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

RE: JAMES H. DOBSON & SANDRA J. DOBSON/
WICKFORD SERVICE, INC. AAD NO. 93-052/GWE
NOTICE OF VIOLATION UST 93-03237

DECISION AND ORDER

This matter came before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD") pursuant to the Respondent's request for hearing on the Notice of Violation and Order ("NOV") issued by the Division of Waste Management ("Division") on September 1, 1993. The hearing was conducted on July 10, 1995, following which the parties filed post-hearing memoranda.

The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R.I.G.L. Section 42-17.7-1 et seq), the Administrative Procedures Act (R.I.G.L. Section 42-35-1 et seq), the Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters ("AAD Rules"), and the Rules and Regulations for Assessment of Administrative Penalties ("1992 Penalty Regulations").

PREHEARING CONFERENCE

A Prehearing Conference was conducted on August 3, 1994 at which the parties agreed to the following stipulations of fact:

1. The respondents, James H. and Sandra Dobson are the owners of a certain parcel(s) of real property located at 590 Boston Neck Road, North Kingstown, Rhode Island, otherwise known as North Kingstown Assessor's Plat 26, Lot 43 ("the Facility").

2. The Facility is registered with the Department as UST Facility ID #03237.

3. The Facility is comprised of a retail gasoline service station known as the Wickford Service Station, which Facility has at least four underground storage tank ("UST") systems located thereon.

4. The following information regarding the UST systems at the Facility has been registered with the Department.

UST ID#	DATE UST INSTALLED	CAPACITY (gal.)	CONTENT	SPILL CONTAIN.	LEAK DETECT.
001	8/70	1,000	Waste Oil	Yes	n/a
003	8/70	6,280	Gasoline	Yes	Yes
004	8/70	6,280	Gasoline	Yes	Yes
005	8/70	6,280	Gasoline	Yes	Yes

5. The above-referenced USTs were not precision tested during the following years:
   (a) 001: 1987, 1988, 1989, 1990, 1991, 1992
   (b) 003: 1988, 1989
   (c) 004: 1988, 1989
   (d) 005: 1988, 1989

6. As of the date of the Notice of Violation and Order ("NOV"), the respondents had not submitted to the Department any precision test results for the tanks and years as stipulated in paragraph (5) above.

7. As of the date of issuance of the Notice of Violation

> and Order ("NOV"), the Department had information that indicated that UST nos. 003, 004 and 005 had not been precision tested during 1990. Subsequent to the issuance of the NOV the Department was provided with precision test results verifying the performance of precision tests on these tanks during 1990. (emphasis in original)

8. Sandra Dobson is not involved and has not been involved with the operation of the Facility.

The exhibits proffered by the parties, marked as they were admitted at the hearing, are attached to this Decision as Appendix A. The NOV was not offered as an exhibit.

BACKGROUND

The NOV, though not an exhibit, serves as the Division's pleading or complaint against Respondents James H. Dobson and Sandra J. Dobson as owners of the property and against WICKFORD SERVICE, INC. as the operator of the business located on the property. The NOV alleges that the facility and/or tank owners and operators have not submitted verification of the installation of spill containment basins for tank # 001 and have failed to precision test and/or to submit to the Department copies of precision test results for three (3) tanks for the years 1987, 1988, 1989, 1990 and 1991, and for one (1) tank for those same years as well as for 1992. It cites Respondents for violating certain provisions of the Regulations for Underground Storage Facilities Used for Petroleum Products and Hazardous Materials (1992), as amended (the "1992 UST Regulations"), specifically UST Regulation Sections 10.06 (A) and (B)

relating to precision testing requirements; UST Regulation Section 10.10 (A) relating to spill containment basin requirements; UST Regulation Section 10.06 (B) (9) requiring the submission of written verification of compliance with Section 10.06 (A) and (B); and UST Regulation Section 10.10 (C) requiring the submission of written verification of compliance with Section 10.10 (A).

The above-cited sections are located in the 1992 UST Regulations as amended, with the effective date of August 25, 1993 (the NOV was issued September 1, 1993), and are not found under those same citations in the Regulations which would have been in effect during the years that the Respondent is alleged to have failed to test, to install or to submit verification. The substantive requirements of those sections, however, were in effect in the prior iterations of the Regulations, though they are found in differently-numbered sections. This decision will consider the facts and the substantive requirements of the sections the Respondent is alleged to have violated.

HEARING SUMMARY

The Division presented one (1) witness, Susan W. Cabeceiras, a senior environmental scientist with the Department of Environmental Management. At the prehearing conference, Respondent had agreed to Ms. Cabeceiras' qualification as an expert witness with regard to the

Department's UST and Administrative Penalty Regulations; UST regulatory enforcement practices and procedures; and UST penalty calculation practices and procedures. Respondent presented one (1) witness, James H. Dobson, a respondent and one of the owners of the facility in question, a retail gasoline service station known as Wickford Service Station.

Precision Testing

The NOV alleges failure to precision test and/or to submit copies of the precision test results for the following tanks and years:

(a) UST #001: 1987, 1988, 1989, 1990, 1991, 1992;

(b) UST #003: 1987, 1988, 1989, 1990, 1991;

(c) UST #004: 1987, 1988, 1989, 1990, 1991; and

(d) UST #005: 1987, 1988, 1989, 1990, 1991.

