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

RE: MEDEA, L.L.C. **AAD NO. 00-006/SRE**
NOTICE OF VIOLATION OC&I/LUST 00-3256

PARTIAL DECISION AND ORDER

This matter came before the Department of Environmental Management ("DEM") Administrative Adjudication Division for Environmental Matters ("AAD") pursuant to Medea, L.L.C.'s request for hearing on the Notice of Violation and Order ("NOV") issued jointly to Medea, L.L.C. and to D.T.P., Inc. by the DEM Office of Compliance and Inspection ("OCI") on November 16, 2000. Both named Respondents separately filed requests for hearing before the AAD. On January 31, 2001, D.T.P., Inc. entered into a Consent Agreement wherein the right to any further administrative proceeding was waived. The matter thereafter proceeded solely against Medea, L.L.C. (hereafter "Respondent" or "Medea").

The OCI agreed that the Respondent was not responsible for any violations that may have occurred prior to April 8, 1998. An administrative order was entered dismissing any and all violations alleged by the OCI that occurred prior to April 8, 1998.

The hearing was held on February 26, 2002 and April 25, 2002.

Following the hearing, the OCI and Respondent filed post-hearing memoranda; due to extensions for filing the briefs, the hearing was considered closed on November 8, 2002.

The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R.I. GEN. LAWS § 42-17.7-1 *et seq.*); Chapter 17.6 of Title 42 entitled "Administrative Penalties for Environmental Violations"; the Administrative Procedures Act (R.I. GEN. LAWS § 42-35-

1 *et seq.*); the Administrative Rules of Practice and Procedure of the Administrative Adjudication Division for Environmental Matters ("AAD Rules"); and the Rules and Regulations for Assessment of Administrative Penalties ("Penalty Regulations").

PREHEARING CONFERENCE

A prehearing conference was held on September 7, 2001 and a Prehearing Conference Record and Order was issued. That Order was later amended to include an additional stipulation of fact. The parties have agreed to the following stipulations:

1. The subject property is located at 186 Main Street in the Town of South Kingstown, Rhode Island.

2. Medea, L.L.C. is/was the owner/operator of the facility located at 186 Main Street, Wakefield, RI from April 8, 1998 through September 4, 2001. Medea, L.L.C. is the current owner of the above-referenced property.

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

HEARING SUMMARY

At the hearing, the OCI called two (2) witnesses: **Paula-Jean W. Therrien**, a Principal Environmental Scientist in the Office of Waste Management's Underground Storage Tank Program; and **Michael Mulhare**, the present DEM Environmental Response Administrator, but at the times relevant to this NOV, the Supervising Sanitary Engineer in the OCI.

Respondent called one (1) witness: **Nancy Hannon**, Medea's bookkeeper since April 1998.

I. The Notice of Violation

The NOV issued to the named Respondents on November 16, 2000 identifies property located at 186 Main Street, South Kingstown, Rhode Island. According to the

NOV, Medea has been the owner and operator of the property since April 8, 1998. D.T.P., Inc. was the prior owner and operator of the property. Due to the dismissal of any violations that may have occurred prior to April 8, 1998, this Decision only addresses the alleged violations by Medea on or after that date.

The NOV indicates that there were nine (9) underground storage tanks ("USTs") located on the site. On January 5, 1999 USTs Nos. 001 through 006 were removed and permanently closed. A DEM inspector reported that three of the USTs had holes in them and that petroleum-contaminated soil was discovered in the tank graves.

On June 15, 1999 DEM notified Respondent that the Closure Assessment Report was past due and required its submittal within seven days. On September 3, 1999 the DEM received the Closure Assessment Report, prepared by Applied Enviro-Tech, Inc. ("Applied") on behalf of Medea. Applied reported that 687 tons of petroleum-contaminated soil had been excavated from the property; that USTs Nos. 002, 003, 004 and 006 were found to have had holes in them; that field screening of soils indicated that the fill pipes for the USTs may have leaked; and that excavation of contaminated soil from the dispenser island area was limited by the canopy footings. Applied stated that, as a result, petroleum-contaminated soil remained in the area.

The NOV states that, although no monitoring wells were sampled and an undetermined amount of contaminated soil remained in the dispenser area, Applied recommended that no further action was required.

By letter dated September 21, 1999, the DEM notified Respondent that the Closure Assessment Report was deficient; that DEM disagreed with Applied's recommendation for no further action; and that DEM required Respondent to perform a

site investigation and submit a Site Investigation Report ("SIR") within sixty (60) days. As of November 16, 2000 (the date the NOV was issued) the DEM had not yet received the SIR.

The NOV cites Respondent for violating R.I. GEN. LAWS § 46-12.5 (a) [sic] and (b) and § 46-12-28 prohibiting the discharge of pollutants to waters of the State; R.I. GEN. LAWS § 46-12.5.1-3 prohibiting discharges of oil and/or petroleum products; Section 6(a) of the Oil Pollution Control Regulations prohibiting releases and/or discharges of oil or pollutants to waters or land of the State; Sections 14.08 and 14.09 of the Regulations for Underground Storage Facilities Used for Petroleum Products and Hazardous Materials ("UST Regulations"), pertaining to site investigation and the submission of a Site Investigation Report; and Section 15.10 (C) of the UST Regulations requiring the submittal of the Closure Assessment Report within thirty (30) days of tank closure.

The pertinent sections of the Rhode Island General Laws and of the Department's regulations are set forth below.

The first statute cited in the NOV is an incomplete citation or contains a typographical error. *RIDEM's Posthearing Memorandum* discusses R.I. GEN. LAWS § 46-12.5-3, so I have assumed that that was the intended citation.

> **46-12.5-3. 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 or any rule or regulation or order of the director issued pursuant to this chapter shall be strictly liable to the state.

