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

RE: NICKERSON, DAVID / NICKERSON, MICHAEL / NICKERSON, ALLEN **AAD NO. 00-033/WME**
NOTICE OF VIOLATION OC&I/UST 00-02907

DECISION AND ORDER

This matter came before the Administrative Adjudication Division for Environmental Matters ("AAD") pursuant to a request for hearing by David Nickerson, Michael Nickerson, and Allen Nickerson ("Respondents") on the Notice of Violation and Order ("NOV") issued on May 23, 2000 by the Office of Compliance and Inspection ("OCI") of the Department of Environmental Management ("Department" or "DEM") to the Respondents.[1] The Respondents filed a request for hearing at the AAD on June 2, 2000. The matter is properly before the Hearing Officer pursuant to R.I.G.L. Sections 42-17.1-2 and 42-17.6-4; the Administrative Procedures Act (R.I.G.L. Section 42.35-1 et seq); the statutes governing the AAD (R.I.G.L. §42-17.7-1 et seq); the Regulations for Underground Storage Facilities Used for Petroleum Products and Hazardous Materials ("UST Regulations"); the Administrative Rules of Practice and Procedure for the AAD; and the Rules and Regulations for Assessment of Administrative Penalties ("Penalty Regulations"). The proceedings were conducted in accordance with the above-noted statutes and regulations.

The NOV (as originally issued) cites all of the parties listed in the NOV for the following violations of the UST Regulations at the premises located at 190 East Main Road in the Town of Little Compton, Rhode Island ("Property" or "Facility"): (1) Section 10.03 pertaining to corrosion protection upgrade requirements for UST facilities; (2) Section 10.06(B)

[1] The NOV was issued to Warren B. Nickerson, Jr., Warren B. Nickerson, Sr., and Eric C. Nickerson (in addition to the above named Respondents). Warren B. Nickerson, Jr. did not request an administrative

pertaining to precision testing requirements; (3) Sections 10.10(A) and (C) pertaining to the installation of spill containment basins and the submittal of written verification of the upgrade to DEM; and (4) sections 10.10(B) and (C) pertaining to the installation of overfill protection and the submittal of written verification of the upgrade to DEM.

The Prehearing Conference was held on February 1, 2001 and the Prehearing Conference Record was entered on February 21, 2001. The hearing was conducted on May 14 and 15, 2001. Brian A. Wagner, Esq. represented OCI, and Raymond A. LaFazia, Esq. represented Respondents. Following the hearing, Post-Hearing Memoranda were filed by OCI and Respondents. Respondents and OCI filed responses to Post-Hearing Memoranda on July 26 and 27, 2001, respectively.

The following stipulations of fact were agreed to at the hearing:

1. The subject property is located at 190 East Main Road, Little Compton, Rhode Island.

2. The property was originally owned by Eric C. Nickerson.

3. In 1957 Eric C. Nickerson conveyed the property to said Eric C. Nickerson and his son, Warren B. Nickerson, Sr. as joint tenants.

4. Eric C. Nickerson died on December 20, 1993. His estate was probated in the Probate Court for the Town of Little Compton.

5. After Eric died, Warren B. Nickerson, Sr. was the sole owner of the property until his death in October 1994. His estate was probated in the Probate Court for the Town of Little Compton.

6. The deed of Warren B. Nickerson, Sr. conveyed the real estate at 190 East Main Road in Little Compton, Rhode Island to his four sons, Allen, David, Michael and Warren B. Nickerson, Jr. upon his death.

7. In accordance with Section 9002 of the Resource Conservation and Recovery Act, (RCRA), as amended, Warren B. Nickerson, Sr. registered three underground storage tanks in November 1988 identifying the "facility" as Nickerson's Garage.

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hearing. Warren B. Nickerson, Sr. and Eric C. Nickerson are deceased.

8. The three underground storage tanks (USTs) were registered by the State of Rhode Island with ID UST Facility No. 2907 pursuant to Section 8.00 of the UST Regulations.

9. On March 14, 1989, DEM issued a notice of violation and order, No. GW88-19-T to Warren B. Nickerson, Sr. for alleged violations of the General Laws of Rhode Island, Chapter 46-12, and the Regulations for Underground Storage Facilities Used for Petroleum Products and Hazardous Materials.

10. Warren B. Nickerson, Sr. never paid the penalty assessed in the final compliance order which resulted from the 1989 NOV and no claim was made vs. his estate for payment of the penalty imposed on him.

11. Warren B. Nickerson removed the gasoline and diesel pumps and drained the three underground tanks. The Department of Environmental Management granted Warren B. Nickerson, Jr. his request to place the three tanks at issue in temporary closure from January until June 22, 1999. DEM denied his request in June 1999 for a four to six month extension so that he could remove the underground storage tanks at his facility at 190 East Main Road, Little Compton, Rhode Island (UST No. 2907).

