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

RE: DTP, INC. NOV NO. 726

DECISION AND ORDER

This matter was heard before the Administrative Adjudication Division for Environmental Matters ("AAD") of the Department of Environmental Management ("DEM"), or the ("Department"), on June 14, 15 and 16, 1993 at the Administration Building, One Capitol Hill, Providence, Rhode Island. This action is the result of a timely appeal taken by the Respondent from the Notice of Violation and Order ("NOVAO") issued by the Underground Storage Tank Program ("UST Program") on December 21, 1988.

AUTHORITY

This administrative proceeding was convened pursuant to the authority and requirements of the Administrative Procedures Act, R.I. Gen. Laws chapter 42-35 et seq, as amended; statutes governing the Department of Environmental Management, R.I. Gen. Laws chapter 42-17.1 et seq., as amended; the Administrative Adjudication Division for Environmental Matters R.I.G.L. 42-17-7.1 et seq. as amended; the Administrative Penalties for Environmental Violations Act, R.I. Gen. Laws chapter 42-17.6. and the Rules of Practice & Procedure for the Administrative Adjudication Division of the Department of Environmental Matters ("AAD Rules") effective July 10, 1990; Regulations for Underground Storage Facilities

Used for Petroleum Products and Hazardous Materials (1985 and 1992) (the "UST Regulations"), or ("Tank Regulations"), which regulations are promulgated pursuant to the authority of the Water Pollution Act, R.I. Gen. Laws chapter 46-12, as amended; the Groundwater Protection Act, R.I. Gen. Laws 46-13.1, as amended; and the Hazardous Waste Management Act, R.I. Gen. Laws 23-19.1, as amended, and the Rules and Regulations for Assessment of Administrative Penalties (promulgated in 1987 and 1992) (the "Penalty Regulations").

Representation

Brian Wagner, Counsel for the Department of Environmental Management, represented the State and James Mullen appeared as attorney for Respondent, DTP, Inc.

Witnesses

The following witnesses proffered testimony at the hearing:

Susan Cabeceiras - Environmental Scientist employed by DEM.

David R. Sheldon - Senior Sanitary Engineer employed by DEM.

George Potter - Manager, Wakefield facility.

Robert S. Potter - Principal of PRO, Inc., Manager South Kingstown facility.

Stipulations

The following stipulations were placed on the record on June 14, 1993 (T p. 3-5, Vol. I).

1. On or about March, 1988, an Application for Underground Storage Facilities was submitted to the Department by Dorothy Potter, acting in her capacity as president of DTP, in regard to the Tower Hill Road Facility.

2. The application for Facility #2778 indicated that four (4) steel UST's used for the storage of gasoline and two (2) UST's used for the commercial storage and sale of No. 2 fuel oil are located at the site, which UST;s are identified as follows:

3. Thereafter, the Tower Hill Road Facility was assigned the registration number 2778.

4. On or about March, 1988, an application for Underground Storage Facilities was submitted to the Department by Dorothy Potter, acting in her capacity as president of DTP, in regard to the Wakefield facility.

5. The application for Facility #2779 indicated that four (4) steel UST's used for the storage of gasoline are located at the site.

6. Thereafter, the Wakefield Facility was assigned the registration number #2779.

7. Said applications were submitted after the Department had advised respondent that it had failed to register or close the two facilities as required by § 7 of the Regulations for Underground Storage Facilities Used for Petroleum Products and Hazardous Materials (1985) (the "1985 UST Regulations").

8. As of August, 1988, DTP had not:

   (a) performed precision test results or submitted the results thereof to the Department;

   (b) installed line-leak detection equipment; or installed spill containment basins for Facilities #2778 or #2779 in accordance with § 9 of the 1985 UST Regulations.

9. The Application for Underground Storage Facilities submitted for the Tower Hill Road Facility, indicated that the six (6) UST's located at Facility #2778 were empty and temporarily out-of-use as of the March 28, 1988 application dated.

10. As of August 15, 1988, the UST's at the Tower Hill Road Facility were still closed and not in use.

11. As of December 1, 1988, the Tower Hill Road Facility and its tanks were still not in use but were being prepared to be reopened.