> **46-12-28. Protection of groundwaters.** – Groundwaters shall be and shall be deemed to be waters of the state and shall be protected pursuant to the provisions of this chapter with respect to the following activities, which shall be regulated by the director in accordance with the provisions of this chapter and chapter 13.1 of this title:

(1) Discharge of pollutants onto or beneath the land surface; in a location where it is likely for the pollutants to enter the groundwaters of the state;
(2) Subsurface containment systems used to store wastewaters, petroleum products, hazardous materials or other pollutants;
(3) Facilities which treat or provide for disposal of petroleum products, hazardous materials, hazardous waste, solid waste or dredged material;
(4) Facilities with [sic] store bulk quantities of petroleum products, hazardous materials or hazardous waste;
(5) Facilities and activities which have caused or have the potential to cause a release of pollutants to groundwater;
(6) Activities undertaken to remediate groundwater quality.

R.I. GEN. LAWS § 46-12.5.1-3 contains identical language to that set forth in R.I. GEN. LAWS § 46-12.5-3.

Section 6(a) of the Oil Pollution Control Regulations provides in pertinent part as follows:

> No person shall place oil or pollutants into the waters or land of the State or in a location where they are likely to enter the waters of the State, except in compliance with the terms and conditions of a permit or order issued by the Director....

Respondent is also cited for violating Sections 14.08 and 14.09 of the UST Regulations regarding the performance of a site investigation and submittal of a report.

14.08 Site Investigation:

(A) ***

(B) The Director may require that a site investigation be conducted at any UST facility where one or more of the following conditions exists:

(1) The facility has closed USTs storing hazardous materials;
(2) Groundwater or surface waters adjacent to the facility have been affected by a release of petroleum product or hazardous material;
(3) An inspection of a tank closure reveals soil or groundwater contamination; or
(4) Other evidence of a release exists.

(C) The Director may require the site investigation be conducted by and a Site Investigation Report prepared under the supervision of a professional engineer, certified professional geologist or a

person of appropriate qualifications and relevant professional experience that is acceptable to the Director.

(D) The results of a site investigation shall be reported to the Department within 60 days or within an alternate deadline pre-approved by DEM in the format of a site investigation report pursuant to part 14.09.

Section 14.09 sets forth the required contents of the SIR that includes the following: a description of past and present activities on the site; a compliance history of the site; a site plan; a description of the site's hydrogeology; a description of the area surrounding the site; the nature of the contamination; the results of analytical testing; and the consultant's conclusions and recommendations.

Respondent is also cited for violating Section 15.10 (C) of the UST Regulations:

The Closure Assessment shall be submitted to the Department within 30 days after the date of the UST closure; or as specified by the Director.

The order portion of the NOV includes sections that presumably are addressed to D.T.P., Inc. since they concern records and requirements that pre-date Medea's involvement with the site. Other paragraphs of the order concern Medea's submission of the SIR and of monthly status reports; reimbursement for all funds expended by DEM in the investigation and/or remediation of the contamination at the facility; and imposition of a Fifty-one Thousand Six Hundred and Ten ($51,610.00) Dollar administrative penalty, assessed jointly and severally, against D.T.P., Inc. and Medea.

At the hearing, OCI counsel's opening statement indicated that they would be pursuing Violations 1, 2, 3, 6 and 7 against Medea, with a reduced penalty of $7,500.00 for the first three alleged violations dealing with the release and the full penalty for the latter two alleged violations. No relief other than the adjusted penalty in the amount of $26,250.00 was sought by OCI counsel and such further relief has been

either waived or otherwise resolved to OCI's satisfaction.

At the hearing, through the testimony of Michael Mulhare, the proposed administrative penalty was adjusted to take into consideration the settlement with D.T.P., Inc. That testimony is discussed below.

II. Violations 1, 2 and 3: Discharge/Release of Petroleum Product

Paula-Jean Therrien testified that she is a project manager in the UST Program, responsible for investigation and cleanup of sites contaminated by releases from USTs. In 1998, while the facility was owned by D.T.P., Inc., she learned that three USTs had failed precision tests. The tanks were later retested and found to be tight.

Medea, LLC became the owner/operator of the facility on April 8, 1998[1]. On or about January 5, 1999 six USTs were removed. Ms. Therrien stated that she was present at the site on that date, as were Christian Potter and Anne Heffron. Ms. Heffron, the Project Engineer/President of Applied Enviro-Tech, Inc. (see OCI 9 at numbered page 15), the company that had been retained as Medea's consultant, briefed Ms. Therrien on the closure of three tanks that had been removed prior to Ms. Therrien's arrival at the site. Ms. Heffron had advised her that the three USTs had had holes. She was informed that soils that had been contaminated were being excavated.

Paula-Jean Therrien was present for the removal of one other tank and also observed a hole.

The Closure Assessment Report, submitted to the Department on September 3, 1999, suggests that piping into the tanks may have leaked. OCI 9 at 2. It also recites that USTs 1, 2 and 3 had holes in the bottom of the tanks. *Id.* at 12. The

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[1] See stipulation #2 set forth on page 2 of this Decision.

report states that 687.69 tons of contaminated soil were removed from the tank graves of tanks 1 through 4 and beneath the dispenser island. *Id.* at 3.

Ms. Therrien conceded under cross-examination that a hole observed during tank removal is not necessarily indicative of a leaking tank. She explained that it was standard operating procedure to "whack" the tank with a sledgehammer after its removal from the ground, which could result in a hole. The "whacking" would be done to remove the dirt and facilitate the investigation. A hole could also have been plugged and not resulted in a leak of petroleum product. Under further questioning by OCI counsel, the witness clarified that, when used with other information like the contaminated soil at this site, a hole is usually indicative that a release has occurred.

Conclusion

Based upon the evidence presented at the hearing, I conclude that the OCI has proved by a preponderance of the evidence that Respondent violated R.I. GEN. LAWS § § 46-12.5-3 (a) and 46-12-28; R.I. GEN. LAWS § 46-12.5.1-3; and Section 6(a) of the Oil Pollution Control Regulations as set forth in the NOV.

III. Violation 7: Closure Assessment Report[2]

As stated above, on or about January 5, 1999, six tanks were removed. Ms. Therrien stated that she later learned that the piping was removed around the middle of the month.