12. On May 23, 2000, DEM issued the notice of violation which is the subject matter of this hearing to the above-named respondents and to Warren B. Nickerson, Jr., the sole owner of the property since March 1997, and the sole operator of the facility since prior to the death of his father, Warren B. Nickerson, Sr., in October 1994.

13. Respondent, Warren B. Nickerson, Jr., has not to date responded to the notice of violation which is the subject matter of this hearing.

14. No claim was made by the Complainant in this matter against either the Estate of Warren Nickerson, Sr. or the Estate of Eric Nickerson.

The Exhibits proffered by the parties, marked as they were admitted at the hearing, are indicated on Appendix A.

OCI conceded at the hearing that it would be going forward on a more limited basis than is alleged in the NOV, based on the fact that only the named Respondents herein requested a hearing. OCI pointed out that it was only after the NOV was issued that OCI became aware that certain of those parties named in the NOV were deceased and of the various property transactions concerning the Property.

OCI stipulated at the hearing that only the following violations alleged in the NOV are applicable to the Respondents: (1) Violation No. two relating to precision testing for the years 1994, 1995, 1996 and 1997; (2) Violation No. three with respect to spill containment basins; and (3) Violation No. four with respect to overfill protection equipment.

Tracey Tyrrell, a DEM Principal Environmental Scientist, testified for OCI. Nathan Smith (the holder of a mortgage on the Property), Allen Nickerson, Michael Nickerson, and Warren Nickerson, Jr. (present owner/operator of Nickerson's Garage on the subject property) testified for Respondents.[2]

The relevant facts in this matter are essentially undisputed. The background facts are contained in the stipulations of fact that were agreed to by the parties, and the remaining pertinent facts are contained in the documents that were introduced as full Exhibits or established by uncontradicted testimony of the witnesses.

Respondents do not deny their ownership of the Property from October, 1994 through March 17, 1997, but they deny any involvement in the operation of the Facility. The issues to be addressed at this time are essentially: (1) Whether Respondents are responsible for the violations in the NOV (i.e. those remaining after OCI's stipulation limiting those violations applicable to Respondents); and (2) Whether the penalty (as reduced by OCI's stipulation) is appropriate and should be imposed in this matter.

It is Respondents' contention that they should not be held responsible for the alleged violations since the Respondents merely shared title to the subject real estate with Warren Nickerson, Jr. during the period of time in question and they were never operators of the Facility;

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[2] At the hearing, it was deemed that the testimony of David Nickerson would only be redundant and cumulative, and that no adverse interest should be drawn from his absence on the second day of the

and that in any event, the failure to perform precision testing or to install spill containment basins and overfill protection equipment were not "violations" because the USTs at the Facility were empty and no gasoline was sold at the Facility during the period of time of Respondents' joint ownership.

Respondents argue that: (1) they did not receive any notice of violation from the Director during the time they had an ownership interest in the Real Estate as required by R.I.G.L. 1956 §§ 42-17.6-2 and 3; (2) imposition of an administrative penalty on these Respondents is unwarranted and an abuse of the Director's power under R.I.G.L. 1956 § 42-17.6-6; (3) Respondents did not own or control the facility in question (according to the definition of the terms "facility" and "owner" in Sections 7.22 and 7.58 of the UST Regulations); (4) imposition of the penalties assessed against the Respondents exceeds the authority granted to the Director by the General Assembly under R.I.G.L. § 42-17.6-2, and is violative of Article 1, Section 8 of the Rhode Island Constitution which prohibits any court from exacting penalties disproportionate to the offense charged; and (5) the imposition of such a penalty against the Respondents would be violative of the constitutional prohibition against bills of attainder, and would punish them for something over which they had no control.

It is OCI's contention that the requirements of the UST Regulations apply jointly and severally to owners as well as operators of UST facilities, and therefore the Respondents' lack of participation in the operation of the subject Facility is irrelevant. OCI also contends that the mere fact that the USTs may have been empty during the time in question (February, 1994 through March, 1997) does not mean that they are not subject to the requirements of the UST Regulations.

OCI argues that: (1) Respondents were properly served in accordance with the

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hearing.

requirements of R.I.G.L. §§ 42-17.1-2(u)(1) and 42-17.6-3; and although there is no statutory or regulatory obligation to serve informational letters, notices or warnings as is required for NOVs, OCI does regularly try to notify the registered facility owners and operators of potential violations before enforcement action is commenced (which was done in this matter); (2) Respondents were "owners" of the "Facility" as those terms are defined in §§ 7.22 and 7.58 of the UST Regulations; (3) OCI presented sufficient evidence to demonstrate that the penalties proposed in the NOV (as modified at hearing) are properly calculated in accordance with all applicable laws and regulations and is neither unwarranted nor an abuse of discretion; (4) the proposed penalties do not constitute an illegal bill of attainder, since there has been no legislative predetermination of Respondents' guilt; and (5) the constitutional argument raised by Respondents is not only beyond the statutory jurisdiction of the AAD, but is also a misapplication of the cases mentioned by Respondents.