12. The UST's located at the Tower Hill Road Facility were closed for at least 240 consecutive days following the date of the submission of its Application for Underground Storage Facilities.

13. No request for an extended temporary closure of the Tower Hill Road Facility was ever submitted to the Director by DTP in accordance with § 15 of the 1985 UST Regulations.

14. The 1988 Notice of Violation and Order issued by the Department against DTP was issued after the Department had made significant attempts to resolve this matter through a Consent Agreement without proceeding to hearing.

15. Since the issuance of the 1988 NOV, DTP has continued to operate both the Tower Hill Road and Wakefield Facilities in noncompliance with the UST Regulations, which regulations were properly amended in 1992.

16. As a result of these alleged continuing violations of the UST Regulations, the Department moved to amend the 1988 NOV on February 22, 1993.

17. The Department's motion to amend was granted by Order, dated March 17, 1993.

18. In accordance with the terms of the Order of March 17, 1993, the Amended Notice of Violation and Order was served on DTP, Inc. on March 22, 1993 and received by DTP, Inc. on March 24, 1993.

19. As of the date of filing of this Supplemental Memorandum, no response to the Amended Notice of Violation and Order has been filed by DTP, Inc.

20. As of the date of the filing of this Supplemental Memorandum, DTP has not submitted any documentation to the Department to indicate that line leak detection equipment has been installed on each tank located at the Tower Hill Facility.

21. As of the date of the filing of this Supplemental Memorandum, line leak detection equipment has not been installed on each tank located at the Tower Hill Facility.

Experts:

The Prehearing Conference Record, dated June 8, 1993, indicates the parties stipulated to the expertise of David Sheldon as an expert in geology, hydrology, underground storage tank regulation and leaking underground storage tank remediation. (Bruce Catterall was also stipulated as an expert but did not testify during the hearing.)

Exhibits

The following exhibits are full exhibits that were either entered during the proceeding or agreed to prior to the hearing: (see T p. 38 Vol III)

DEM Full Exhibits

1. Site diagram of Respondent's Tower Hill Road facility (1 p.).

2. Correspondence dated March 21, 1988, from the Department to Respondent regarding its Tower Hill Road facility (1 p.).

3. Correspondence, dated March 21, 1988, from the Department to Respondent regarding its Wakefield facility (1 p.).

4. Application for Underground Storage Facilities, for Respondent's Tower Hill Road facility (6 pp.).

5. Application for Underground Storage Facilities, for Respondent's Wakefield facility (6 pp.).

6. Complaint/Inspection Report, dated August 15, 1988, by David Sheldon (1 p.).

7. Correspondence dated August 16, 1988 from the Department to Dorothy Potter (2 pp.).

13. Complaint/Inspection Report, dated December 1, 1988, by David Sheldon (1 p.).

14. Correspondence dated December 9, 1988 from the Department

to Harry W. Asquith, Jr., Esq. (1 p.)

15. Notice of Violation and Order dated December 22, 1988, with penalty worksheets, issued by the Department against DTP (9 pp.).

16. Correspondence dated December 22, 1988 from the Department to Harry W. Asquith, Jr., Esq. (1 p.).

17. Correspondence dated January 5, 1989 from the Department to Harry W. Asquith, Jr., Esq. (1 p.).

18. Correspondence dated March 7, 1989 from DTP, Inc.

19. Correspondence dated March 7, 1989 from Harry W. Asquith, Jr., Esq., to the Department (1 p.).

20. Certificate of Registration of Underground Storage Facilities, dated March 19, 1990, issued by the Department for Respondent's Wakefield facility (1 p.).

21. Certificate of Registration of Underground Storage Facilities, dated December 11, 1990, issued by the Department for Respondent's Tower Hill Road facility (1 p.).