Ms. Therrien testified that a Closure Assessment Report was required to be submitted to the Department because the USTs were being permanently closed. According to the witness, the regulations require that the report be submitted within thirty (30) days of the removal of the USTs and associated piping. On June 14, 1999,

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2 For better chronological discussion of the evidence, Violation 7 is considered prior to Violation 6.

not having received the report, Ms. Therrien called Anne Heffron. She also followed up by sending a letter to Christian Potter about the missing report. See OCI 8. The Closure Assessment Report was finally received by the Department on September 3, 1999. See OCI 9.

Ms. Therrien explained that she sent correspondence to Christian Potter, not because he was Medea's attorney, but because he had been identified as the managing member of Medea in the closure application. She stated that, although the Closure Assessment Report must be prepared by a qualified consultant retained by the owner/operator, and cannot be prepared by the owner/operator of the facility, it was the owner/operator's responsibility to have the report submitted.

Respondent's only witness, Nancy Hannon, who has served as bookkeeper for Medea, LLC since April 1998, testified that she paid Applied Enviro-Tech's invoice for a "soil closure" on March 8, 1999. The check was in the amount of $6,320.00. Resp. 1.

Conclusion

Though it was evident that some of the delay in the submission of the closure assessment report was directly attributable to the consultant, the UST Regulations require that the owner/operator retain a qualified consultant to prepare the report, but that it is the owner/operator who must comply with the requirement to submit the Closure Assessment Report. This conclusion is based upon my reading of the following pertinent provisions of the UST Regulations:

> 15.05 Permanent Closure: All owners/operators that have removed any underground storage tank from operation ... or who desire to permanently close a UST shall comply with the procedures for closing underground storage tank(s) in accordance with the provisions of this Section and appropriate national codes of practice.
>
> 15.08(C) The owner/operator is required to retain consultants to be present on the site during the tank removal process in order to ensure that an adequate

closure assessment is performed.

"Consultant" is defined in Section 7.10 of the UST Regulations to mean:

a geologist certified by the American Institute of Professional Geologists, or a geologist registered by any state program, or a professional engineer registered in Rhode Island, or an engineer-in-training working under the supervision of a professional engineer.

15.10 Closure Assessments:

(A) Except as otherwise provided in Rule 15.10, the owner/operator of any UST which is to be permanently closed, shall have performed a Closure Assessment to detect the presence of contamination at the UST site at those locations where contamination is most likely to be found.

(B) Closure Assessments shall be performed in accordance with DEM guidelines and indicate whether contamination was detected at the closure site. Closure Assessments shall be submitted to the DEM in writing and include, but not be limited to:
(1) ***
(2) ***
(3) ***
(4) ***
(5) ***
(6) The name and qualifications of the person preparing the Closure Assessment.

(C) The Closure Assessment shall be submitted to the Department within 30 days after the date of the UST closure; or as specified by the Director.

Based upon the evidence presented at the hearing, I conclude that the OCI has proved by a preponderance of the evidence that although Respondent properly retained a consultant, Respondent violated Section 15.10 of the UST Regulations by failing to submit the Closure Assessment Report within thirty (30) days from the date of the closure.

IV. Violation 6: Site Investigation Report

The NOV states that as of the date of its issuance on November 16, 2000, the Site Investigation Report had not yet been submitted.

Ms. Therrien testified that when the Department finally received the Closure Assessment Report on September 3, 1999, the report had recommended that no further action was required. OCI 9 at 13. The witness testified that after receiving the report, she had sent a letter to Christian Potter citing deficiencies in the report and stating that, contrary to the recommendation of Applied Enviro-Tech, a site investigation would be required and that a SIR must be submitted.

Ms. Therrien testified that she had determined a site investigation was necessary because the Closure Assessment Report had identified holes in three of the USTs; there was a large amount of contaminated soil; and the area was classified as a GA groundwater area, that is, drinkable without treatment. She required submittal of a SIR because of the evidence of a significant release and her concern that soil screening conducted at the site had not been done in accordance with the closure assessment guidelines. Ms. Therrien sent a letter dated September 21, 1999 to Christian Potter that required Respondent to conduct a full site investigation and submit the SIR within sixty (60) days. OCI 10 at 3.

Although the Department received a report from MDR Engineering, Inc. on May 7, 2001, Ms. Therrien stated that it was not the result of the full site investigation that had been required. On May 11, 2001 Ms. Therrien sent a letter to Mr. Potter advising him that the report "does not come close to providing the information required to be submitted in a SIR... I have contacted your consultant and he is well aware that this is not a SIR, but this report is what he said his client told him to submit." OCI 11 at 1. She again required that a SIR be prepared and submitted. *Id.*

Finally, on or about August 20, 2001, a SIR was submitted to the Department. See OCI 13. Ms. Therrien testified that the SIR remained inadequate due to the lack

of information regarding private wells in the area and insufficient monitoring wells to delineate potential groundwater contamination.

Under cross-examination by Respondent's counsel, the witness agreed that when she had corresponded with Mr. Potter on November 9, 2001 regarding the SIR's deficiencies, she had been aware that Medea, LLC was in bankruptcy as is indicated in the "cc" list reference to "U.S. Trustee". OCI 17 at 3. The witness stated that she continued to correspond with Christian Potter because the information in the SIR had to be certified as accurate by both the preparer and the owner/operator, and he had represented himself as being the managing member of Medea, LLC.

Ms. Therrien also testified that it was not unusual for the Department to disagree with a consultant's recommendation contained in a Closure Assessment Report. She stated that sometimes the consultant suggests that more work be done onsite and the Department disagrees, or the consultant may recommend less and the Department requires additional work based on their review of the totality of information regarding the site.

Conclusion

Section 14.08 of the UST Regulations states that the Director may require that a site investigation be conducted whenever a tank closure reveals soil or groundwater contamination or if there is other evidence of a release of petroleum product. The SIR must then be provided to the Department within sixty (60) days.

Here, there was clear evidence of a release. The Department exercised its discretion pursuant to Section 14.08 (B) and required that a site investigation be conducted. The letter requiring the site investigation and submittal of the SIR was sent by the Department on September 21, 1999 and received by Mr. Potter on September

23, 1999. See OCI 10 at 4 (return receipt). The SIR was therefore due on or about November 23, 1999.