As set forth above in stipulation #7 from the prehearing conference, subsequent to the issuance of the NOV the Division was provided test results verifying that precision tests had been conducted on tanks 003, 004, and 005 for the year 1990. In stipulation #5 from the prehearing conference, Respondent admitted failure to precision test tank 001 as set forth in the NOV (the years 1987-1992); admitted failure to precision test tank 003 for the years 1988 and 1989; admitted failure to precision test tank 004 for the years 1988 and 1989; and admitted failure to

precision test tank 005 for the years 1988 and 1989. As a result, the testimony concerning Respondent's alleged failure to test focused on the following tanks and years:

#003: 1987 and 1991;

#004: 1987 and 1991; and

#005: 1987 and 1991.

Ms. Cabeceiras testified that the Division determined that the facility had not complied with its obligations to conduct precision tests on tanks #003, #004, and #005 in 1987 and 1991 because the Division did not have the test results in its files which, pursuant to regulation, were required to have been submitted to the Division within fifteen (15) days of the completion of the tests. If those results have not been received by the Division, she testified, then it is assumed that the test has not been conducted. (Tr. 8, 11-12).

James H. Dobson was called to testify on Respondents' behalf. He testified that tests had been conducted on all but the waste oil tank in 1987 and for the years 1990 through 1995. (Tr. 17-18, 26). When the tanks were tested in 1987, according to the testimony, it was Mr. Dobson's understanding that the testing company would be submitting the results to the Department.

Mr. Dobson also testified about the missing documentation for the 1991 precision testing. He stated

that he thought the SureTest company conducted the test in 1991 but that he was unable to obtain a copy of the results. He added that SureTest was now out of business. Under further questioning, Mr. Dobson stated that initially he had refused to pay SureTest for the 1991 precision testing because he had not received the result of the test. Later, the 1991 testing was paid for by means of a check made payable to the attorney for SureTest. (Tr. 31-32). No explanation was given as to why the payment was made without obtaining the test results. No check was produced and no other witnesses were called.

Mr. Dobson testified that the reason he had failed to test three of the tanks during the years he admitted he was in violation of the UST Regulations, 1988 and 1989, was because it was his understanding that the tanks had to be full in order to test, and his tanks held twice the amount of normal storage so it was expensive to fill and he did not have the money to do it. (Tr. 18). He did stick the tanks on a daily basis, however. (Tr. 19).

As for the lack of testing on the waste oil tank, Mr. Dobson testified that he had believed that that tank also had to be full in order to test for tank tightness. The waste oil tank was first tested in 1994, according to Mr. Dobson. (Tr. 20, 33).

Although Mr. Dobson's testimony appeared truthful, he

himself was concerned about confusing the years, particularly 1990 and 1991. (Tr. 29-30). He was unable to provide any documentation substantiating that testing had been done in 1987 and 1991. Without any other evidence that the tanks were tested in 1987 and 1991, I do not accept Mr. Dobson's oral assertions as fact.

After considering the stipulations and other evidence provided by the parties, I find that the Division has met its burden to prove that the Respondents violated the UST Regulations' requirement to precision test tank #001 (the waste oil tank) for the years 1987, 1988, 1989, 1990, 1991 and 1992 as alleged in the NOV. I also find that the Division has proved by a preponderance of the evidence that the Respondents violated the regulatory requirements to precision test tanks #003, #004, and #005 for the years 1987, 1988, 1989, and 1991 as alleged in the NOV. I find the Division has not met its burden to prove the failure to test for the year 1990 on tanks #003, #004, and #005.

Verification of Respondents' compliance with the precision testing requirement for the year 1990 was submitted to the Department subsequent to the issuance of the NOV, long after the fifteen (15) day requirement set forth in the regulations. The Division therefore has met its burden to prove that Respondents violated the requirement to submit verification of the 1990 testing in

the time period set forth in the regulations as alleged in the NOV.

Division's counsel conceded at the hearing that failure to comply with the reporting requirements was "significantly less serious" than noncompliance with the testing requirement. He stated that it would be appropriate to reduce the level of the penalty. (Tr. 36). As discussed below in the section on "Administrative Penalty", however, no evidence was introduced or elicited regarding the penalty amount and its calculation for failure to timely submit verification of compliance with the testing requirement.

Spill Containment Basin

The NOV also alleges that the facility and/or tank owners and operators failed to submit to the Department verification of the installation of spill containment basins for tank #001 and, based upon this allegation, cites Respondents for violation of the regulation which requires installation of spill containment basins "around all fill pipes with the exception of above-ground fill pipes, by May 8, 1987" and for violation of the regulation which requires that written verification of the upgrade be submitted to the Department within fifteen (15) days of installation.

Ms. Cabeceiras testified that, following the issuance of the NOV, proof of installation was submitted to the

Division. (Tr. 12-13). Respondents' Exhibit Resp. 1 Full, p. 2, an invoice from WHITCO TESTING, INC., indicates that a spill containment basin had been installed, presumably on or about the date of the invoice, October 1, 1993. It is a logical assumption that since the spill containment basin was installed, Respondents' fill pipes were not the subject of the above-ground exception. The Division has therefore met its burden to prove that the Respondents violated the regulatory requirement to install a spill containment basin on tank #001 (the waste oil tank) by May 8, 1987.

As discussed below in the section on "Administrative Penalty", however, though the failure to install the spill containment basin was identified by Ms. Cabeceiras as a "Type 2 Moderate" violation, there was no testimony or other evidence which assigned a dollar amount as the penalty.