22. Correspondence, dated June 5, 1991, from the Department to Robert Potter, with return receipt (2 pp.).

23. Request for Admissions, dated October 9, 1992, submitted by the Department (5 pp.).

36. Amended Notice of Violation dated March 19, 1993 (7 pp.).

41. Resume of David Sheldon

42. Resume of Susan Cabeceiras

45. Administrative Penalty Worksheet for Amended Notice of Violated, undated (3 pp). (for Amended Violation II).

52. Tower Hill Citgo, Sample Report, dated April 2, 1993, DEM sample ID, DTP-5, S1; ESS Sample ID, 930852-01 through 93-952-03 (3 pp.).

53. Tower Hill Citgo Sample Report, dated April 2, 1993, chain of custody report (1 p.).

3/30/95

54. Tower Hill Citgo, site and groundwater contour maps (3 pp.).

Respondent Full Exhibits:

b) 1989 Corporate Income Tax Return

c) 1990 Corporate Income Tax Return

l) Request for Hearing on NOV #GW 91-1019 to James W. Fester, dated October 1, 1991 and received by the Department on October 3, 1991.

m) Letter from Environmental Research of N.E. Ltd to George Potter dated July 17, 1987.

n) Subpoena duces tecum dated June 4, 1993.

o) Data Chart for tank system Tightness Test (1992 Precision Test Records).

Travel of the Case:

The Respondent in this matter is a Rhode Island corporation called DTP, Inc. ("DTP"). The company is the owner to two retail gasoline service stations located at 186 Main Street, Wakefield, RI (referred to as the Wakefield facility) and 2946 Tower Hill Road, South Kingstown (the Tower Hill facility). On December 21, 1988, the Department of Environmental Management ("DEM") or (the "Department"), issued a Notice of Violation and Order (NOVA) to the corporation which alleged that DTP violated the Department's Underground Storage Tank Regulations ("UST" or "Tank Regulations") for failure to register and submit precision tank test results. As a result of this violation, the Department ordered

compliance with the regulations and payment of a $30,600.00 administrative penalty. In accordance with 42-17.6-4, the Respondent filed a timely request for an administrative hearing on December 28, 1988.

This matter was referred to an ad hoc Hearing Officer for adjudication on February 15, 1989 by then Director, Robert Bendick. On March 2, 1989, the Hearing Officer was informed by counsel for the company and DEM that the parties were attempting to settle and requested a stay of the administrative proceedings. This stay was granted and no further action was taken on this matter until July 17, 1991. At that time, the Clerk of the newly-established Administrative Adjudication Division ("AAD") requested information on the status of the case. The violation had not been resolved and on December 20, 1991 AAD scheduled a Status Conference.

Respondent failed to appear at the hearing and at the request of the State, the Administrative Hearing Officer entered a Conditional Order of Default. The Status Conference Order and the conditional default were mailed to attorney Harry Asquith, the attorney of record for DTP. Mr. Asquith subsequently informed the tribunal that he had had no dealings with DTP since 1989 but would make attempts to notify the principals of the company of this pending violation.

On January 3, 1992, Mr. George Potter called the AAD Clerk to inform the tribunal that he had been contacted by Mr. Asquith and provide the Clerk of the correct mailing address for the company. He further informed the Clerk that his wife owned DTP but that neither he nor his wife had any prior notice of the scheduled hearing. Based upon these assertions, the Hearing Officer assigned to the case entered an administrative order (dated January 7, 1992) withdrawing the Conditional Order of Default subject to DEM objection. On January 10, 1992, the State objected and the matter was set down for oral argument. As a result of that hearing, the Hearing Officer withdrew the conditional default and set the matter down for Status Conference on April 10, 1992 (see Administrative order February 4, 1992).

At the April 10, 1992 Status Conference, DTP was represented by Daniel Archetto (see entry of appearance dated January 31, 1992) and all parties agreed to a control date to pursue settlement of July 10, 1992 (see Administrative Order April 14, 1992).

No settlement was reached between the parties and a Prehearing Conference was scheduled for August 11, 1992. To accommodate DEM legal counsel, Brian Wagner's vacation schedule, the matter was subsequently rescheduled for prehearing on September 11, 1992. Due to Mr. Archetta's court

schedule, the matter was again postponed to October 9, 1992 (see Administrative order September 15, 1992).