The SIR (even if inadequate[3]) was submitted to the Department on August 20, 2001. The document was not filed until almost 21 months after it was due and over nine (9) months after the NOV was issued. I therefore conclude that the OCI has proved by a preponderance of the evidence that Respondent violated Sections 14.08 and 14.09 of the UST Regulations as set forth in the NOV.

V. Assessment of an Administrative Penalty

The NOV originally sought an administrative penalty in the amount of Fifty-one Thousand Six Hundred and Ten ($51,610.00) Dollars, jointly and severally against Medea, LLC and D.T.P., Inc. for seven alleged violations. OCI 20 at 1, 7. The NOV states that the penalty was assessed pursuant to R.I. GEN. LAWS § 42-17.6-2 and was calculated pursuant to the Penalty Regulations.

§ 12(c) of the Penalty Regulations provides the following:

> In an enforcement hearing the Director must prove the alleged violation by a preponderance of the evidence. Once a violation is established, the violator bears the burden of proving by a preponderance of the evidence that the Director failed to assess the penalty and/or the economic benefit portion of the penalty in accordance with these regulations.

The Department's interpretation of this provision requires the OCI to prove the alleged violation by a preponderance of the evidence and "includes establishing, in evidence, the penalty amount and its calculation." The violator then bears the burden of proving that the penalty and/or economic benefit portion of the penalty was not assessed in accordance with the Penalty Regulations. In Re: Richard Fickett, AAD No. 93-014/GWE, Final Decision and Order issued by the Director on December 9, 1995.

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3 The OCI did not seek a more complete SIR at the hearing or in its post-hearing memoranda. The only relief requested is the imposition of a $17,500.00 administrative penalty for the late submittal of the SIR.

Section 10 of the Penalty Regulations provides for the calculation of the penalty through the determination of whether a violation is a Type I, Type II or Type III violation and whether the Deviation from Standard is Minor, Moderate or Major. Once the Type and Deviation from Standard are known, a penalty range for the violation can be determined by reference to the appropriate penalty matrix.

The penalty amount and its calculation were established in evidence through the introduction of the NOV with the attached Penalty Summary and Worksheet (OCI 20) and the testimony of Michael Mulhare, currently the Environmental Response Administrator at DEM. At the time the NOV was issued, however, Mr. Mulhare was a Supervising Sanitary Engineer in the OCI. For UST cases, one of his responsibilities had been to review the UST facility file with the draft NOV prepared by staff. After he had approved the NOV it would be forwarded to the chief of the OCI.

In this matter, Tracey Tyrrell had prepared the penalties in the draft NOV. As her supervisor, Mr. Mulhare reviewed the draft NOV with the UST facility file. He also reviewed the penalty calculations to determine if they were consistent with the Penalty Regulations.

The six-page Penalty Summary and Worksheet established in evidence the $51,610.00 total proposed administrative penalty as well as whether the violations were classified as Type I, II or III and whether the Deviation from Standard was considered Minor, Moderate or Major. OCI 20 at 10-15.

Mr. Mulhare was also involved in obtaining the consent agreement with D.T.P., Inc. He stated that of the original penalty of $17,500.00 for Violations 1, 2 and 3, D.T.P., Inc. paid $10,000.00, leaving a balance of $7,500.00 that OCI was pursuing against Medea. Further discussion of the testimony and legal issues are set forth

below in my discussions of "Joint and Several Liability" and of the penalty for "Violations 1, 2 and 3".

Violations 4 and 5 were settled in the consent agreement and had only applied to D.T.P., Inc. Violation 6, although clearly applicable against Medea alone, considered D.T.P., Inc.'s 1988 NOV as part of its determination of Deviation from Standard in calculating the administrative penalty. Violation 7, the late Closure Assessment Report, also only applied to Medea. Violations 6 and 7 do not raise issues of joint and several liability. The penalty calculations for these violations are also discussed below.

A. Joint and Several Liability

This NOV presented the novel issue of the Department citing two Respondents, asserting joint and several liability, reaching settlement with one of the Respondents and seeking the remaining amount against the non-settling party. For Violations 1, 2 and 3, concerning the discharge/release of petroleum product, the Department sought a $17,500.00 administrative penalty, jointly and severally, against both Respondents. In determining the administrative penalty for these violations, the OCI considered factors that applied to both parties but also considered factors that only applied to D.T.P., Inc. OCI 20 at 11. Mr. Mulhare testified that, in accordance with the consent agreement, D.T.P., Inc. paid an administrative penalty in the amount of $10,000.00. The OCI seeks assessment of the remaining portion of the penalty against Medea.

Respondent contends that, by considering D.T.P., Inc.'s actions, the OCI has not properly applied the criteria necessary for the determination of the penalties against Medea. As is stated in *Respondent's Post-Hearing Memorandum*, "This is a clear case of two separate individual persons that have been grouped together and

been forced to suffer for the sins of the other". at 14. Respondent urges that the NOV be dismissed or that the penalty be substantially lowered, or that the OCI be ordered "to reconsider and evaluate the penalty assessment with respect to the true facts of the case". at 14-15.

The OCI has responded that the penalty for Violations 1, 2 and 3 was properly calculated. "The remaining portion of the total penalty ($7,500.00) is legally, fairly, equitably, and justly being sought against the owner of the Facility at the time the release was discovered, Medea, LLC". *RIDEM's Reply to Respondent Medea, LLC's Posthearing Memorandum* at 9.

As set forth in the NOV and as established by stipulation of the parties, Medea, LLC was the successor owner/operator of the facility to D.T.P., Inc. The general principle of joint and several liability is that where parties act in concert or share in the advantages, or if there is a right to relief arising out of the same transaction, occurrence, or series of transactions, then liability may also be shared. See R.I. GEN. LAWS § 10-6-2; Restatement (Second) of Torts § 876 (1979); Rule 20 of the Rhode Island Superior Court Rules of Civil Procedure; Cole v. Lippitt, 22 RI 31, 46 A. 43 (RI); Cady v. IMC Mortg. Co., Inc., 2002 WL 220899 (R.I. Super.) Jan. 31, 2002.