The NOV also cites Respondents for failure to comply with the requirement for submission of verification of installation of the spill containment basin. The regulation states that "written verification ...must be submitted by the owner or operator to the Director within fifteen (15) calendar days of installation".

Respondents' Exhibit 1 Full indicates that the spill containment basin was installed on or about October 1, 1993. The Division's only evidence regarding the filing of the verification was that it was submitted "about a month after

the Notice of Violation was issued". (Tr. 13). The Notice of Violation was issued on September 1, 1993. From this evidence, it would seem that the verification was submitted within fifteen (15) calendar days of the installation of the spill containment basin. I therefore find that the Division has not met its burden to prove that the Respondents failed to comply with the regulatory requirement for submission of verification of the installation of the spill containment basin.

Having concluded that the Division has, in part, proved that Respondents violated the UST Regulations from 1987 though 1992, I now approach the issue of the administrative penalty. The NOV proposed an administrative penalty in the amount of $30,100.00 and stated that the sum was calculated pursuant to the Rules and Regulations for Assessment of Administrative Penalties (1992), as amended ("1992 Penalty Regulations"). Ms. Cabeceiras testified that she had drafted the Notice of Violation and confirmed that the penalties were calculated in accordance with the penalty regulations. (Tr. 7, 13). The issue that the 1992 Penalty Regulations were being applied to pre-1992 violations was not raised by either party at the hearing.

Three recent cases before the AAD have, in some fashion, dealt with circumstances wherein the Division proposed an administrative penalty based upon the 1992

Penalty Regulations, or where the AAD applied the 1992 Penalty Regulations, even though the matters involved violations which had occurred prior to the effective date of the 1992 Penalty Regulations.

One of the decisions, In Re: DTP, Inc., AAD No. N/A, Final Decision and Order dated March 8, 1996, *appeal pending sub nom.*, DTP, INC. v. Keeney, C.A. 96-1656 (R.I. Super.Ct.), considered that the Division was applying 1992 Penalty Regulations to pre-1992 violations and found that any violation which occurred prior to the effective date of the 1992 Penalty Regulations was to be reviewed in accordance with the rules and regulations in existence at the time the violation occurred. Final Decision and Order, conclusion of law #18. This resulted in a remand to the Division for recalculation of the penalty under the 1987 Penalty Rules; the Division was also required to prove by a preponderance of the evidence that the penalty was assessed in accordance with the penalty statute and the Penalty Regulations and was not excessive. Final Decision and Order, conclusion of law #31.

The other two decisions, In Re: Robert DeLisle and Joyce DeLisle, East Greenwich Oil Company, Inc., AAD No. 93-026/GWE, Decision and Order entered as Final Agency Order on October 5, 1995, *reversed on other grounds sub nom.* East Greenwich Oil Co. v. Keeney, C.A. PC95-5901 (R.I. Super.

Ct., December 17, 1996) and In Re: Richard Fickett, AAD No. 93-014/GWE, Final Decision and Order issued by the Director on December 9, 1995, were issued prior to the DTP decision. Both applied the 1992 Penalty Regulations to pre-1992 violations. It is important to note that, as in the Dobson case, the Notices of Violation in the DeLisle and Fickett matters were issued after the effective date of the 1992 Penalty Regulations. This was not the case in DTP.

In light of the DTP decision, it is worth examining the similarities and differences among the three cases, particularly with respect to the facts in this case.

Summary of Recent Precedential Regulatory Decisions

The Dobson case was heard following the hearings on DTP, Inc. (June 14, 15, 16, 1993), Richard Fickett (September 26, 1994), and Robert DeLisle, Joyce DeLisle/East Greenwich Oil Company, Inc. (March 27, 1995), but prior to the issuance of any of the final decisions in those matters. The precedential impact of those cases was unknown during the hearing on this matter held on July 10, 1995.

The final agency order in In Re: Robert DeLisle and Joyce DeLisle, East Greenwich Oil Company, Inc., AAD No. 93-026/GWE, which was entered on October 5, 1995, was the first of these decisions. The decision does not indicate when the NOV was issued, but according to the AAD numbering identification on the appeal, AAD No. 93-026/GWE (which

indicates that the AAD received DeLisle's request for hearing in 1993), the enforcement action was commenced well after the effective date of the 1992 Penalty Regulations (effective May 25, 1992).

The decision recited testimony from the Division's witness that the 1992 Penalty Regulations were applied to all the violations alleged in the NOV, including those violations which had occurred prior to the effective date of the Penalty Regulations. The witness explained that the later penalty regulations were applied as a matter of convenience and did not present an adverse impact to Respondents because the earlier regulations would have imposed a higher penalty. In Re: Robert DeLisle and Joyce DeLisle, East Greenwich Oil Company, Inc., AAD No. 93-026/GWE, Decision and Order entered as Final Agency Order on October 5, 1995, p. 6. Other than this explanation of the calculation of the penalty, the retroactive application of the 1992 Penalty Regulations was not an issue at the hearing.

Another similarity to the Dobson case is that the NOV was not offered into evidence at the DeLisle hearing. It is interesting to note, especially in light of the Fickett case discussed below and the limited evidence on the calculation and amount of the penalty in Dobson, that the DeLisle Findings of Fact cite testimonial evidence from the Division

establishing the calculation (Type II/Moderate) and amount of the penalty ($1000.00 for each failure to precision test) sought to be assessed against Respondent. The Hearing Officer also found as fact that the Division had determined an economic benefit to Respondent of $350.00 for each failure to precision test.