At the October 9, 1992 Prehearing Conference, the State submitted a Request for Admissions. On October 21, 1992, Mr. Archetta filed a Notice of Withdrawal. Subsequent to his withdrawal, Mr. Archetta filed a joint stipulation with DEM counsel Wagner extending Respondent's deadline to file a prehearing memo and Request for Admissions to November 16, 1992. This stipulation was rejected by Hearing Officer McMahon who ordered Respondent to file a prehearing memo by October 16, 1992 (see administrative order October 14, 1992).

Alleging Respondent never filed the required Prehearing Conference Memo, the State filed for an Entry of Default. An Administrative Order entered February 5, 1992 denied DEM's motion noting that the Prehearing Conference Memo Order had never been sent to DTP's previous counsel but never to Respondent's address. A hearing date was set for February 15, 1992.

Respondent appeared pro se for the February 15, 1992 administrative hearing and was granted leave to obtain new counsel over the Department's objection. A new hearing date was scheduled for April 19, 1992 (see Administrative order dated February 17, 1992).

At the February 15, 1992 hearing, the State requested

the unanswered Request for Admissions submitted October 9, 1992, be admitted. By written decision issued March 15, 1992, the Hearing Officer granted DEM's request (these admissions were based upon the original NOVA which was later amended).

The State also filed a Motion to Amend the original NOVA on February 22, 1992 (Amended Violation I) and a Motion to Compel Discovery. Respondent objected and the State filed a written response to the objection on March 12, 1992. In conjunction with the Motion to Amend, the State filed a second Request for Admissions and a Request for Production. Both motions were objected to by DTP in a letter to DEM dated February 26, 1992. The Hearing Officer granted the State's request to amend the violation on March 17, 1992 and set the matter down for prehearing April 12, 1993 and hearing April 19, 1993 (see administrative order dated March 17, 1993).

On April 9, 1993, Mr. James Mullen entered his appearance on behalf of the DTP, Inc. On the same day, Respondent's attorney requested an extension of time to comply with the discovery orders and motions from the State. In his affidavit and request, Mr. Mullen stated he was unable to fully apprise himself of the case before April 12, 1993 because George Potter was attending funeral services for his brother.

The company's motion was granted by the Hearing Officer

and once again new dates were set. A Prehearing Conference was scheduled for June 4, 1992 and the matter was placed on the calendar for hearing on June 14, 1992. (see administrative order dated April 12, 1992). The Respondent timely answered the Amended Notice and Violation (amended Notice I) and responded to the Department's second Request for Admissions on April 28, 1993.

A full Prehearing Conference finally convened on June 14, 1993 and the Hearing Officer entered a Prehearing Conference Record on June 8, 1993. The hearing was conducted on June 14, 15 and 16.

At the onset of the hearing, the DEM again moved to amend the Notice of Violation and Order (Amended Violation II). Mr. Mullen had no objection to the amendments (T. P. 10 Vol I). The State was not prepared to submit a written violation so the amendments to the violation were placed on the record (see T P.5-10, Vol I). Amended Notice of Violation II was submitted to the tribunal on June 18, 1993 and Respondent filed his answers to that NOVAO on July 2, 1993.

After the hearing was completed, both parties requested the Hearing Officer to accept written closing arguments. The Hearing Officer granted that request and asked the parties to submit memos interpreting the terms owner/operator as used in the UST regulations. Dates were then set for submission of

briefs and reply briefs. (T. p. 43-45, Vol. III).

In the interim, the presiding Hearing Officer's term expired. On August 31, 1993, Respondent requested the original Hearing Officer render a decision in this matter. The Chief Hearing Officer set the matter down for oral argument. On October 1, 1993, memos were submitted by both parties. Over strenuous objection from the State, the Chief Hearing Officer agreed the appointment of the original Hearing Officer on an ad hoc basis was warranted. This decision was reaffirmed by DEM Director, Michael Annarummo, on November 30, 1994. After a discussion with the Chief Hearing Officer and Mr. Annarummo, the original Hearing Officer agreed to render a recommended decision.