The OCI, and the Department, have in the past applied joint and several liability against multiple Respondents for violations of the UST Regulations, but those most often involved concurrent owners and operators of facilities. Here they were successive owners/operators of the facility. Ms. Therrien had testified that when D.T.P., Inc. owned the facility, three USTs had failed precision tests, were retested and later passed. She provided no evidence as to whether the petroleum contamination may have begun during D.T.P.'s ownership of the facility. Although Mr. Mulhare had

testified that a portion of the penalty for Violations 1, 2 and 3 had been paid by D.T.P., Inc. in the consent agreement, there was also specific testimonial evidence from the same witness that the remaining penalty was properly assessed against Medea because the tanks had passed precision tests prior to Medea taking ownership of the site. He stated that between that time and when the tanks were removed, they developed holes that resulted in a petroleum release and resulting contamination.

Based upon that inconsistent stance and the lack of clear evidence attributing the release to the period while D.T.P., Inc. was the owner/operator of the facility, I find that joint and several liability has not been established. There was no evidence that the two entities acted in concert or shared in the advantages. There was conflicting evidence that the discharge/release of petroleum product was ongoing while D.T.P., Inc. was owner/operator and that it continued after conveyance of the property to Medea. I therefore conclude that all evidence concerning D.T.P., Inc., including the issue of whether Medea was liable for the remaining penalty amount as a joint and several obligation, is not to be considered in determining the penalty in this matter.

B. Violations 1, 2 and 3

The Penalty Summary and Worksheet identified Violations 1, 2 and 3 as a Type I violation: "DIRECTLY related to the protection of the public health, safety, welfare or environment." Mr. Mulhare testified that a release violation is consistently determined to be a Type I violation.

Eight of the ten factors ((a) through (j)) listed in Section 10 (a)(2) of the Penalty Regulations were identified as having been considered in determining that the violations were a Major Deviation from Standard. Several of the factors applied only to D.T.P., Inc. or applied to both parties. Although Michael Mulhare testified that he

considered a $7,500.00 penalty against Medea to be its fair proportion of the penalty (which would make the penalty fall in the Moderate range), that amount was based upon principles of joint and several liability. Due to the fact that the OCI considered factors that did not apply solely to Medea, each factor is discussed with specificity below.

Under cross-examination, Michael Mulhare stated that not every facility with a release is issued a Notice of Violation. He testified that the OCI determines whether to fine a facility by considering the significance of the release, the potential receptors and the groundwater conditions where the release occurred. If a release was "de minimus", a penalty may not be assessed.

The factors considered by OCI in determining that Violations 1, 2 and 3 were a Major Deviation from Standard are as follows:

(a) The extent to which the act or failure to act was out of compliance

The Penalty Matrix Worksheet (OCI 20 at 11) states that holes were discovered in three of the USTs during closure and that 687 tons of petroleum contaminated soil was excavated for off-site disposal. An undetermined amount of petroleum contaminated soil remained on-site and impact to groundwater had not yet been determined. The full nature of the petroleum release had yet to be determined because the required site investigation had not been conducted. All of the above considerations clearly applied to Medea and the period of Medea's ownership of the facility.

The Worksheet also states that "Respondents' non-compliance with the UST Regulations pertaining to precision testing and maintenance of inventory records may have contributed to the severity of the release." This is a reference to Violations 4 and

5 that clearly only applied to D.T.P., Inc.

(b) Environmental conditions

The Penalty Matrix Worksheet states that the facility is located in a densely developed area with numerous potential vapor receptors. The facility is located in a GA groundwater classification zone. The Worksheet notes that contaminated soils remain on the property.

(c) The amount of the pollutant

The Penalty Matrix Worksheet states that approximately 687 tons of petroleum contaminated soil was excavated during the closure. The full extent of the contamination was unknown due to Medea's failure to perform a site investigation.

(d) The toxicity or nature of the pollutant

The Penalty Matrix Worksheet cites the volatile nature of gasoline and its potential as a public health hazard (inhalation of benzene) and public safety hazard (explosive). It states that petroleum products are capable of causing significant soil and groundwater contamination.

(f) The areal extent of the violation

The Penalty Matrix Worksheet states that the extent of the contamination was unknown due to Medea's failure to perform a site investigation.

(g) Whether the person took reasonable and appropriate steps to prevent and/or mitigate the non-compliance

The Penalty Matrix Worksheet cited D.T.P., Inc.'s failure to comply with precision testing and inventory record-keeping regulations. It then considers Medea's efforts to mitigate the violation by permanently closing the tanks and removing some of the contaminated soil. It complains of Medea's failure to investigate the release.

(h) Whether the person has previously failed to comply with any regulations or statutes which the DEM has the authority or responsibility to enforce

The Penalty Matrix Worksheet cites the 1988 NOV issued to D.T.P., Inc. Michael Mulhare acknowledged that at the time the NOV was issued, Medea was not in violation of past regulations.

(i) The degree of willfulness or negligence, including but not limited to, how much control the violator had over the occurrence of the violation and whether the violation was foreseeable

The Penalty Matrix Worksheet states that both D.T.P., Inc. and Medea had complete control over the occurrence of the alleged violations.

According to the testimony of Michael Mulhare, the tanks had tested tight prior to the facility's conveyance to Medea in April 1998. Approximately nine months later, Medea permanently closed the USTs.

Mr. Mulhare was questioned under cross-examination about what steps Medea might have taken to prevent the release when the tanks had passed precision tests. The witness stated that, because the tanks were old, the "prudent thing to do" would have been for Medea to have had the tanks lined. Additionally, Medea could have installed a monitoring system or adopted a testing frequency greater than that required in the UST Regulations.

Conclusion

Respondent does not dispute that Violations 1, 2 and 3 were appropriately identified as a Type I violation. *Respondent's Post-Hearing Memorandum* at 6.

Respondent has proved by a preponderance of the evidence that the Deviation from Standard was not properly calculated as to Medea because the OCI considered factors that applied to D.T.P., Inc. Rather than the Hearing Officer attempting to filter

out the factors that weighed more heavily against D.T.P., Inc., I have determined that a remand for re-calculation of the penalty against Medea alone is a fairer and more reasonable way to proceed. This matter is remanded to the OCI for the OCI to recalculate the Deviation from Standard and specifically, to reconsider factors (a), (g), (h) and (i) as they apply only to Medea.