OCI has the burden of proving the alleged violations by a preponderance of the evidence. Once a violation is established and OCI has discharged its initial duty of establishing in evidence the penalty amount and its calculation, the Respondents then bear the burden of proving by a preponderance of the evidence that OCI failed to assess the penalty and/or the economic benefit portion of the penalty in accordance with Section 12(c) of the Penalty Regulations.

Ms. Tyrrell testified that she utilized the facts contained in the NOV, and the rules and regulations for the assessment of administrative penalties to prepare the penalty summary and the penalty matrix worksheets (as spelled out in OCI's Exhibits No. 5 full and No. 6 full) which are basically an addendum to the instant NOV. These worksheets summarize the regulations that have been violated, the type, and the deviation from the standard that those violations have been assessed at; and also includes an economic benefit component which figures in the cost of

economic benefit which is enjoyed by not complying with the regulations as spelled out in the summary.

The witnesses called by Respondents testified that the Respondents never operated the Facility and never registered the Facility; that no gasoline was dispensed from the Facility at any time during the period Respondents had an ownership interest in the property; and that Respondents never received any notice of violation from DEM during the time they had an ownership interest in the real estate.

The NOV (as modified at the hearing) cites Respondents for: (1) the failure to perform leak detection ("precision") testing on each of the USTs at the Facility in 1994, 1995, 1996 and 1997; (2) the failure to install spill containment basins on each of the USTs at the Facility; and (3) the failure to install overfill protection equipment on each of the USTs at the Facility. OCI conceded at the hearing that the remaining violations alleged in the NOV (i.e. those that arose before February 28, 1994 or after March 17, 1997) are attributable to either the prior owner/operators, Warren B. Nickerson, Sr. and Eric C. Nickerson (deceased) or to the current owner/operator, Warren B. Nickerson, Jr., who did not request a hearing and therefore is not a party to this action.

The Facility was registered with DEM in 1988 by Warren B. Nickerson, Sr. The Facility's registration was never updated or amended in accordance with the applicable regulatory requirements to show any changes at the Facility, including but not limited to modifications to the Facility's UST systems or the changes in ownership that occurred in February, 1994 and March, 1997.

ALLEGED VIOLATIONS

1. Precision Testing

Section 10.06 of the UST Regulations requires that "owners/operators of all existing facilities shall comply with one of the following leak detection requirements". The Facility's registration data does not indicate that the USTs at this location are either double-walled or fitted with a continuous monitoring system. Therefore, the appropriate leak detection method for this Facility is precision testing in accordance with UST Regulation § 10.06(B). Since the USTs in question were installed in 1972, they were more than thirteen (13) years old during the years in question and were subject to annual testing under UST Regulation § 10.06(B)(1). The results from any such precision tests were to have been submitted by the owner/operator to DEM within fifteen (15) calendar days of the date of test completion in accordance with UST Regulation § 10.06(B)(9). The uncontradicted testimony of OCI's witness, Tracey Tyrrell, demonstrates that the Department's file for the Facility contained no precision testing results for the years in question (1994 through 1997) and that although the Respondents were invited to produce for OCI any available documentation that might tend to indicate that the required tests were performed, no such documentation was ever received from Respondents.

2. Spill Containment Basins

Section 10.10(A) of the UST Regulations requires that all USTs were to have been fitted with spill containment basins by May 8, 1987; and Section 10.10(c) of the UST Regulations requires that written verification of this upgrade was to have been submitted by the owner/operator to DEM within fifteen (15) calendar days of installation. Tracey Tyrrell's uncontradicted testimony also demonstrated that the Department's records contained no information indicating that spill containment basins were installed at the Facility; and that although the Respondents were

invited to provide OCI with any available documentation that might tend to indicate that spill containment basins had been installed, no such documentation was ever received from Respondents.

3. Overfill Protection Equipment

Section 10:10(B) of the UST Regulations requires that all USTs were to have been retrofitted with overfill protection equipment by January 1, 1996; and Section 10:10(c) of the UST Regulations requires that written verification of this upgrade was to be submitted by the owner/operator to DEM within fifteen (15) calendar days of installation. Tracey Tyrrell's uncontradicted testimony also demonstrated that there was no information contained in the Department's records to indicate that overfill protection equipment had been installed at the Facility, and that Respondents were unable to provide any documentation to indicate that overfill protection equipment was installed.

It is undisputed that the three (3) Respondents and their brother, Warren B. Nickerson, Jr. became the joint owners of the subject property upon the date of death of their father, Warren B. Nickerson, in October, 1994. They acquired title to same by virtue of deed dated February 28, 1994 wherein the father, Warren B. Nickerson conveyed the subject property (i.e. the land as described in said deed "with all the buildings and improvements thereon" to himself for life and the remainder to his four (4) sons. The three (3) Respondents, by deed dated March 12, 1997, conveyed the subject property "with all buildings and improvements thereon" to Warren B. Nickerson, Jr.

