

Department of Environmental Management

Administrative Adjudication Division

State of Rhode Island

RE: GARY J. VERDUCHI

AAD No. 99-007/WME

Notice of Violation OC & I/UST 99-03032

March 31, 2000

DECISION AND ORDER

This matter came before the Administrative Adjudication Division ("AAD"), of the Department of Environmental Management ("Department" or "DEM") pursuant to a request for hearing on the Notice of Violation and Order ("NOV") issued on April 15, 1999 by the Office of Compliance and Inspection ("OCI") to Gary J. Verduchi ("Respondent"). Brian A. Wagner, Esq., represented OCI and John H. Ruginski, Jr., Esq., represented Respondent.

This matter is properly before the Hearing Officer pursuant to R.I.G.L. Chapter 12 of Title 46 entitled "Water Pollution", specifically § 46-12-9, R.I.G.L. § 42-17.1-2 and § 42-17.6, statutes governing the AAD, (R.I.G.L. § 42-17.7-1 et seq.), the Administrative Procedures Act (R.I.G.L. § 42-35-1 et seq.), the Regulations for Underground Storage Facilities Used for Petroleum Products and Hazardous Materials ("UST Regulations"), 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 the Department of Environmental Matters ("AAD Rules"). The proceedings were conducted in accordance with the above-noted statutes and regulations. The NOV alleges that the Respondent was the operator of property located at 75 Mineral Spring Avenue, Pawtucket, Rhode Island ("Facility") which operated, *inter alia*, as a gasoline service station. The Facility had five underground storage tanks registered with the Department. The NOV alleges that as operator of the Facility, Respondent failed to precision test and/or submit to the Department written precision test results for the tanks (which had been used for the storage of petroleum products or hazardous materials) in violation of Section 10.06(B) of the UST Regulations; that Respondent failed to install and maintain line leak detection systems and perform annual line tightness testing in violation of Section 10.07(B) and Section 10.08 of the UST Regulations; that Respondent failed to install and maintain spill containment basins or submit documentation of such installation to DEM in violation of the Sections 10.10(A) and (C) of the UST Regulations; that Respondent failed to perform and maintain records of daily inventory and monthly reconciliation in violation of Section 13.02 of the UST Regulations; and that Respondent failed to submit records of daily inventory and monthly reconciliation for the months of August and September 1997 as required by Section 13.04 of the UST Regulations.

The Prehearing Conference was held on October 1, 1999 and a Prehearing Conference Record was entered on October 28, 1999 in accordance with R.I.Gen.Laws § 42-17.7-5. As a result of the Prehearing Conference the following stipulations were entered:

STIPULATIONS

1. At the time of its registration with DEM, the subject facility located at 75 Mineral Spring Avenue, Pawtucket, Rhode Island (the "Facility") was owned by Louis "Jake" Verduchi and Carol Verduchi as tenants by the entirety.
2. Louis Verduchi died in January 1997.
3. Carol Verduchi died in November 1989.
4. The Facility contained five (5) registered underground storage tanks ("USTs").
5. The Facility is operated by Gary J. Verduchi.
6. The Facility is identified by RIDEM as UST Facility ID #03032.
7. A RIDEM representative conducted a compliance inspection of the Facility on or about July 31, 1997.
8. By letter dated September 4, 1997, RIDEM notified Respondents of the violations observed at the Facility during the July 31, 1997 inspection and requested that the Respondents submit copies of certain Facility records to DEM.

An administrative hearing was held on January 10, 2000. At hearing the following documents were admitted and/or marked as indicated below:

OCI Exhibit List

- OCI 1 Full Copy of application for Underground Storage Facilities dated 3/29/89 (4 pages).
- OCI 2 Full Copy of notification for Underground Storage Tanks dated 3/29/89 (2 pages).
- OCI 3 Full Copy of Leak Detection Inspection Form dated 7/31/97 (5 pages).
- OCI 4 Full Copy of correspondence dated 9/4/97 from F. Daniel Russell, Jr. of RIDEM to Gary Verduchi regarding a 7/31/97 compliance inspection (3 pages with return receipts).
- OCI 5 Full Copy of Permanent Closure Application for USTs dated 7/8/98 (4 pages).
- OCI 6 Full Copy of Penalty Summary & Worksheet(s) from NOV dated 4/15/99 (6 pages).
- OCI 7 Full Copy of deed dated 7/28/76 from Sun Oil Co. to Louis and Carol Verduchi as tenants by the entireties (3 pages).