C. Violation 6

The Penalty Summary and Worksheet identified Violation 6, the failure to submit the SIR, as a Type I violation: "Directly related to the protection of the public health, safety, welfare or environment." Mr. Mulhare testified that it was classified as such because the Site Investigation Report is a critical piece of information to determine the public health and environmental impact of a release. He stated that the amount of contaminated soil removed from the site during closure indicated that there was considerable contamination present within the soil and groundwater.

Seven of the ten factors listed in Section 10 (a)(2) of the Penalty Regulations were identified as having been considered in determining that the violation was a Major Deviation from Standard. The OCI considered the extent to which the act or failure to act was out of compliance, concluding that the SIR was due on or about November 23, 1999 and had not been submitted by the date the NOV was issued on November 16, 2000. Environmental conditions were considered, in that the facility was located in a GA groundwater classification zone; that contaminated subsurface soils remained on the property; and that the facility was located in a densely developed area with numerous potential vapor receptors. The Penalty Matrix Worksheet also cited the toxicity or nature of the pollutant, particularly the volatile nature of gasoline as both a public health hazard (the potential for inhalation) and as a public safety hazard (the

potential for explosion).

The Penalty Matrix Worksheet included the duration of the violation as a factor. The SIR was due on or about November 23, 1999 and had not been submitted by the time the NOV was issued almost a year later. Whether the person took reasonable and appropriate steps to prevent and/or mitigate the noncompliance was also considered. The OCI determined that Medea did not take steps to prevent the noncompliance because they did not submit the SIR as required.

Even though this violation clearly applied to Medea's failure to submit the SIR, the OCI considered D.T.P.'s 1988 NOV in factor (h) on the Penalty Matrix Worksheet. The OCI concluded that Respondent D.T.P., Inc. had previously failed to comply with regulations or statutes which the DEM has the authority or responsibility to enforce.

The Penalty Matrix Worksheet's final consideration -- factor (i) -- was the degree of willfulness or negligence, including but not limited to, how much control the violator had over the occurrence of the violation and whether the violation was foreseeable. The Worksheet provides that "Respondents, as owners and operators of the Facility, had complete control over the occurrence of the alleged violations." The OCI concluded in the Worksheet that this was a Major Deviation from Standard and fell midway in the $12,500 to $25,000 penalty range for a Type I Major violation. The OCI assessed a $17,500 administrative penalty for this violation.

Michael Mulhare acknowledged under cross-examination that the failure to submit a SIR is not always a Major Deviation from Standard. He stated that the period of time involved was one consideration, that is, that submitting the SIR three years late as opposed to 30 days late would be a substantial factor.

Respondent's counsel presented two NOVs (Resp 11 and Resp 12) that had

been issued to other entities for failure to submit SIRs and questioned the witness about the assessed penalties set forth therein. The NOV issued to DB Marketing Company, Inc. and Narragansett Pier Associates on November 8, 2000 cited those Respondents for failure to submit an SIR as required. The SIR should have been submitted to the DEM on or about December 16, 1997, but had not been provided as of the date the NOV was issued. Despite the nearly three-year delay, the violation was calculated to be a Type I Moderate violation and assessed a penalty of $10,000.00. Resp 11 at 8.

The second NOV, issued to P.J. Land Investments, Inc. and James J. Bolster and Catherine V. Bolster on July 21, 1999, stated that the SIR had been required to be submitted to the DEM on or about December 1993 (See Resp 12 at 12, factor (e)), but had not yet been submitted by the date of the NOV's issuance. The NOV identified it as a Type I Moderate Deviation from Standard and assessed a penalty of $5,000.00[4]. Resp 12 at 12.

When questioned about the two NOVs, the witness was unsure whether or not he had participated in the issuance of the DB Marketing NOV but stated that he had probably reviewed the one issued to P.J. Land Investments. In further questioning by OCI counsel, Mr. Mulhare clarified that the duration of the violation -- the lateness of the submittal of the SIR-- was only one of the factors considered in determining the Deviation from Standard.

Conclusion

I find that Violation 6 was appropriately identified as a Type I violation.

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[4] I note from comparing the DB Marketing NOV issued in November 2000 to the NOV issued to P.J. Land Investments in July 1999, as well as the one issued to Respondent Medea in November 2000, that the penalty range in the matrix for a Type I Moderate violation had changed. Apparently penalty increases were adopted subsequent to the July 1999 NOV issued to P.J. Land Investments.

I am concerned about the discrepancy in the penalty calculations in the three NOVs; that the two provided by Respondent's counsel identify the Deviation from Standard as Moderate, yet the one issued to Medea is Major. I am cognizant, however, that I have only three NOV calculations before me when many others that have been issued may contain calculations similar to the one in Medea's NOV.

I have reviewed the various factors identified in each NOV to determine whether there was justification for the difference in the penalty calculation. In the DB Marketing NOV, the duration of the violation was approximately three years, the area was densely developed, the water classified as GA, but the Respondents were not cited for an actual release of petroleum product and there were no specifics on the amount of the pollutant. With the NOV issued to P.J. Land Investments, the duration of the violation may have been as long as 5 ½ years, the area was again densely developed, the water GB, and there was clear evidence of a release for which the Respondents were cited. Tank 004 contained 500 gallons of oil/water mixture and approximately 510 tons of contaminated soil was excavated and disposed of.

Unlike in the Medea NOV, neither of the above NOVs identified factor (h) as a consideration in determining that the Deviation from Standard was Moderate, "whether the person has previously failed to comply with any regulations or statutes which the DEM has the authority or responsibility to enforce". In considering factor (h), the Medea NOV cited D.T.P.'s past violations as set forth in the 1988 NOV that had been issued to D.T.P., Inc. I can only speculate that if the other two NOVs had concerns regarding a past history of violation, then they may have also found that factor (h) justified a determination that the violations were Major. I therefore find that the comparison of the NOVs does not prove that the OCI improperly calculated the NOV in

this matter.