Fickett was the next pertinent decision to be issued. The Final Decision and Order ("Final Decision") in the matter of In Re: Richard Fickett, AAD No. 93-014/GWE, was issued by the Director on December 9, 1995 and adopted the Findings of Fact and Conclusions of Law set forth in the Hearing Officer's recommended decision. The issue in Fickett, raised sua sponte by the Hearing Officer, was the absence of documentary or testimonial evidence establishing the penalty amount and its calculation which the Division sought to assess against the Respondent.

As in the DeLisle matter and in Dobson, Respondent Fickett had been cited for failure to precision test for several years prior to the adoption of the 1992 Penalty Regulations. Due to the limited documentary and testimonial evidence considered by the Hearing Officer in the recommended decision, it is unknown precisely when the NOV was issued or whether the Division had proposed an administrative penalty based upon the 1992 Penalty Regulations. From the date of Fickett's hearing request

(according to the AAD numbering identification on the appeal, AAD No. 93-014/GWE, the AAD received Fickett's request for hearing in 1993), however, it can be determined that, as in DeLisle, the Division's enforcement action against Mr. Fickett commenced well after the effective date of the 1992 Penalty Regulations.

The Division presented no testimonial evidence at the Fickett hearing and rested its case based upon the stipulations and exhibits of record, which did not include the NOV. The Division invoked the provisions of Section 12(c) of the 1992 Penalty Regulations:

> 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 Division presented no evidence on the amount or calculation of the administrative penalty. Neither the Division nor Respondent voiced an objection to Section 12(c)'s application to pre-1992 violations.

The Hearing Officer's recommended decision and the Final Decision issued by the Director discussed the interpretation and application of Section 12(c) of the 1992 Penalty Regulations but were silent on the provision's application to the pre-1992 violations. The Final Decision stated that the Department's interpretation of the

regulation requires the Division 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 the economic benefit portion of the penalty was not assessed in accordance with the Penalty Regulations. at 1.

The Final Decision adopted the Hearing Officer's Findings of Fact and Conclusions of Law, including conclusion #7: "There is no evidence in the record to establish the amount of the administrative penalty." As there was no evidence establishing a penalty, the Decision did not assess one. It is clear however, that the Decision applied the 1992 Penalty Regulations to both the post-1992 violations and to those which occurred prior to the adoption of Section 12(c).

As is discussed further below in the section on "Administrative Penalty", the Dobson hearing contained sporadic evidence on the penalty to be assessed: for some of the violations there was testimony regarding the calculation of the penalty but not the amount, for others there was no evidence of the amount of the economic benefit or the calculation of the penalty. It is clear from the ruling in Fickett that if the 1992 Penalty Regulations are applicable to Dobson, then at the Dobson hearing the Division produced

insufficient evidence on the penalty amount or its calculation for some of the violations. And, as discussed below in the DTP decision, if the earlier regulations applied, the Division would have had to provide even more evidence in order

> to prove by a preponderance of the evidence that the penalty was assessed in accordance with the Administrative Penalties for Environmental Violations Act and the Penalty Regulations. This burden includes proving that the amount of the penalty imposed is within the parameters of the Penalty Regulations and is not excessive. In Re: DTP, Inc., AAD No. N/A, Final Decision and Order, at 9-10, conclusion of law #31.

Finally, I reach consideration of the decision in DTP. The pertinent facts in that case concern an enforcement action which commenced by issuance of an NOV in December, 1988. The NOV was later amended twice, the second motion to amend having been granted at the hearing with the written amended NOV submitted after the hearing had concluded. The Amended Notice of Violation II alleged that from 1988 through 1992, Respondent had violated various sections of the 1985 and 1992 UST Regulations; the Division sought an administrative penalty based upon the 1992 Penalty Regulations for all of the violations.

The Hearing Officer's recommended decision concluded the following:

> Since the majority of the violations committed occurred before the new rules were promulgated DEM must follow the guidelines outlined in the regulations that existed at the time the infractions were committed. The application of the appropriate penalty rules is

> particularly significant to this violation because different standards and burdens are reflected in the 1992 rules than appear within the 1987 regulations. The Hearing Officer has no choice but to remand the NOVAO back to the UST program so the appropriate rules can be applied to any founded infractions which occurred prior to May 25, 1992. Recommended Decision and Order, p. 26.

The Hearing Officer's recommended decision and the Final Decision and Order issued by the Director set forth in their conclusions of law that any violation which occurred prior to the effective date of the 1992 Penalty Regulations must be reviewed in accordance with the rules and regulations in existence at the time the violations occurred. Recommended Decision and Order, conclusion of law #20; Final Decision and Order, conclusion of law #18.

It may seem that the outcomes in the Fickett and DeLisle cases are inconsistent with this conclusion since in those matters the 1992 Penalty Regulations were applied to violations which occurred prior to May 25, 1992, the effective date of the regulations. But the important distinction shared by Messrs. Fickett and DeLisle, and by Mr. Dobson, is that their Notices of Violation were issued after the effective date of the 1992 Penalty Regulations. The 1992 Penalty Regulations specifically address this point.

