plaza, Providence, RI 02903; and via interoffice mail to John Langlois, Esquire, DEM Office of Legal Services and David Chopy, Acting Chief, DEM Office of Compliance and Inspection, 235 Promenade Street, Providence, RI 02908 on this _____ day of October, 2008.

_____