OCI 8 ID Copy of NOV dated 4/15/99

Respondent's Exhibit List

Resp 1 ID Copy of application for employer identification number.

Resp 2 Full Copy of Probate Docket Sheet and affidavit of completed administration dated 8/3/98.

Resp 3 ID Copy of Last Will & Testament of Louis Verduchi—First page pertaining to Gasoline Station.

Resp 4 Full Copy of Death Certificate of Louis Verduchi 1/29/97.

Resp 5 Full COPY of Death Certificate of Carol Verduchi 11/3/89.

Resp 6 ID Invoice UST Corp. 6/18/99 (2 pages).

Resp 7 ID Eleven Receipts from RI Resource Recovery Corp. signed by G. J. Verduchi.

Resp 8 ID HEI Report (8 pages).

AS this matter is an enforcement proceeding, OCI bears the burden of proving the violations alleged in the NOV by a preponderance of the evidence. Once proven, the Rules and Regulations for the Assessment of Administrative Penalties, Section 12(c), shifts the burden to Respondent to prove by a preponderance of the evidence that the penalty was not calculated in accordance with the Penalty Regulations and statute.

Tracey D'Amadio Tyrrell, a Senior Environmental Scientist in the UST Section of the Office of Compliance and Inspection was OCI's only witness. She testified that her duties include reviewing requests from the Office of Waste Management for action on violations of UST Regulations including the drafting and review of notices of violation and the calculation of administrative penalties. Ms. Tyrrell testified that she was familiar with this particular case and had reviewed the request for action submitted by Waste Management and had been involved in the review of the NOV, the calculation of the administrative penalty and the preparation of the penalty worksheet. She stated that she calculated the administrative penalty using the standards required by the Rules and Regulations for the Assessment of Administrative Penalties. Ms. Tyrrell continued that the penalty summary and worksheet is part of the NOV and is regularly prepared in the ordinary course of issuing an NOV. She testified that the penalty summary and worksheet in this matter accurately reflect what she took into account in calculating the proposed administrative penalty.

Ms. Tyrrell also testified concerning a certified letter dated September 4, 1997 addressed to Respondent (OCI 4 Full) detailing certain deficiencies in compliance with the UST Regulations noted pursuant to a Facility inspection conducted on July 31, 1997. It notified Respondent of UST Regulations that had not been complied with as of the date of the letter and requested that

documentation be forwarded to the author, F. Daniel Russell Jr., in the DEM Office of Waste Management. The letter required Respondent to submit records of inventory control, precision testing documentation, overfill protection documentation, and spill containment and tank upgrade verification. The receipt for certified mail indicated that the letter was received at the Facility and signed for on September 6, 1997. Ms. Tyrrell testified that there is no indication in Department files that Waste Management received any documents in reply to this correspondence.

On cross-examination Ms. Tyrrell was questioned regarding Respondent's status as operator or owner of the Facility. Ms. Tyrrell indicated that the conclusion that Respondent was the operator of the Facility was based substantially upon the facility registration application ("Application") (OCI 1 Full) which was submitted to the Department in 1989. The Application was signed by Louis Verduchi, Respondent's father and the owner of the Facility. Mr. Louis Verduchi signed the document as the "owner/operator" of the Facility. The Application, on page one, also identifies the Respondent as the "operator" of the Facility. Ms. Tyrrell testified that although Respondent was not the owner of the Facility, it was OCI's position that by virtue of the facility registration application, Respondent was the operator of the Facility at the time of the Application (1989).

Gary Joseph Verduchi testified on his own behalf. He stated that he is currently the owner and operator of the Facility. He testified that he became the operator of Woodlawn Sunoco upon the death of his father, Louis Verduchi.¹ He stated that prior to his father's death Louis and Carol Verduchi² were the owners/operators of the Facility. He could not remember submitting any documents to DEM but was certain that he never filled out any document indicating that he was the operator of the Facility because his father was still alive at that time.

Upon cross-examination Respondent stated that the first time he became aware of any outstanding violations at the Facility was when he received the Notice of Violation. He reiterated the fact that he began operating the Facility upon his father's death in January, 1997 but could not recall being present at the Facility when it was inspected in July, 1997. Mr. Verduchi similarly could not recall OCI 4, the certified letter sent to the Facility in September, 1997 outlining the deficiencies and requiring compliance with the UST Regulations. He did acknowledge that the letter was addressed to him at the Facility address and delivered there, but he did not sign for it and could not remember receiving it.