Section 14, the "Effective Date" section of the 1992 Penalty Regulations (p. 15), provides that the 1992 Penalty Regulations "shall not be construed to govern any

enforcement action which is **commenced** by the Director prior to the formal adoption of these regulations..." (emphasis added). While Section 14 is not discussed in the DTP decisions, it supports the determination that the DTP violations be evaluated under the old rules since the enforcement action in DTP commenced in December 1988, well before the effective date of the 1992 Penalty Regulations. Section 14 is also consistent with the application of the 1992 Penalty Regulations to the matters of Fickett, DeLisle, and Dobson as each of those actions was commenced after the adoption of the 1992 regulations.

Retroactive application of the 1992 Penalty Regulations was unchallenged in Dobson. Both parties were aware that the violations were being considered and the penalty assessed in accordance with the 1992 regulations. My analysis of the above AAD cases and of the language in Section 14, in conjunction with the lack of objection from any party, leads me to the conclusion that the Dobson case is distinguished from the decision in DTP and should follow the law and precedent established in the Fickett and DeLisle matters. I therefore hold that, based upon the circumstances before me, the 1992 Penalty Regulations are applicable to this matter.

Administrative Penalty

The NOV, which was not in evidence, seeks the

assessment of an administrative penalty in the sum of Thirty Thousand One Hundred ($30,100.00) Dollars. Ms. Cabeceiras testified that she had drafted the Notice of Violation and that the penalties were calculated in accordance with the penalty regulations. (Tr. 7, 13).

Ms. Cabeceiras stated that the precision testing violations are classified as a "Type II Moderate" violation, for which the Department assesses the penalty at a thousand dollars. As stated above, I have found that the Division has proved that Respondents failed to test tank #001 for six (6) years, tank #003 for four (4) years, tank #004 for four (4) years, and tank #005 for four (4) years. By way of arithmetical computation, this results in an administrative penalty in the amount of eighteen thousand ($18,000.00) dollars. The witness also testified that the economic benefit penalty was calculated as the average price charged by licensed precision testers to test a tank. (Tr. 14). No evidence of the specific dollar amount was introduced or elicited in testimony. There was also no evidence introduced or elicited regarding the penalty amount or its calculation for violation of any of the reporting requirements.

Failure to install the spill containment basin was also

identified by Ms. Cabeceiras to be a "Type II Moderate"[1] violation, but there was no testimony or other evidence which assigned a dollar amount as the penalty. The economic benefit penalty was stated to be the average cost to have the basin purchased and installed. (Tr. 14). Ms. Cabeceiras acknowledged that the economic benefit, which had been assigned the value of $750.00, should be eliminated since the spill containment basin was installed subsequent to the issuance of the NOV, thereby removing any economic benefit from the violation. (Tr. 14-15).

Based upon the testimony and evidence in the record and applying the requirements set forth in the Fickett ruling, I find that the Division has proven the violations of the precision testing requirements for tank #001 for the years 1987 through 1992 and for tanks #003, #004, and #005 for the years 1987, 1988, 1989, and 1991 and established in evidence the penalty amount and its calculation for those violations. The Division failed, however, to establish in evidence the amount of economic benefit for failure to test; it failed to

[1]In the Division's Response to Respondents' Post-Hearing Memorandum, p. 16, the Division recommends that the violation for the untimely compliance with the requirement for installation of the spill containment basin be reclassified as a Type III/Moderate violation. Evidence establishing the amount of the Type III/Moderate penalty was not presented at the hearing nor does the Division's Response suggest the amount or a reduction of the penalty. To the contrary, the Division continues to seek the full amount of the penalty proposed in the NOV. Division's Response, p. 19.

establish the penalty amount and its calculation for violation of the precision test reporting requirements; and it failed to establish in evidence the penalty amount for failure to comply with the requirement for installation of the spill containment basin.

Pursuant to Section 12(c) of the 1992 Penalty Regulations, once the violations have been proven and the penalty amount and its calculation have been established in evidence, the Respondent then bears the burden of proving that the penalty and/or the economic benefit portion of the penalty was not assessed in accordance with the Penalty Regulations.

Through Respondents' Post-Hearing Memorandum and the testimony of Mr. Dobson, the Respondents addressed some of the factors which the Department is required to consider in determining the amount of the penalty. Mr. Dobson testified that his failure to precision test the tanks was due to financial limitations[2], that he stuck the tanks on a daily basis to ensure there were no leaks, and that he had not realized that the waste oil tank was supposed to be tested.

The financial condition of the person being assessed the administrative penalty, the actual and potential impact

[2]Although Mr. Dobson testified that he had not tested the tanks because of the expense of filling them, no financial records were submitted nor was there any specific testimony regarding Respondents' incomes, assets, debts or liabilities.

on the environment, and whether the failure to comply was intentional are elements to be considered, to the extent practicable, in determining the amount of each administrative penalty. R.I. GEN LAWS §42-17.6-6. The Penalty Regulations require that the above factors, as well as some others identified in Respondents' Post-Hearing Memorandum, are to be considered when calculating the Type of Violation (Type I, II, or III) and the Deviation from Standard (Major, Moderate or Minor) to determine the amount of the penalty. 1992 Penalty Regulations §10.

The Division had determined the precision testing violations to be "Type II Moderate". The Water Pollution Control Penalty Matrix set forth in the Penalty Regulations provides for the assessment of a penalty for a Type II Moderate violation in the range of $1,000.00 to $5,000.00. The Division seeks an assessment against Respondents of the minimum penalty for a Type II Moderate violation.