RECOMMENDED DECISION:

In accordance with Rhode Island Superior Court of Civil Procedures Rule 15 and the applicable case law, (Gormley v. Vartim, 121 RI 770, 430 A2d, 256 (1979), Zito v. Cassara, 309 RI 112, 281 A2.d, 303 (1971)); this recommended decision is based upon the second Amended Notice of Violation and Order (Amended Violation II) introduced by the State (without objection by Respondent) at the beginning of the administrative proceeding. (T p. 5-10 Vol II).

In essence, Amended Violation II alleges that DTP violated various sections of the 1985 and 1992 UST

regulations, orders the company to comply with those regulations and assess an administrative penalty in the amount of $118,900.00 (DEM Full Exhibit 45).

It is the State's responsibility to prove by preponderance of the evidence the occurrence of each instance or omission alleged in the violation (see RIGL 42-17.6-4(a)). The Hearing Officer will divide this decision into two parts: An evaluation and determination if DEM has met its burden with regard to the allegations and a review of the penalty assessed by the State to ascertain if it comports with the penalty regulations and the Administrative Penalties for Environmental Regulations codified in RIGL 42-17.6 et seq.

I. Did Respondent violate 1985 UST Regulation 9(c) and 1992 UST Regulation 10.05(B) relating to precision-testing requirements as alleged in section D(1) of the violation?

To establish the State's claim that DTP, Inc. had not precision tested, the DEM presented Susan Cabeceiras, an environmental scientist employed by the Department for the last seven years. She has been working for the UST program for eleven months (T p. 11-12 Vol. I). The Hearing Officer found her testimony to be credible and informative. Ms. Cabeceiras testified that she reviewed the DEM file on this matter and determined the tests required by DEM were not

submitted. She explained that the Department assumes if test data is not submitted that the required tests were not conducted. She further noted that the 1985 and 1992 regulations requiring precision testing were the same. (T p. 30 Vol. I).

As a defense to the Department's allegations, Respondent presented two witnesses George Potter, manager of the Wakefield facility and husband of DTP, Inc.'s sole shareholder Dorothy Potter and Robert Potter, President of Pro-Oil, Inc. Robert Potter, nephew to George Potter, has leased the Tower Hill Station from DTP, Inc. and exclusively manages that facility.

A review of Mr. George Potter's testimony shows that, although his testimony appeared truthful and credible, he was unable to offer any documentation or explanation regarding precision testing except in one instance. Apparently he requested an independent company to precision-test the Wakefield tanks in 1987 but that those tests were never conducted. However, as an alternative, the testing company "stuck" the tanks over two days to see if any product had leaked (T p.27, Vol. II Resp. M full). In rebuttal, Ms. Cabeceiras testified that sticking an underground storage tank was not an acceptable method of precision testing in either the 1985 or 1992 regulations (T p. 5 and p. 18 Vol. III). Mr

Potter also stipulated (Stipulation 9(a)) prior to hearing that as of August 1988, DTP had not performed precision test in accordance with 1985 UST Regulations.

Mr. Robert Potter testified that he leased the Tower Hill facility from DTP in January 1989 and arranged for precision testing for the years 1989, 90, 91 and 92. However, he never submitted copies of these tests to DEM (T p. 39 Vol. II). He could not produce any documentation to bolster his claim that testing was done in 1989 - 1991. Nor could he confirm that he apprised DEM of the precision test results. The Hearing Officer also found Mr. Potter's testimony to be credible but without any documentation that the tanks were tested in 1989-1991, the Hearing Officer cannot accept his oral assertions as fact.

Robert Potter was able to produce evidence that testing was done in the year 1992. Exhibit O submitted by Respondent indicates precision tests were performed on three tanks at Tower Hill Road in 1992, (tanks 001, 002 and 003). Ms. Cabeceiras in her rebuttal testimony, stated that the documentation presented showed the 1992 test were valid and accurate and acceptable to the Department (T p. 3-6 Vol. III). She also testified that as a result of this information the violation would be removed.