Respondents do not deny that precision testing was not performed during the years in question, nor do they deny that spill containment basins or overfill protection equipment had not

been installed at the Facility. Rather, Respondents seek to avoid responsibility for the alleged violations by asserting that they merely shared legal title to the subject real estate during the years in question and that they were never operators of the Facility. Also that, in any event, the failure to perform the required tests and install the required equipment were not "violations" because the USTs were allegedly empty and no gasoline was sold at the Facility during the period in question.

A review of the pertinent regulations demonstrates that the Respondents are responsible for the alleged violations (as amended at the hearing) despite the fact that they may not have participated in the operation of the facility during the period of time in question and regardless of whether the USTs may have been empty and no gasoline sold during the period in question.

Section 10.06 of the UST Regulations requires that "the owners/operators of all existing facilities" shall comply with the precision testing requirements, and pursuant to Section 10.06(B)(1), the USTs in question were subject to annual testing, and pursuant to Section 10.06(B)(9), the precision test results were required to be submitted to DEM within fifteen (15) days. Section 10.10(A) of the UST Regulations required that the USTs were to have been filled with spill containment basins by May 8, 1987; Section 10.10(B) of the UST Regulations required the USTs to be retrofitted with overfill protection by January 1, 1996; and pursuant to Section 10.10(c), written verification of the upgrades were to be submitted by the owner/operator to DEM within fifteen (15) calendar days of installation.

The mere fact that the USTs may have been empty during the time in question (February, 1994 through March, 1997) does not mean that they were not subject to the requirements of the UST Regulations. § 15.03 of the UST Regulations provides for Temporary Closure of USTs; and §§ 15.04 and 15.05 provide for Extensions of Temporary Closure and Permanent Closure. § 15.08

provides for Notification and Inspection of Closures. Under §§ 15.11 and 15.12 tanks that are not permanently closed (removed or filled in-place), or granted permission for an extended temporary closure, are either in use and subject to all requirements of the UST Regulations or are abandoned and subject to permanent closure. The subject USTs were never taken completely out of service, but rather the sale of gasoline was simply discontinued between 1993 and 1997. The sale of gasoline eventually resumed in May or June of 1997, and continued through December of 1998. The tanks were neither closed nor abandoned pursuant to the UST Regulations and the fact that they may have been taken out of service does not excuse Respondents' failure to comply with the regulations for which they were cited.

DEM is not required (as argued by Respondents) to give notice of its intent to assess an administrative penalty prior to issuance of the NOV. R.I.G.L. § 42-17.6-3 requires that notice be given (in the form of an NOV) when DEM intends to assess an administrative penalty, and not that any advance notice or warning be given. Respondents can hardly fault OCI for not sending them any informational or advance notice (such as was sent to the registered owner in this case) since the Respondents never registered themselves with DEM as owners of the Facility. It is unfortunate that Respondents may not have become aware of the violations until issuance of the NOV; however, owners of Facilities cannot shed their responsibilities for compliance with the UST Regulations by attributing violations to one of the other joint owners, even if said other party was solely active in the operation of the business conducted at the Facility or if the business was inactive.

R.I.G.L. § 42-17.6-6 addresses factors to be considered when determining the amount of an administrative penalty; however, § 42-17.6-6 specifically provides that these factors are to be

considered "to the extent practicable". Certainly said factors do not have to be considered to the extent that they are irrelevant, inapplicable or not susceptible to determination by OCI at the time the NOV is issued. The Respondents offered no evidence that the penalty was not assessed in accordance with the Penalty Regulations, or that it is excessive. Contrary to Respondents' arguments, the penalty proposed is neither unwarranted nor an abuse of discretion. The evidence introduced by OCI establishes that the proposed penalty (as adjusted) is appropriate and should be assessed in this matter.

Section 5.01 of the UST Regulations, entitled "General Applicability" provides that these Regulations apply to all UST facilities, whether such facilities or USTs located there upon have been abandoned, and to persons who owned or operated such facilities since May, 1985.

The UST Regulations contain the following definitions:

"**FACILITY** means any parcel of real estate or contiguous parcels of real estate owned and/or operated by the same person(s), which together with all land, structures, facility components, improvements, fixtures and other appurtenances located therein form a distinct geographic unit and at which petroleum products or hazardous materials are or have been stored in underground storage tanks."

"**OWNER** means any person who holds exclusive or joint title to or lawful possession of a facility or part of a facility."

"**OWNER/OPERATOR** means owner and/or operator.