Respondents' Post-Hearing Memorandum attacks the Division's penalty classification and argues that the violations should be re-identified as "Type III Minor", resulting in the lower penalty range of $100.00 to $500.00. They contend that the violations are "Type III" because they are 'acts of noncompliance with routine sampling schedules and reporting requirements which are incidental to the Department's ability and obligation to enforce the laws

administered by the Director.' Respondents' Post-Hearing Memorandum, p.5.

Respondents also challenge the Division's characterization of the violations as a "Moderate" Deviation from Standard. The Respondents' Post-Hearing Memorandum discusses the different criteria the Department can evaluate in order to determine whether the violation is a minor, moderate, or major deviation. Respondents argue that when Mr. Dobson's conduct over the years and the lack of environmental damage are considered in light of that criteria, the violation should be re-classified as a "Minor" Deviation from Standard.

Respondents' contention that the penalty should be recalculated in order to be in accordance with statute and Penalty Regulations is addressed in the Division's Response to Respondents' Post-Hearing Memorandum ("Division's Response"). The Division's Response disagrees with Respondents' conclusion that the failure to precision test is a Type III Minor violation.

As set forth in the Penalty Regulations, Type III violations are "violations of legal requirements identified by the Director as important but incidental to the protection of public health, safety, welfare or the environment". §10 (a)(1)(C). The Division asserts that precision testing is not a requirement that is "incidental"

to the Division's enforcement of the UST Regulations, rather it is a specific requirement of the UST Regulations that precision testing be performed. Division's Response, p. 13. According to the Division, the requirement to precision test tanks is a "central component of the UST Regulations' intent to prevent releases or to at least discover releases and clean them up while they are still manageable and before a water supply is rendered undrinkable". Division's Response, p. 5. The Division suggests two examples of noncompliance with requirements that are incidental to the enforcement of the UST Regulations: failure to submit results after the tanks had passed a precision test and the untimely installation of spill containment basins. Division's Response, p. 13.

The Division's Response also discusses the regulatory provisions that identify Type II violations. Pursuant to the 1992 Penalty Regulations, Type II violations

> ...include violations of legal requirements identified by the Director as important but indirectly related to the protection of the public health, safety, welfare or environment. Such violations include, but are not necessarily limited to, acts which pose an indirect actual or potential for harm to the public health, safety, welfare or the environment; acts or failures to act which are of moderate importance to the regulatory program; and/or failure to comply with any procedure required by any law administered by the Director, or by a rule or regulation adopted pursuant to the Director's authority for the prevention of harm to the public health, safety, welfare or the environment. 1992 Penalty Regulations, §10 (a)(1)(B).

The Division asserts that failure to precision test clearly

fits the Type II definition: Failure to test indirectly increases the potential for harm because it increases the risk that a leaking UST will not be detected; failure to test is a failure to act, "which is of at least moderate importance to the UST Program because regular precision testing is the first line of defense against leaking USTs"; and failure to test is a "blatant" failure to comply with a procedure required by regulation. Division's Response, p. 12.

The Division's Response also evaluates the criteria set forth in the Penalty Regulations which are cited by Respondents as grounds for the violation to be reclassified as a Minor Deviation from Standard. Respondents claim that the violation should be deemed "Minor" because they had been in compliance with UST requirements prior to the issuance of the NOV and that their compliance was voluntary and not the result of action by the Department. Respondents' Post-Hearing Memorandum, p. 5. The Division counters that the Respondents

> were one hundred percent (100%) out of compliance. Testing was not performed when it was required to be performed... This is not a situation where the Respondents attempted to comply...but failed. No form of compliance occurred during the period of time when it was required. Division's Response, pp. 14-15.

Additionally, on the occasions when Respondents voluntarily complied with the testing requirements, they "merely performed tests that they were required to perform".

Division's Response, p.6.

Another factor disputed by the parties was the duration of the violation. Respondents contend that they failed to test the tanks "for at most two years out of nine years, including 1995". Respondents' Post-Hearing Memorandum, p. 6. The Division considers the duration of the violation to be the amount of time that elapsed between Respondents' performance of precision tests as compared to the testing requirements of the UST Regulations. Division's Response, p. 15. While not cited by the Division, I note that in stipulation #5 from the Prehearing Conference Record, the Respondents admitted failure to test the waste oil tank over a period of six (6) years. This evidence belies Respondents' statement that the duration of the violation was "at most" two years.

Other factors are discussed in Respondents' Post-Hearing Memorandum and in the Division's Response. Although I have considered them in my below conclusion, I find it unnecessary to discuss each disagreement of the parties.

I have considered the arguments of the parties and reviewed the testimonial and documentary evidence of record to determine whether the Division properly classified the precision testing violations as Type II Moderate. I conclude that the Type II Moderate designation is consistent with the pertinent provisions of the Penalty Regulations and

with the evidence presented in this case. I therefore find that Respondents have not met their burden to prove that the eighteen thousand ($18,000.00) dollar administrative penalty for failure to precision test was not assessed in accordance with the Penalty Regulations.

Other Issues

Respondents' Post-Hearing Memorandum raised two additional issues: the first concerned Sandra Dobson's status as a party and the second involved a disputed evidentiary ruling at the hearing. Citing stipulation #8 from the Prehearing Conference Record, Respondents argue that Ms. Dobson should be dismissed as a party because she was not involved in the operation of the facility. The Division has countered that although Ms. Dobson may not have been involved in the operation of the facility, ownership of the facility by "James H. and Sandra Dobson" was stipulated to at the prehearing conference (see stipulation #1 from the Prehearing Conference Record).