Notwithstanding this conclusion, I find that Respondent has proved that the OCI considered factor (h) that was inapplicable to Medea, and therefore may have incorrectly calculated the penalty. To consider D.T.P., Inc.'s history of noncompliance when joint and several liability has not been established, and particularly when this violation was only against Medea, was error. The Respondent has also proved that the OCI considered D.T.P., Inc.'s control over the occurrence of the violation, in addition to Medea's role, when it made its determination as to factor (i).

Rather than the Hearing Officer weighing whether these two factors were so substantial as to alter the Deviation classification or to lower the penalty amount within the penalty range, I will also send this penalty calculation back to the OCI for reconsideration.

D. Violation 7

The Penalty Summary and Worksheet identified Violation 7, the late submittal of the Closure Assessment Report, as a Type II violation: "Indirectly related to the protection of the public health, safety, welfare or environment". Mr. Mulhare testified that it was considered a Type II violation because the Report was eventually submitted.

Six of the ten factors listed in Section 10 (a)(2) of the Penalty Regulations were identified as having been considered in determining that the violation was a Minor Deviation from Standard. The factors considered were the same as those identified in the calculation for Violation 6, except that factor (h) was not considered. The Penalty Matrix Worksheet identified the range for a Type II Minor Deviation from Standard as $1,250 to $2,500. The OCI proposed a $1,250 administrative penalty.

Conclusion

Respondent has failed to prove that the proposed $1,250 penalty for the delayed submittal of the Closure Assessment Report was not assessed in accordance with the Penalty Regulations.

VI. Respondent's Motion to Dismiss

At the hearing, Respondent's counsel made an oral motion to dismiss Violation 6, the failure to submit the SIR. Counsel argued that the document had since been submitted so that this violation was more appropriately identified as a late submittal of the SIR, similar to Violation 7 – the late submittal of the Closure Assessment Report.

The OCI objected, stating that the NOV was accurate, that the Respondent had failed to submit the SIR in accordance with the Regulations (within 60 days of the Department's request) at the time the NOV was issued.

Ruling on the motion was held for issuance with this Decision. After considering the arguments of counsel, I conclude that there is no merit to Respondent's motion and it is summarily denied.

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

FINDINGS OF FACT

1. The NOV in this matter was issued to Medea, LLC ("Respondent") and to D.T.P., Inc. on November 16, 2000.

2. The subject property is located at 186 Main Street in the Town of South Kingstown, Rhode Island (the "Facility").

3. The NOV alleges that D.T.P., Inc. was the owner and operator of the Facility from December 28, 1987 through April 8, 1998.

4. Respondent was the owner and operator of the Facility from April 8, 1998 through September 4, 2001.

5. Respondent is the current owner of the above-referenced property.

6. Prior to the hearing, the DEM and D.T.P., Inc. entered into a consent agreement wherein D.T.P., Inc. agreed to pay an administrative penalty.

7. In 1998, when D.T.P., Inc. was owner and operator of the Facility, three (3) USTs failed precision tests, were later retested and found to be tight.

8. On or about January 5, 1999, six (6) USTs were removed. The associated piping was removed in mid-January.

9. Anne Heffron, the Project Engineer/President of Applied Enviro-Tech, Inc., the company that had been retained as Medea's consultant, was present for the closure and removal of the USTs.

10. The Closure Assessment Report was submitted to the Department on September 3, 1999.

11. The Closure Assessment Report identified holes in four of the USTs.

12. The Closure Assessment Report stated that 687.69 tons of contaminated soil was removed from the tank graves of tanks 1 through 4 and from beneath the dispenser island.

13. The subject property is located in an area with a groundwater classification GA, suitable for drinking purposes.

14. The Closure Assessment Report recommended that no further action was required.

15. Paula-Jean Therrien, the DEM project manager for this site, disagreed with Respondent's consultant and determined that a site investigation was necessary.

16. On September 21, 1999, the DEM sent Respondent a letter requiring that a full site investigation be conducted and that a SIR be submitted to the Department within sixty (60) days.

17. The SIR was submitted to the Department on or about August 20, 2001.

18. The NOV originally sought an administrative penalty in the amount of $51,610.00, jointly and severally, against Medea, LLC and D.T.P., Inc. for seven (7) alleged violations.

19. The penalty amount and its calculation for each of the seven (7) alleged violations was established in evidence through the introduction of the NOV with the attached Penalty Summary and Worksheet.

20. The OCI established in evidence that Violations 1, 2, and 3, the discharge/release of petroleum product, was calculated to be a Type I Major Deviation from Standard with a proposed administrative penalty of $7,500.00 against Respondent.

21. The OCI considered D.T.P., Inc.'s actions when it weighed factors (a), (g), (h) and (i) of Section 10(a)(2) of the Penalty Regulations in its determination that Violations 1, 2 and 3 were a Major Deviation from Standard.

22. Violations 4 and 5 were settled in the consent agreement with D.T.P., Inc.

23. The OCI established in evidence that Violation 6, the failure to submit the SIR, was calculated to be a Type I Major Deviation from Standard with a proposed administrative penalty of $17,500.00.

24. The OCI considered D.T.P., Inc.'s actions when it weighed factors (h) and (i) of Section 10(a)(2) of the Penalty Regulations in its determination that Violation 6 was a Major Deviation from Standard.

25. The OCI established in evidence that Violation 7, the late submittal of the Closure Assessment Report, was calculated to be a Type II Minor Deviation from Standard with a proposed administrative penalty of $1,250.00

26. An administrative penalty in the amount of $1,250.00 for Violation 7 is not excessive.

CONCLUSIONS OF LAW

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

1. The OCI has proved by a preponderance of the evidence that Respondent violated R.I. GEN. LAWS § 46-12.5-3 and § 46-12-28 as set forth in Violation 1 of the NOV.

2. The OCI has proved by a preponderance of the evidence that Respondent violated R.I. GEN. LAWS § 46-12.5.1-3 as set forth in Violation 2 of the NOV.

3. The OCI has proved by a preponderance of the evidence that Respondent violated Section 6(a) of the Oil Pollution Control Regulations as set forth in Violation 3 of the NOV.