In June of 1999 Mr. Verduchi removed all the UST systems at substantial cost. He indicated that some contaminated soils were present and that they were disposed of at the Central Landfill in Johnston, R.I. Under questioning from his counsel, Mr. Verduchi indicated that he began correcting deficiencies at the Facility right after he took ownership.

The hearing officer did not require the filing of briefs in this matter. After a recess, Counsel made closing arguments summarizing testimony and law and the hearing was closed.

The OCI contends that Respondent has operated the Facility since 1989 and is responsible for compliance with the UST Regulations from 1989 forward. To support its contention OCI relies on the representations in the facility registration application. Although Gary Verduchi is listed as the

Facility operator on page one of the Application, the signature page reflects, under the signature of Louis Verduchi, that he (Louis Verduchi) signed the document as the owner and operator of the Facility. Respondent argues that he is not responsible for compliance commencing in 1989 because he was not owner or operator of the Facility until several years later.

The evidentiary value of this document, to prove that Respondent was the operator of the Facility, is at best equivocal. The conflicting information in the Application, coupled with Respondent's uncontradicted testimony that he became operator of the Facility only upon his father's death in January 1997, resolves this issue in Respondent's favor. The evidence introduced at hearing establishes that Respondent was operator of the Facility commencing on January 30, 1997. At some point thereafter, Respondent also became the owner of the Facility. Accordingly, since Respondent was neither the owner nor the operator of the Facility prior to January, 1997, he is not legally responsible for failures to precision test the UST systems prior to 1997.

From that date forward, however, Respondent, as operator of the Facility, was legally responsible for compliance with UST Regulations. The evidence reveals that precision testing was not done in 1997 and 1998 and that a Facility inspection conducted in July, 1997 revealed numerous regulatory violations. Precision testing, installation of line leak detection, installation of spill containment basins, installation of overfill protection and inventory reconciliation were regulatory requirements for which Respondent was legally responsible from the time he became the operator in January, 1997. In June of 1999 Respondent chose to permanently close the UST systems and removal was accomplished to the satisfaction of the Department. Respondent expended a substantial sum of money to remove the UST systems. Closure of the USTs is not an issue in this proceeding.

It is clear from the evidence adduced at hearing that Respondent failed to comply with UST Regulations during the period in which he operated the Facility. The evidence establishes that administrative penalties were calculated in accordance with the Penalty Regulations and statute and that they were appropriately characterized as to Type and Deviation from the Standard. Respondent did not introduce any evidence to prove that the penalties were not calculated properly nor did he present sufficient evidence of factors which might mitigate the penalties. The sums expended in removing the UST systems do not mitigate the penalties assessed for failures to precision test in previous years or for neglecting to install spill containment basins, overfill protection, line leak detection systems or tightness testing, all of which had been regulatory requirements for some time. Respondent became responsible for compliance with ongoing regulatory requirements when he assumed operation of the Facility in January 1997. Although he is not legally responsible for compliance prior to that date, it was his obligation as of January 30, 1997 to ensure that the Facility was in compliance with UST Regulations. Whether or not Respondent received actual notice of the deficiencies at the Facility in September of 1997 did not affect his obligation to comply with the regulatory requirements pertinent to the Facility. The evidence indicates that prompt action was not taken by Respondent to bring the Facility into compliance and ultimately, Respondent chose to remove the UST systems in June of 1999.

FINDINGS OF FACT

1. At the time of its registration with DEM, the subject facility located at 75 Mineral Spring Avenue, Pawtucket, Rhode Island (the "Facility") was owned by Louis "Jake" Verduchi and Carol Verduchi as tenants by the entirety.
2. The Facility was operated as "Woodlawn Sunoco".
3. The Facility was registered with DEM in 1989.
4. The Facility is identified by RIDEM as UST Facility ID #03032.
5. Louis Verduchi was Respondent's father.
6. Carol Verduchi died in November 1989.
7. Louis Verduchi died on January 29, 1997.
8. The Facility is operated by Gary J. Verduchi.
9. Gary J. Verduchi began operating the Facility upon the death of Louis Verduchi.
10. Gary Verduchi was neither the owner nor operator of the Facility prior to January 30, 1997.
11. The Facility contained five (5) registered underground storage tanks ("USTs").
12. A RIDEM representative conducted a compliance inspection of the Facility on or about July 31, 1997 which revealed numerous regulatory violations.
13. By certified letter dated September 4, 1997, RIDEM notified Respondents of the violations observed at the Facility during the July 31, 1997 inspection and requested that the Respondents submit copies of certain Facility records to DEM.
14. The DEM did not receive any answer or documentation in response to the September 4th letter.
15. The following information regarding the UST systems at the Facility is registered with the Department:

UST ID NO.	DATE INSTALLED	SIZE (Gallons)/SUBSTANCE STORED
001	April 1970	4,000/gasoline
002	April 1970	4,000/gasoline

003	April 1970	4,000/gasoline
004	April 1970	500/waste oil
005	April 1970	500/fuel oil

16. The UST systems located at the Facility were not precision tested during the following years:

- a. UST #001: 1993, 1994, 1995, 1996, 1997, 1998
- b. UST #002: 1993, 1994, 1995, 1996, 1997, 1998
- c. UST #003: 1993, 1994, 1995, 1996, 1997, 1998
- d. UST #004: 1993, 1994, 1995, 1996, 1997, 1998

17. Precision test results for the tanks and years identified in Finding of Fact No. 16 herein were never submitted to the Department.

18. The failures to precision test USTs #001 – #003 (gasoline) constituted a Type II Moderate violation.

19. Each failure to precision test USTs #001 – #003 was assessed a penalty of \$1,000.00, which is the lowest penalty amount for a Type II Moderate violation referenced in the penalty matrix for Water Pollution Control.

20. The failure to precision test UST No. 004 (waste oil) constituted a Type II minor violation.

21. Each failure to precision test UST No. 004 was assessed a penalty of \$500.00 which is the lowest amount for a Type II Minor violation referenced in the penalty matrix for Water Pollution Control.

22. The amount of economic benefit accruing to Respondent for each of the eight failures to precision test, during the period Respondent operated the Facility, was determined by OCI to be \$450.00 per test.

23. The inspection conducted on July 31, 1997 revealed that UST Nos. 001, 002, and 003 (gasoline) did not have line leak detection systems as required by UST Regulation 10.08.

24. Each failure to install and maintain line leak detection systems constituted a Type II Moderate violation.

25. Each failure to install a line-leak detection system for UST Nos. 001, 002, and 003 was assessed a penalty of \$1,000 per missing system which is the lowest penalty amount referenced for a Type

II Moderate violation in the penalty matrix for Water Pollution Control.

26. Respondent failed to install and maintain spill containment basins and/or submit to the DEM documentation of the installation of spill containment basins for UST Nos. 004 and 005 (waste oil/heating oil) as required by sections 10.10(A) and (C) of the UST Regulations.

27. Failure to install and maintain a spill containment basin for UST Nos. 004 and 005 constituted a Type II Minor violation.

28. Each failure to install and maintain a spill containment basin was assessed a penalty of \$500.00 per system, the lowest amount referenced for a Type II Minor violation in the penalty matrix for Water Pollution Control.

29. The amount of economic benefit accruing to Respondent for failure to install a spill containment basin was \$720.00 per UST.

30. Respondent failed to install overfill protection on UST Nos. 001, 002, 003, (gasoline) and 004 (waste oil).

31. The failure to install overfill protection constituted a Type II Moderate violation for UST Nos. 001, 002, and 003 (gasoline), and constituted a Type II Minor Violation for UST No. 004 (waste oil).

32. Each of the three (3) failures to install overfill protection on USTs storing gasoline was assessed a penalty of \$1,000.00 which is the lowest penalty amount referenced in the Penalty matrix for Water Pollution Control for a Moderate violation.

33. The one (1) failure to install overfill protection on the UST storing waste oil was assessed a penalty of \$500.00 which is the lowest penalty amount referenced in the penalty matrix for Water Pollution Control for a Minor violation.

34. The amount of economic benefit accruing to Respondent for failure to install overfill protection is \$580.00 per UST.

35. Respondent failed to submit records of daily inventory and monthly reconciliation for the months of August and September 1997, as required by Section 13.04 of the UST Regulations.

36. The failure to submit records of daily inventory and monthly reconciliation constituted a Type II Minor violation for UST Nos. 001, 002, 003 and 004.

37. The failure to submit records of daily inventory and monthly reconciliation was assessed a penalty of \$500.00 for each UST for each month's failure to submit the required records.