The issue of owner v. operator responsibility for compliance with the UST Regulations for precision testing and installation of spill containment basins was addressed in In Re: Barbara D'Allesandro, AAD No. 91-006/GWE, Decision and Order As to Liability entered as a Final Order on August 6, 1993. The decision found that, although the Regulations regarding spill containment basins and precision testing do

not specifically state the party responsible for compliance,

> [o]wners should not be allowed to avoid responsibility for the safety precaution measures mandated by the Regulations (such as spill containment basins and precision testing) solely because the Regulations do not state specifically that owners should be responsible for same. A clear reading of the Regulations in their entirety establishes that the owner as well as the operator should be responsible for the installation, use and maintenance of all facility components and related equipment in order to protect the groundwaters and surface waters of the state from pollution from USTs. at 12.

The decision concluded that the provisions concerning spill containment basins and precision testing are applicable to owners as well as operators and that penalties may be assessed against both for violations of these requirements. at 15. The ruling in D'Allesandro was upheld by the Rhode Island Superior Court in a decision issued by Mr. Justice Needham. D'Allesandro v. Annarummo, C.A. 93-4913 (R.I. Super. Ct. August 21, 1995).

Accordingly, Respondents' motion to dismiss Sandra Dobson as a party to this matter is denied.

The second issue, raised both at the hearing and in Respondents' Post-Hearing Memorandum, was Respondents' contention that the hearing should be/have been restricted to the years 1988 and 1989 and only for tanks 003 and 004. Respondents' posture is based upon their interpretation of issue #5 set forth in the Prehearing Conference Record: "Whether the failure of the Respondents to have precision testing on 003 and 004 during the years 1988 and 1989

justify the imposition of the penalties sought by the Department." Counsel argues that issue #5 limited the hearing to only those tanks and years.

The Prehearing Conference Record, prepared by this Hearing Officer, lists the issues which were identified at the prehearing conference and are copied from the prehearing memoranda supplied by the parties. Six issues are listed. Issue #5 is a restatement of one of the two issues identified by Respondents. Respondents' conclusion that the hearing and this Decision should be limited to the two tanks and years ignores the four issues submitted by the Division. There is no representation or stipulation from the Division that the hearing would be restricted to the consideration of certain tanks or years or that only issue #5 would be considered at the hearing.

Respondents' objection to testimony beyond those tanks and years identified in issue #5 was overruled at the hearing. Respondents have failed to persuade me that that ruling was incorrect. Reconsideration is therefore 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. Respondents James H. and Sandra Dobson are the owners of a certain parcel(s) of real property located at 590 Boston Neck Road, North Kingstown, Rhode Island, otherwise known as North Kingstown Assessor's Plat 26,

Lot 43 ("the Facility").

2. The Facility is comprised of a retail gasoline service station known as the Wickford Service Station, which facility has at least four underground storage tank ("UST") systems located thereon.

3. Respondent Wickford Service, Inc. is the owner of the underground storage tanks located at the facility.

4. Respondent James H. Dobson is the President of Wickford Service, Inc.

5. The Facility is registered with the Department as UST Facility ID #03237.

6. The following information regarding the UST systems at the Facility has been registered with the Department:

UST ID#	DATE UST INSTALLED	CAPACITY (gal.)	CONTENT	SPILL CONTAIN.	LEAK DETECT.
001	8/70	1,000	Waste Oil	Yes	n/a
003	8/70	6,280	Gasoline	Yes	Yes
004	8/70	6,280	Gasoline	Yes	Yes
005	8/70	6,280	Gasoline	Yes	Yes

7. The above-referenced USTs were not precision tested during the following years:
   (a) 001: 1987, 1988, 1989, 1990, 1991 and 1992
   (b) 003: 1987, 1988, 1989 and 1991
   (c) 004: 1987, 1988, 1989 and 1991
   (d) 005: 1987, 1988, 1989 and 1991

8. Respondents did not submit to the Department any precision test results for the tanks and years identified in Finding of Fact No. 7.

9. After September 1, 1993, Respondents submitted to the Department the 1990 precision test results for tanks 003, 004 and 005.

10. Testimony from the Division established that Respondents' failure to precision test constituted a Type II Moderate violation for which the Respondents were assessed a $1,000.00 administrative penalty for each violation.

11. On or about October 1, 1993, Respondents installed a spill containment basin on tank 001.

12. On or about October 1, 1993, Respondents submitted to the Department written verification of the installation of the spill containment basin.

13. Testimony from the Division established that Respondents' failure to install the spill containment basin constituted a Type II Moderate violation (but see footnote 1 of this Decision).

14. Testimony from the Division established that the economic benefit portion of the penalty for failure to install the spill containment basin should be eliminated since the spill containment basin was installed subsequent to the issuance of the NOV, thereby removing any economic benefit from the violation.

15. Sandra Dobson is not involved and has not been involved with the operation of the Facility.

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. Respondents, as the owners and/or operators of the subject facility and the owners and/or operators of the UST systems located thereon are legally liable for regulatory compliance with the provisions in the UST Regulations concerning spill containment basins and precision testing at the facility.