At the close of the hearing, DEM's legal counsel

reiterated the position expostulated by Ms. Cabeceiras stating "Based on the information provided to the Department during yesterday's proceedings, the Department will further amend its Notice of Violation and worksheet summary to delete violations from the Tower Hill facility for tanks 1, 2 and 3 for tests allegedly not conducted in 1992" (T.p. 36-37 Vol III). However, it should be noted that Amended Violation II submitted to this tribunal on June 18, 1992 did not delete the violations.

In addition to presenting witnesses, Respondent has put forth a legal argument. The company argues that the 1985 regulations only imposes responsibility or sanctions on operators for noncompliance with the regulations and contends that since DTP leased the Tower Hill facility to Pro-Oil, Inc. in 1989, it is not the party responsible for precision testing those tanks.

Respondent correctly points out that section 9 of the 1985 regulations is silent as to owners' obligations. The owner/operator dichotomy was not clarified in the regulations until the installation of the 1992 rules. The 1992 regulations clearly state that the owner or operator is responsible for precision testing. However, this issue was recently settled by administrative decision in the matter of Barbara D'Allesandro (AAD No. 91-006 GWE, NOV UST 91-00278

final agency decision, August 16, 1993).

In D'Allesandro, the Respondent argued that she was not responsible for installing spill containment basins or conducting precision testing pursuant to a lease executed with the gas stations operator. The Hearing Officer's decision upheld by the Director found that although the 1985 regulations did not specifically address the responsibility of owners, that a clear reading of the regulations as a whole showed owners and operators were equally responsible (final agency decision p. 12).

Rejecting D'Allesandro's argument that she was not liable for any nonfeasance which occurred as a result of the operator's actions the Final Agency Decision stated "owners of facilities cannot shed their responsibility for the maintenance of the UST's by delegating such duties to operators. It is the owner's prerogative to select an operator for the facility and the UST program should not be responsible for a lack of communication between contacting parties or between the contract person and the owner" (Final Agency Decision p. 15).

Testimony and documentary evidence clearly shows that DTP, Inc. has been the owner of both the Wakefield and Tower Hill facilities for approximately 5-6 years. (T. p 8 Vol. II DEM exhibit 4 & 5). Adhering to the administrative precedent

established in D'Allesandro, the Hearing Officer must reject Respondent's argument and finds DTP, Inc. as owner of the gas stations, is responsible for complying with precision testing under the 1985 and 1992 regulations.

After reviewing all the witnesses' testimony, documentary evidence and stipulations, the Hearing Officer finds that the State has shown by preponderance of the evidence that the Respondent did not comply with UST regulations to precision test underground storage tanks in these instances:

1. DTP, Inc. violated 1985 UST regulation 9(c) at the Wakefield facility for the following tanks and years:

   Tank 001 in the years 1987, 1989, 1990, 1991
   Tank 002 in the years 1987, 1989, 1990, 1991
   Tank 003 in the years 1987, 1988, 1990, 1991
   Tank 004 in the years 1987, 1988, 1990, 1991

2. DTP, Inc. violated 1992 UST regulation 10.05(B) at the Wakefield facility on tanks 001, 002, 003 and 004 in the year 1992.

3. DTP, Inc. violated the 1985 UST regulation 9(c) at the Tower Hill facility for the following tanks and years:

   Tank 001 in the years 1987, 1989, 1990
   Tank 002 in the years 1987, 1989, 1990
   Tank 003 in the years 1987, 1989, 1990
   Tank 004 in the years 1987, 1988, 1989, 1990

4. DTP, Inc. violated 1992 UST regulation 10.05(B) at the Tower Hill facility on tanks 004, 005 and 006 in the year 1992.

The State was unable to prove by preponderance of the evidence that Respondent had not complied with regulatory testing as required in 1992 regulation 10.05(B) at the Tower

Hill facility on tanks 001, 002, 003 in 1992.

II. Did Respondent violate 1985 UST Regulation 9(a) and 1992 UST Regulation 10.06 and 10.07 relating to line-leak detection requirements as alleged in section D(2) of the violation?

Regulation 9(a) of the 1985 UST Regulations requires that "all underground storage tanks at existing facilities that are equipped with remote pumps shall be fitted with line-leak detection systems within two years of the effective date of these regulations". The State has limited this violation to the Tower Hill facility (DEM 45 (C) 15).