38. In assessing the administrative penalty for each violation, OCI considered the extent to which

the act or failure to act was out of compliance; environmental conditions; the nature and toxicity of the pollutant; duration of the violation; extent of the violation; whether reasonable steps were taken to prevent and/or mitigate the non-compliance and the degree of willfulness or negligence including how much control Respondent had over the occurrence of the violation and whether the violation was foreseeable.

39. The UST systems located at the Facility were removed by the Respondent in June of 1999.

40. The removal of the USTs in June 1999 was done to the satisfaction of the Department and is not an issue in this enforcement proceeding.

CONCLUSIONS OF LAW

After consideration of the testimonial and documentary evidence in this proceeding, I conclude the following as a matter of law:

1. OCI failed to prove by a preponderance of the evidence that Respondent was the owner or operator of the Facility prior to January 30, 1997.

2. OCI failed to prove by a preponderance of the evidence that Respondent was legally responsible for violations of UST Regulation 10.06(B) pertaining to precision testing requirements for the years 1993, 1994, 1995 and 1996.

3. Commencing on January 30, 1997 the Respondent, as operator of the Facility, was legally liable for regulatory compliance with the UST Regulations at the Facility.

4. Four (4) UST systems located at the Facility were required to be precision tested in 1997 and 1998.

5. The OCI proved by a preponderance of the evidence that the Respondent violated the UST Regulation 10.06(B) relating to precision testing requirements in that Respondent failed to precision test tanks #001 – 004 for the years 1997 and 1998 or to submit precision testing results to the Department.

6. OCI proved by a preponderance of the evidence that Respondent violated UST Regulations 10.07(B) and 10.08 pertaining to line tightness testing and the installation of line leak detection systems on three UST systems used for the storage of gasoline.

7. OCI proved by a preponderance of the evidence that Respondent violated UST Regulations 10.10(A) and 10.10(C) by failing to install spill containment basins for two UST systems.

8. OCI proved by a preponderance of the evidence that Respondent violated UST Regulations 10.10(B) and 10.10(C) by failing to install overfill protection on four (4) UST systems at the Facility.

9. OCI proved by a preponderance of the evidence that Respondent violated UST Regulations 13.02 and 13.04 by failing to submit records of daily inventory and monthly reconciliation for four (4) of the UST systems for the months of August and September 1997.

10. The penalty assessments were properly calculated in accordance with the Rules and Regulations for the Assessment of Administrative Penalties and R.I.Gen.Laws § 42-17.6.

11. Evidence presented by Respondent was insufficient to warrant a reduction in penalties for the violations proved.

12. The penalty assessment for the violations proven are reasonable and warranted and are not excessive.

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

ORDERED

1. Alleged violations of Section 10-06(8) of the UST Regulations pertaining to precision testing of the UST Systems No. 001 through 004 at the Facility for the years 1993, 1994, 1995 and 1996 are DISMISSED.

2. The remaining violations of the NOV are SUSTAINED.

3. Pursuant to R.I.Gen.Laws § 42-17.6 an administrative penalty is assessed against Respondent in the amount of \$25,860.00.3

4. The Respondent shall pay to the Department the total sum of Twenty-Five Thousand, Eight Hundred and Sixty Dollars (\$25,860.00) in administrative and economic benefit penalties as set forth herein. Said Penalty shall be paid within ten (10) days of the date of the Final Decision and Order, and shall be in the form of a certified check made payable to the "General Treasurer, State of RI, for deposit in the Air and Water Protection Fund", and shall be forwarded to:
Office of Management Services

R.I. Department of Environmental Management

235 Promenade Street, Third Floor

Providence, Rhode Island 02908

Attention: Glen Miller

Entered as a Recommended Decision and Order this 24th day of March, 2000.

Kathleen M. Lanphear
Chief Hearing Officer

Entered as a Final Agency order this 31st day of March 2000.

Jan H. Reitsma
Director

Footnotes

- 1 Respondent's 4 Full, a copy of the Death Certificate of Louis Verduchi, notes date of death as January 29, 1997.
- 2 Respondent's 5 Full, a copy of the Death Certificate of Carol Verduchi, notes date of death as November 3, 1989.
- 3 The administrative penalty is reduced to reflect the violations which were dismissed. The computation is as follows:
\$47,060.00 (original proposed penalty)
- 14,000.00 (dismissed violations of 10.06(B))
33,060.00
- 7,200.00 (economic benefit component of dismissed violations)
\$25,860.00 TOTAL ADMINISTRATIVE PENALTY