2. In accordance with the UST Regulations, the UST systems located at the facility were required to be precision tested during the following years:

   a. #001: 1987, 1988, 1989, 1990, 1991, 1992

b. #003: 1987, 1988, 1989, 1990, 1991
c. #004: 1987, 1988, 1989, 1990, 1991
d. #005: 1987, 1988, 1989, 1990, 1991

3. The Division proved by a preponderance of the evidence that Respondents failed to precision test the UST systems at the facility during the years referenced in Finding of Fact No. 7 in violation of the UST Regulations.

4. The Division has not met its burden to prove by a preponderance of the evidence that Respondents failed to precision test tanks #003, #004 and #005 for the year 1990.

5. The Division proved by a preponderance of the evidence that Respondents failed to timely submit to the Department the 1990 precision test results for tanks 003, 004 and 005 in violation of the UST Regulations.

6. The Division proved by a preponderance of the evidence that Respondents failed to timely install a spill containment basin on UST #001 in violation of the UST Regulations.

7. The Division has not met its burden to prove by a preponderance of the evidence that Respondents failed to submit to the Department written verification of the installation of the spill containment basin in violation of the UST Regulations.

8. The 1992 Penalty Regulations are applicable to this matter.

9. Pursuant to Section 12(c) of the 1992 Penalty Regulations, the Division is required to prove the alleged violations by a preponderance of the evidence and establish in evidence the penalty amount and its calculation.

10. The Division established in evidence the penalty amount and its calculation for failure to precision test the UST systems at the facility during the years referenced in Finding of Fact No. 7.

11. The Division has not established in evidence the amount of the economic benefit portion of the penalty for failure to precision test the UST systems at the facility during the years referenced in Finding of Fact

No. 7.

12. The Division has not established in evidence the penalty amount or its calculation for failure to timely submit to the Department the 1990 precision test results for tanks 003, 004 and 005.

13. The Division established in evidence the calculation of the penalty for failure to install a spill containment basin but did not establish in evidence the amount of the penalty.

14. Pursuant to Section 12(c) of the 1992 Penalty Regulations, the Division has proved that Respondents violated the precision testing requirements for the tanks and years referenced in Finding of Fact No. 7, and has met its burden to establish in evidence the penalty amount and its calculation for those violations, which by mathematical computation results in an administrative penalty in the amount of eighteen thousand ($18,000.00) dollars. Although the Division has proved that the Respondents also violated UST Regulations regarding the submission of precision test results and the installation of spill containment basins, the Division has not met its burden to establish in evidence the penalty amount and its calculation for those violations.

15. Respondents have failed to prove by a preponderance of the evidence that the penalty for failure to precision test the UST systems at the facility during the years referenced in Finding of Fact No. 7 was not assessed in accordance with the 1992 Penalty Regulations.

16. An administrative penalty in the amount of eighteen thousand ($18,000.00) dollars for failure to precision test the UST systems at the facility during the years referenced in Finding of Fact No. 7 is not excessive.

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

ORDERED

1. Respondents' motion to dismiss Sandra Dobson as a party to this matter is Denied.

2. Respondents' request for reconsideration of their objection to testimony beyond those tanks and years identified in issue #5 set forth in the Prehearing Conference Record is Denied.

3. Within thirty (30) days of receipt of the Final Agency Order in this matter, Respondents shall bring the facility into full compliance with all UST Regulations including, but not limited to, performance of the following activities: Precision test all UST (tanks & piping) systems located at the facility that have not been tested within one calendar year of the date of this Final Agency Order or as otherwise required by Sections 10.06(A)(B) and 10.06(B)(9) of the UST Regulations.

4. In lieu of complying with paragraph 3, above, of this Order, within thirty (30) days of receipt of this Final Agency Order, Respondents shall close all UST systems at the facility in accordance with Section 15 of the UST Regulations.

5. Pursuant to R.I. Gen. Laws Ch. 42-17.6, the following administrative penalty is hereby assessed, jointly and severally, against each named Respondent:
$18,000.00

6. Respondents shall pay the administrative penalty within ten (10) days of the receipt of this Final Agency Order. Payment shall be in the form of a certified check made payable to the "General Treasury - Water & Air Protection Program Account", and shall be forwarded to:

R.I. Department of Environmental Management
Office of Business Affairs
235 Promenade Street, Rm. 340
Providence, Rhode Island 02908
Attn: Glenn Miller

Entered as an Administrative Order this 28th day of January, 1997 and herewith recommended to the Director for issuance as a Final Agency Order.

Mary F. McMahon
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
235 Promenade Street
Providence, RI 02908

Entered as a Final Agency Order this 14th day of February 1997.

Timothy R. E. Keeney
Commissioner
Department of Environmental Management
235 Promenade Street
Providence, RI 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within order to be forwarded, via regular mail, postage prepaid to George M. Landes, Esq., 300 Centerville Road, Warwick, RI 02886 and via interoffice mail to Brian A. Wagner, Esq., Office of Legal Services, 235 Promenade Street, Providence, Rhode Island 02908 on this 17th day of February, 1997.

Diane L. Stewart

APPENDIX A

LIST OF EXHIBITS

The below-listed documents are marked as they were admitted into evidence:

Division's Exhibits:

DEM 1 for Id	Property Title - dated 1/19/83 (1 p.).
DEM 2 Full	UST Registration Information - dated 8/20/90 (6 pp.)
DEM 3 Full	Certified Correspondence - dated 4/16/93 (3 pp.)
DEM 4 Full	Resume of Susan Cabeceiras.

Respondents' Exhibits:

Resp. 1 Full	Report from Whitco Testing, Inc. dated October 1, 1993 relative to a certain spill containment basin.