A clear reading of the definitions above demonstrates that a "Facility" comprises real estate and the "structures, facility components, improvements, fixtures and other appurtenances" located thereon. The Respondents herein cannot avoid their responsibilities to comply with the safety precaution measures mandated by the UST Regulations merely because they did not participate in the day-to-day management and operation of the Facility. The Respondents as owners of the Facility (as that term is defined in the UST Regulations) as well as the operator are

jointly and severally responsible for compliance with the pertinent regulations in order to protect the groundwaters and surface waters of the State from pollution that may result from the underground storage of petroleum products and hazardous materials. The implicit meaning of the wording of the regulations and the concern for public safety make clear the drafters intent to hold an owner liable. D'Allesandro v. Annarummo, C.A. No. 93-4913 (R.I. Super. August 21, 1995).

The fact that the Respondents herein may not have held an ownership interest in the business that was conducted at the subject premises does not mean that they were not owners of the Facility. Respondents were joint owners of the Facility (as that term is defined in the UST Regulations), which includes the land, structures, facility components, improvements, fixtures and other appurtenances located therein. There was no documentation that the buried tanks and piping were severed from the real estate and appurtenances that were conveyed by deed to the four joint owners. It is not necessary to reach the issue of whether the tanks and piping constitute fixtures or improvements since the regulatory definition of "Facility" encompasses at a minimum both. The USTs and piping were certainly facility components, improvements and appurtenances, if not fixtures.

A review of the pertinent statute and the cases cited by Respondents demonstrates that they do not support Respondents' argument that the imposition of the penalties against the Respondents herein exceeds the authority granted to the Director by the General Assembly. R.I.G.L. § 42-17.6-2, entitled "Authority of director to assess penalty" provides that the director may assess an administrative penalty on a person who fails to comply with any provision of any rule, regulation, or any law which the director has the authority or responsibility to enforce. Clearly the UST Regulations involved in this matter came within the purview of said statute, and

the imposition of a penalty against each of the Respondents, jointly and severally, does not exceed the authority granted to the Director by the General Assembly.

The mere fact that the USTs were not in use (or may have been empty) during the time in question (February, 1994 through March, 1997) does not mean that they were not subject to the requirements of the UST Regulations. The USTs were never taken completely out of service, and they were not permanently closed pursuant to the UST Regulations. Although gasoline sales may have been discontinued between 1993 and 1997, no action was taken to disconnect the nozzles and hoses, or to pump out the USTs. Also gasoline sales resumed in May/June of 1997 and continued through December of 1998. The dangers that are posed by the failure to comply with the pertinent regulations were still present under the circumstances involved. The imposition of sanctions against those who fail to comply with the UST Regulations is manifestly necessary to protect the public and the environment from the threat of possible spills.

It is certainly true (as argued by Respondents) that OCI should address the removal of the USTs; however, this is not an issue that can be addressed in this proceeding, due to the absence of Warren Nickerson, Jr. as a party and the fact that the Respondents have not owned the Facility since March of 1997. In any event, any violations relating to the removal of the USTs were waived by OCI as against the Respondents at the hearing. However, there was no such waiver as to Warren B. Nickerson, Jr., who did not request a hearing on the NOV. As stated in paragraph F(5) of the NOV, the NOV automatically becomes a Final Compliance Order enforceable in Superior Court as to any party who fails to request a hearing. See R.I.G.L. §§ 42-17.1-2(u)(5) and 42-17.6-4(b). The Respondents have not suggested, nor is there any reason to believe that such

appropriate action will not be pursued at the Superior Court by OCI.[3]

The issue raised by Respondents as to the constitutionality of the imposition of the administrative penalties sought is beyond the statutory jurisdiction of the AAD. However, even if the Hearing Officer were to consider said issue, a review of the cases cited by Respondents demonstrates that they do not support the Respondents' position in this matter. The Rhode Island Supreme Court in State v. Ouimette, 479 A.2d 702 (R.I. 1984) ruled that ART 1, Section 8 of the Rhode Island Constitution prohibits any court from exacting penalties disproportionate to the offense charged. The facts in the instant matter show that the penalty proposed was not disproportionate to the violation alleged. It was not disparate from penalties generally imposed for similar violations, and is certainly not excessive.

The Rhode Island Supreme Court considered a defendant's claim that his constitutional rights to be protected against double jeopardy and cruel and unusual punishment had been violated, and held that to determine whether a punishment is either disproportionate (in violation of our state constitution) or grossly disproportionate to the offense charged (in violation of the Eighth Amendment to the federal constitution, a court should analyze: (1) the gravity of the offense along with the harshness of the penalty, and if applicable, (2) the sentences imposed upon similarly situated offenders in this and/or other jurisdictions. Retirement Bd. Of Employees' Retirement System of State and City of Cranston v. Azar, 721 A.2d 872 (R.I. 1998). The proposed penalties were calculated in accordance with pertinent statutory and regulatory requirements and can hardly be considered harsh, excessive or unusual.

Hudson v. United States, 522 U.S. 93 (1997) held that the Double Jeopardy Clause of the

[3] This is not to infer that Respondents herein are precluded from maintaining whatever court action they may deem appropriate.