Testimony elicited at the hearing shows that the dispensing system used at the Tower Hill facility is something other than remote pumps. The uncontradicted testimony of both Robert and George Potter, which the Hearing Officer accepts as truthful and credible, is that the pumps at Tower Hill are suction pumps (T. p. 14-16, p. 31 & 38, Vol. II). Also, Ms. Cabeceiras on cross-examination indicated that DEM had nothing in its files to indicate the pumps at Tower Hill were remote pumps (T p. 75 Vol I). Apparently, the State's sole basis for this violation was the registration form submitted by DTP in which the DTP, in response to the question, "What type of dispensing system is used at the facility?", checked the box

on the form marked "other". (DEM 4) Curiously, at no time did the Department request Respondent to explain what was meant by "other" prior to filing the violation.

The Hearing Officer finds the State has failed to produce any evidence to show that Respondent's pumps were remote pumps and therefore must have a line-leak detection system installed.

The 1992 UST regulation 10.07 specifically requires UST's which are equipped with pressured piping to be fitted with line-leak detection systems by May 8, 1987. A review of the definitions listed in the 1992 regulations offer no definition of pressured piping. The only reference to pressured piping came from Susan Cabeceiras. In response to DEM legal counsel's inquiry regarding DEM 4, she explained there are two types of piping used on gasoline storage tanks, suction-type piping and remote piping, also known as pressured-type piping (T. p-33 Vol I). Relying on Ms. Cabeceiras' testimony that pressured piping is associated with remote pumps and having previously found that the Department elicited no evidence to show the pumps at Tower Hill were remote tanks, the Hearing Officer finds the State has not met its burden by preponderance of the evidence to show that Respondent violated Section 10.07 of the 1992 UST regulations.

Regulation 10.06 of the 1992 tank regulations is entitled

"leak detection for piping". This regulations is divided into three sections. (1992 UST Regulation p. 29-30).

The State did not particularize any section of this regulation in the violation . In fact, a laborious review of the transcript shows the only reference to leak detecting for piping was elected during the cross-examination of Susan Cabeceiras' rebuttal testimony (T. p. 16 Vol. III). The scientist was asked by Mr. Mullen to review Respondent's exhibit O, the 1992 precision tests submitted by Robert Potter on the Wakefield facility tanks 001, 002 and 003. He elicited from her that her review of the test calculations did not lead to any reason to question the test results for tightness on those three tanks. (T. p. 16 Vol III).

The Department did not produce any testimonial or documentary evidence relating to any section of regulation 10.06. Absent any specific information on this issue, the Hearing Officer must find the State failed to establish by preponderance of the evidence that Respondent violated section 10.06 of the 1992 tank regulations.

III. Did Respondent violate the 1985 UST Reg. 9(e) and 9(f) and 1992 UST regulation 10.08(H) and 10.13 requiring submission of written, verification of compliance with precision testing and line leak detection requirements as alleged in section D(3) of the Violation?

Regulation 9(e) and 10.08(H) both require that all precision tests be submitted to the Director of DEM within 15 calendar days of the test completion. All evidence presented on this issue demonstrates conclusively that no precision test results were ever submitted to the Director. Not only did Susan Cabeceiras testify that DEM's files had no record of any precision tests being submitted (T. p. 30 Vol. I) but Respondent admitted in stipulation 9(a) that no written copies of any precision tests had been given to the Director. Furthermore, having previously found that Respondent did not conduct the required precision tests on various tanks as required in the regulations the only logical conclusion is that no test results could be submitted for tests which were not conducted.

Therefore, the Hearing Officer finds DEM has satisfied its burden by preponderance of the evidence that Respondent violated section 9(e) and 10.08(H) of the 1985 and 1992 tank regulations at the Tower Hill and Wakefield facilities for the tanks and years alleged in the violation.

Regulation 9(f) and 10.13 refer to written verification for compliance with leak line detection systems. The Hearing Officer has already made a finding that the Department did not present sufficient evidence to show the leak-line detection system requirements set forth in regulations apply to the

Respondent. Similarly, the Hearing Officer finds the State has not met its burden to show DTP was required to provide any written verifications for leak-line detection systems.