4. The OCI has proved by a preponderance of the evidence that Respondent violated Sections 14.08 and 14.09 of the UST Regulations as set forth in Violation 6 of the NOV.

5. The OCI has proved by a preponderance of the evidence that Respondent violated Section 15.10(C) of the UST Regulations as set forth in Violation 7 of the NOV.

6. The OCI has failed to prove that the evidence supports imposition of joint and several liability against Respondent.

7. Respondent has proved by a preponderance of the evidence that in considering D.T.P., Inc.'s actions in calculating and identifying the penalty against Respondent for Violations 1, 2 and 3 and for Violation 6, the OCI failed to assess the penalty in accordance with the Penalty Regulations.

8. Respondent has failed to prove by a preponderance of the evidence that the OCI's determination of Violation 7 as a Type II Minor Deviation from Standard was not in accordance with the Penalty Regulations.

9. Respondent has failed to prove by a preponderance of the evidence that the OCI's assessment of an administrative penalty in the amount of $1,250.00 for Violation 7 is not in accordance with the Penalty Regulations.

Wherefore, based upon the above Findings of Fact and Conclusions of Law, I am issuing the following

ORDER DENYING RESPONDENT'S MOTION TO DISMISS; ORDER OF REMAND

1. Respondent's Motion to Dismiss is herewith DENIED.

2. This matter is remanded to the OCI for recalculation and reconsideration of the administrative penalty against Medea for Violations 1, 2 and 3 and for Violation 6.

3. For Violations 1, 2 and 3, the OCI shall recalculate the Deviation from Standard and specifically shall reconsider factors (a), (g), (h) and (i) of Section 10(a)(2) of the Penalty Regulations as they apply only to Medea.

4. For Violation 6, the OCI shall recalculate the Deviation from Standard and specifically shall reconsider factors (h) and (i) of Section 10(a)(2) of the Penalty Regulations as they apply only to Medea.

5. The OCI shall make such calculations and penalty adjustments consistent with this Partial Decision and Order and submit the new calculations and proposed penalties to the AAD on or before **August 22, 2003**.

6. Following receipt of the new calculations, this matter will be rescheduled for a brief hearing so that the OCI may properly present the recalculations into evidence and Respondent may be afforded the opportunity to challenge the new calculations and proposed assessments for Violations 1, 2 and 3 and for Violation 6.

Entered as an Administrative Order this 25th day of July, 2003.

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

CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded by first-class mail, postage prepaid, to Christian C. Potter, Esquire, 1277 Jefferson Boulevard, 2nd Fl., Warwick, RI 02886; via interoffice mail to Bret Jedele, Esquire, Office of Legal Services and Dean H. Albro, Chief, Office of Compliance and Inspection, 235 Promenade Street, Providence, RI 02908 on this 25th day of July, 2003.

Terri B. Spaid

APPENDIX A
LIST OF EXHIBITS

OCI'S EXHIBITS

OCI 1 for Id	28 March 1988 Application for Underground Storage Tank - (2 pages);
OCI 2 for Id	Transfer of Certificate of Registration - (2 pages);
OCI 3 for Id	4 January 1999 Notice of Intent to Enforce (9 pages);
OCI 4 Full	5 January 1999 UST Closure Inspection Checklist prepared by Paula-Jean Therrien (1 page);
OCI 5 Full	7 January 1999 Letter from Respondent to DEM with accompanying Registration form (6 pages);
OCI 6 for Id	8 January 1999 Letter from DEM to Respondent (2 pages);
OCI 7 for Id	22 February 1999 Notice of Intent to Enforce;
OCI 8 Full	15 June 1999 Letter from DEM to Respondent (2 pages);
OCI 9 Full	3 September 1999 Closure Assessment prepared by Applied Enviro-Tech, Inc. (29 pages);
OCI 10 Full	21 September 1999 Letter from DEM to Respondent (5 pages);
OCI 11 Full	11 May 2001 Letter from DEM to Respondent (2 pages);
OCI 12 Full	31 May 2001 Letter from DEM to Respondent (2 pages);
OCI 13 Full	20 August 2001 Letter from Respondent to DEM (1 page);
OCI 14 Full	Curriculum Vitae of Paula-Jean Therrien

OCI 15 for Id	Curriculum Vitae of Tracy D'Amadio Tyrrell (was listed as exhibit but never submitted)
OCI 16 for Id	Penalty Summary & Worksheet(s) - from NOV dated 16 November 2000 (6 pages);
OCI 17 Full	9 November 2001 Letter from Paula-Jean Therrien to Christian Potter
OCI 18 Full	14 December 2001 Letter from Paula-Jean Therrien to Christian Potter
OCI 19 for Id	Curriculum Vitae of Michael Mulhare
OCI 20 Full	16 November 2000 Notice of Violation

RESPONDENT'S EXHIBITS

Resp I Full	Medea, LLC. *check* dated March 8. 1999 to Applied Enviro-Tech in the amount of $6,320.00 (1 page);
Resp 2 for Id	September 28, 1999, Letter from Anne Heffron to Paula-Jean Therrien (3 pages)
Resp 3 for Id	October 5, 1999, Letter from Christian C. Potter, Esq. to Anne Heffron (2 pages);
Resp 4 for Id	January 9, 2001, Letter from Christian C. Potter, Esq. to Anne Heffron (2 pages);
Resp 5 for Id	May 9, 2001, Letter from Michael DelRossi to Paula-Jean Therrien (2 pages);
Resp 6 Full	January 9, 2001, RIDEM's Answers to Respondent's First Set of Interrogatories (4 pages);
Resp 7 Full	August 17, 2001, Site Investigation Report submitted by MDR Engineering (11 pages without appendices);
Resp 8 for Id	Curriculum Vitae of Michael DelRossi;
Resp 9 for Id	December 18, 2000, Order granting Respondent's Motion to Dismiss (2 pages);

Resp 10 for Id	February 6, 2001, Consent Agreement entered into by DTP. Inc. and RIDEM (6 pages).
Resp 11 Full	November 8, 2000, Notice of Violation issued to DB Marketing Company, et al
Resp 12 Full	July 21, 1999, Notice of Violation issued to PJ Land Investments, Inc., et al