Fifth Amendment did not bar later criminal prosecution where civil proceedings (involving monetary penalties and occupational debarment) were previously brought against petitioners for essentially the same conduct. The Respondents do not allege that they have been prosecuted for or convicted of any crime relating to the administrative violations alleged in the NOV; therefore, there is no need for consideration of the factors required for a determination of whether the proceedings are criminal or civil.

The violations for which the Respondents have been cited involve the failure to perform leak detection testing and the failure to install spill containment basins and overfill protection equipment during the period from October, 1994 through March, 1997. Pursuant to the UST Regulations, the Respondents (as joint owners of the Facility) were responsible for compliance during their period of ownership of the Facility. The assessment of the penalty against the Respondents herein can hardly be considered "tantamount to an illegal bill of attainder". As pointed out in a Rhode Island Superior Court decision, a bill of attainder "legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial". O'Rourke, Inc. v. Century Electric Co., (R.I. Super. 1996) The violations at issue in this matter do not fall within the historical meaning of legislative punishment. Respondents were afforded the right to an adjudicatory hearing in order for a determination to be made if Respondents did violate the pertinent UST Regulations and also as to the imposition of any penalty.

The evidence introduced by OCI (as well as the admissions by Respondents) clearly establishes that OCI has met its burden of proving the alleged violations (as amended at the hearing) by a preponderance of the evidence, and that OCI has more than satisfied its initial duty

of establishing in evidence the penalty amount and its calculation thereof. The evidence introduced by Respondents was insufficient to meet their burden of proving that the penalty was not assessed in accordance with the Penalty Regulations, or that the penalty is excessive.

OCI's witness, Tracy Tyrrell gave a detailed explanation of how the proposed penalty in the NOV was originally calculated, and how the original proposed penalty should be adjusted downward to reflect only those violations for which the three Respondents herein are jointly and severally liable. This witness's testimony that the total penalty of $20,070.00 (for the remaining violations as adjusted at the hearing) was calculated properly, was uncontradicted and most credible. Respondents presented no evidence that the penalty and/or the economic portion of the penalty was not assessed in accordance with the Penalty Regulations. The evidence demonstrates that the penalties for failure to precision test, for failure to install spill containment basins, and for failure to install overfill protection were all properly calculated as Type II Moderate violations. The penalties for same are within the ranges set forth in the Water Pollution Control Matrix, and the economic benefit portions of said penalties meet the criteria for assessment of the penalties for same. These violations cannot be treated as mere technical violations since the failure to comply with these regulations certainly poses a potential for harm to the public health, safety, welfare and environment. Certainly, penalties for failure to comply with the pertinent regulations should be imposed despite the fact that there may not have been any contamination. Untested USTs, as well as the lack of spill containment basins or overfill protection, pose a serious threat which could result in significant contamination and the resulting harm and expense. The penalty (as adjusted) is not excessive or disproportionate to the violations, and (as adjusted) is appropriate and should be imposed in this matter.

FINDINGS OF FACT

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

1. The subject property is located at 190 East Main Road, Little Compton, Rhode Island, otherwise identified as Little Compton Assessor's Plat 29, Lot 48 (the "Facility"), which property contains three (3) underground storage tanks ("USTs").

2. The property was originally owned by Eric C. Nickerson.

3. In 1957 Eric C. Nickerson conveyed the property to said Eric C. Nickerson and his son, Warren B. Nickerson, Sr. as joint tenants.

4. Eric C. Nickerson died on December 20, 1993. His estate was probated in the Probate Court for the Town of Little Compton.

5. After Eric died, Warren B. Nickerson, Sr. was the sole owner of the property until his death in October 1994. His estate was probated in the Probate Court for the Town of Little Compton.

6. The deed of Warren B. Nickerson, Sr. conveyed the real estate at 190 East Main Road in Little Compton, Rhode Island to his four sons, Allen, David, Michael and Warren B. Nickerson, Jr. upon his death.

7. In accordance with Section 9002 of the Resource Conservation and Recovery Act, (RCRA), as amended, Warren B. Nickerson, Sr. registered three underground storage tanks in November 1988 identifying the "facility" as Nickerson's Garage.

8. The three underground storage tanks (USTs) were registered by the State of Rhode Island with ID UST Facility No. 2907 pursuant to Section 8.00 of the UST Regulations.

9. On March 14, 1989, DEM issued a notice of violation and order, No. GW88-19-T to Warren B. Nickerson, Sr. for alleged violations of the General Laws of Rhode Island, Chapter 46-12, and the Regulations for Underground Storage Facilities Used for Petroleum Products and Hazardous Materials.

10. Warren B. Nickerson, Sr. never paid the penalty assessed in the final compliance order which resulted from the 1989 NOV and no claim was made vs. his estate for payment of the penalty imposed on him.

11. Warren B. Nickerson removed the gasoline and diesel pumps and drained the three underground tanks. The Department of Environmental Management granted Warren B.

Nickerson, Jr. his request to place the three tanks at issue in temporary closure from January until June 22, 1999. DEM denied his request in June 1999 for a four to six month extension so that he could remove the underground storage tanks at his facility at 190 East Main Road, Little Compton, Rhode Island (UST No. 2907).

12. On May 23, 2000, DEM issued the notice of violation which is the subject matter of this hearing to the above-named respondents and to Warren B. Nickerson, Jr., the sole owner of the property since March 1997, and the sole operator of the facility since prior to the death of his father, Warren B. Nickerson, Sr., in October 1994.

13. Respondent, Warren B. Nickerson, Jr., has not to date responded to the notice of violation which is the subject matter of this hearing.

14. No claim was made by DEM against either the Estate of Warren Nickerson, Sr. or the Estate of Eric Nickerson.

15. Respondents David Nickerson, Michael Nickerson and Allen Nickerson were joint owners of the subject property, including the three (3) UST systems located thereon, from October 1994 through March 17, 1997.[4]

16. Section 10.06(B) of the UST Regulations requires precision testing of USTs for the years 1994, 1995, 1996 and 1997.

17. Respondents did not perform leak detection or precision testing on the USTs located at the subject property for the years 1994 through 1997.

18. Sections 10.10(A) and (C) of the UST Regulations requires the installation of spill containment basins by January 1, 1993 and the submittal of written verification by the owner/operator to DEM within fifteen (15) calendar days of installation.

19. Respondents did not upgrade the USTs with spill containment basins during the years they owned the Facility.

20. Sections 10.10 (B) and (C) of the UST Regulations requires the installation of overfill protection and the submittal of written verification of the upgrade to DEM.

21. Respondents did not upgrade the USTs with overfill protection equipment during the years they owned the Facility.

22. At no time prior to the issuance of the NOV was DEM notified that the USTs at the facility were out of service from 1994 through 1997.

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[4] As noted herein, Warren B. Nickerson, Jr., also a joint owner, was cited in the NOV, but did not request a hearing.

23. The administrative penalty proposed in the NOV includes penalties for violations that occurred before and after Respondents' ownership of the Facility and that are attributable to other named parties who did not request an administrative hearing.

24. In order to accurately reflect the violations for which Respondents are allegedly jointly and severally liable, the administrative penalty proposed in the NOV must be modified.

25. At the hearing, the Office of Compliance and Inspection presented testimony and documentary evidence detailing a series of downward modifications that could be made to the penalty proposed in the NOV in order to calculate a penalty for the more limited violations for which Respondents are allegedly jointly and severally liable.

26. The Office of Compliance and Inspection has voluntarily withdrawn the alleged violations and the associated penalties pertaining to corrosion protection upgrade requirements for UST facilities, as well as the precision testing violations for years other than 1994, 1995, 1996 and 1997.

27. The penalty modifications are documented in OC&I Exhibit 6 and are incorporated herein by reference.

28. The penalty modifications suggested by the Office of Compliance and Inspection result in a new proposed administrative penalty of Twenty Thousand Seventy and 00/100 Dollars ($20,070.00) for those violations for which Respondents are jointly and severally liable.

CONCLUSIONS OF LAW

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

1. The Office of Compliance and Inspection proved by a preponderance of the evidence that the Respondents violated Section 10.06(B) of the UST Regulations in that leak detection or precision testing was not performed on UST nos. 001 - 003 at the Facility during the years 1994, 1995, 1996 and 1997.

2. The Office of Compliance and Inspection proved by a preponderance of the evidence that the Respondents violated Section 10.06(B)(9) of the UST Regulations in that written copies of precision testing results were not submitted to DEM.

3. The Office of Compliance and Inspection proved by a preponderance of the evidence that the Respondents violated Section 10.10(A) of the UST Regulations in that spill containment basins were not installed on UST nos. 001 - 003 at the Facility.

4. The Office of Compliance and Inspection proved by a preponderance of the evidence that the Respondents violated Section 10.10(C) of the UST Regulations in that written verification of the installation of spill containment basins at the Facility was not submitted to DEM.

5. The Office of Compliance and Inspection proved by a preponderance of the evidence that the Respondents violated Section 10.10(B) of the UST Regulations in that overfill protection equipment was not installed on UST nos. 001 - 003 at the Facility.

6. The Office of Compliance and Inspection has proved by a preponderance of the evidence that the Respondents violated Section 10.10(C) of the UST Regulations in that written verification of the installation of overfill protection equipment at the Facility was not submitted to DEM.

7. Pursuant to UST Regulations and applicable case law, as owners of the Facility from October 1994 to March 17, 1997, Respondents are jointly and severally liable for the above-referenced violations that occurred at the Facility during the period of their ownership.

8. The cessation of gasoline sales at a UST facility does not relieve the facility or its owners and/or operators from compliance with applicable regulations.

9. Where a NOV alleging violations of UST Regulations is issued based upon a reasonable belief that the Facility was in operation at the time of the alleged violations, it shall not be a defense to the violations alleged in the NOV that the USTs were empty, abandoned or were not being used to dispense or sell product unless there is evidence that Respondents notified RIDEM that the USTs were out of service prior to the issuance of the NOV.

10. The administrative penalty as proposed in the NOV was properly calculated in accordance with the Administrative Penalties for Environmental Violations Act, R.I. Gen. Laws ch. 42-17.6 and the Rules and Regulations for the Assessment of Administrative Penalties.

11. The suggested modifications to the penalty proposed in the NOV that were presented by the Office of Compliance and Inspection at the hearing are reasonable and appropriately identify the portion of the total penalty that is attributable to Respondents' violations.

12. The suggested modifications to the penalty proposed in the NOV that were presented by the Office of Compliance and Inspection at hearing were properly calculated in accordance with the Administrative Penalties for Environmental Violations Act, R.I. Gen. Laws ch. 42-17.6 and the Rules and Regulations for the Assessment of Administrative Penalties, and as modified total $20, 070.00.

13. The Respondents' violations (as modified at hearing) are all properly classified as Type II/Moderate in accordance with the Rules And Regulations For Assessment Of Administrative Penalties and the Water Pollution Control Matrix.

14. The penalty assessment (as specified in the amended Administrative Penalty Assessment Worksheet Summary) in the total amount of Twenty Thousand Seventy Dollars ($20,070.00) is not excessive and is reasonable and warranted.

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

ORDERED

1. That the Notice of Violation and Order No. OC&I/UST 00-02907 dated May 23, 2000 (as modified at the hearing) is SUSTAINED.

2. The Respondents shall jointly and severally pay to the Department the sum of Twenty Thousand Seventy Dollars ($20,070.00) in administrative and economic benefit penalties as set forth in the Revised Penalty Worksheet. Said Penalty shall be paid within thirty (30) days of the date of the Final Decision and Order, and shall be in the form of a certified check made payable to the "General Treasury - Water & Air Protection Program Account", and shall be made directly to:

RI Department of Environmental Management
Office of Management Services
235 Promenade Street, Room 340
Providence, RI 02908-5767

Entered as an administrative order this 19th day of November, 2001.

_____

Joseph F. Baffoni
Hearing Officer
Administrative Adjudication Division
Department of Environmental Management
235 Promenade Street, Third Floor
Providence, Rhode Island 02908
(401) 222-1357

Entered as a Final Agency Decision and Order this 20th day of November, 2001.

_____

Jan H. Reitsma
Director

CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded by first-class mail, postage prepaid, to Raymond A. LaFazia, Esquire, Gunning & LaFazia, Inc., 32 Custom House Street, Providence, RI 02903; via interoffice mail to Brian Wagner, Esquire, Office of Legal Services and Dean H. Albro, Chief, Office of Compliance and Inspection, 235 Promenade Street, Providence, RI 02908 on this _____ day of _____, 2001.

_____

APPENDIX A
LIST OF EXHIBITS

OCI EXHIBITS

OC&I 1 Full	Copy of Application for Underground Storage Facilities - Dated 11/16/88 (4 pages).
OC&I 2 for ID	Copy of Notification for Underground Storage Tanks - dated 11/16/88 (2 pages).
OC&I 3 for ID	Copy of 1989 Notice of Violation & Order - dated 3/14/89 (4 pages).
OC&I 4 for ID	Copy of 1999 Notice of Intent to Enforce - dated 1/4/99 (6 pages including cover).
OC&I 5 Full	Copy of Penalty Summary & Worksheet(s) - from NOV dated 5/23/2000 (5 pages).
OC&I 6 Full	Copy of Penalty Summary & Worksheet(s) - as amended at hearing on May 15, 2001 (5 pages).

RESPONDENTS' EXHIBITS

Resp 1 for ID	This Exhibit was not introduced.
Resp 2 Full	Copy of Deed from Allen, David and Michael Nickerson to Warren Nickerson, Jr. dated March 12, 1997.
Resp 3 Full	Copy of Deed from Warren B. Nickerson to himself for life and remainder to his sons, Warren B. Nickerson, Jr., Allen Nickerson, David Nickerson and Michael Nickerson dates February 28, 1994.
Resp 4 for ID	Copy of Property Ownership Research Work Sheet dated February 2, 2000.
Resp 5 for ID	Copy of letter to Ms. Therrien dated June 7, 1999.
Resp 6 for ID	Copy of letter to Warren Nickerson, Nickerson's Garage dated May 17, 1999.
Resp 7 for ID	Copy of letter stamped "Received May 14, 1999 R.I.D.E.M. Office of Waste Management".
Resp 8 for ID	Copy of letter from Paula-Jean Therrien to Warren B. Nickerson, Jr. dated June 10, 1999.

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 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.