IV. Did Respondent violate UST Regulation 15 relating to closure/temporary closure/or abandonment of UST's as alleged in section D(4) of the Violation?

The closure regulations set forth in section 15 of the 1985 regulations extend to four pages. Once again the State did not specify which subpart of the regulation the Respondent allegedly violated. It is not the Hearing Officer's purview to select the appropriate subsection DTP violated nor would it be prudent to guess at the State's intent.

A careful view of the testimony of all witnesses, exhibits and stipulations shows that the evidence presented to this tribunal regarding closure established the following facts: (1) that the Tower Hill facility was closed from at least March 28, 1988 through December 1, 1988 (T. P. 35-40; p. 128, 132, Vol I, stipulation 10-14, exhibit 4, 6, 13) and (2) according to the testimony of Susan Cabeceiras, DTP never petitioned the Director for permission to extend the temporary closure of Tower Hill facility beyond the 180 day period. (T. p. 40-42, Vol. I DEM 6 and 15).

The Hearing Officer finds the State established these facts by preponderance of the evidence but, without further

guidance from the regulatory subsections, cannot conclude how these facts relate to specific sections of the closure regulations.

V. Should the penalty assessed in the violation be affirmed?

The ability of DEM to issue administrative penalties is statutorily granted in RIGL 42-17-6 entitled "Administrative Penalties for Environmental Violations Act", and is codified in the Department of Environmental Management Rules and Regulations for the Assessment of Administrative Penalties promulgated in August, 1987 and May, 1992.

The Director of DEM is authorized by RIGL §42-17-6.2 to assess an administrative penalty to any person who fails to comply with any rule, regulation, order, permit, license or approval issued by the Division or any law which the Division has the authority to enforce. In this case, the Department has assessed Respondent an administrative fine in the amount of $118,900.00. This pecuniary assessment was derived from the Administrative Penalty Assessment Worksheet Summary attached to Amended Violation II. (DEM 45 (F)).

The violations alleged in this matter address occurrences which were committed from 1988 through 1992. The penalty rules used by DEM were revamped in 1992 and went into effect on May 25, 1992. Prior to that date, the Department relied on the criteria set forth in the 1987 penalty regulations to

determine any monetary fine. Stated in this violation is the assertion that DEM has calculated the entire penalty based upon the standards mandated by the 92 regulations (DEM 45 F(2)). In its pursuit of regulatory compliance the State has an obligation to carefully consider and apply the appropriate regulatory criteria before assessing an administrative penalty. 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.

The violations to which the Hearing Officer has previously determined that DEM has met its burden but occurred prior to the promulgation of the 1992 penalty rules are:

1) 1985 UST regulation 9(c) at the Wakefield facility for the following tanks and years:

Tank 001 in the years 1987, 1989, 1990, 1991
Tank 002 in the years 1987, 1989, 1990, 1991

Tank 003 in the years 1987, 1988, 1990, 1991
Tank 004 in the years 1987, 1988, 1990, 1991

2) 1985 UST regulation 9(c) at the Tower Hill facility for the following tanks and years:
Tank 001 in the years 1987, 1989, 1990
Tank 002 in the years 1987, 1989, 1990
Tank 003 in the years 1987, 1989, 1990
Tank 004 in the years 1987, 1988, 1989, 1990

3) 1985 UST Regulation 15 relating to closure at the Tower Hill facility for closing the facility for at least 240 consecutive days and for failure to request permission for closure and/or request permission to extend any closure.

4) 1985 UST regulation 9(e) for failure to submit verification of compliance with precision testing at both facilities for the following tanks and years:

Tower Hill Facility:

Tank 001 in the years 1987, 1989, 1990
Tank 002 in the years 1987, 1989, 1990
Tank 003 in the years 1987, 1989, 1990
Tank 004 in the years 1987, 1988, 1989, 1990

Wakefield Facility:

Tank 001 in the years 1987, 1989, 1990, 1991
Tank 002 in the years 1987, 1989, 1990, 1991
Tank 003 in the years 1987, 1988, 1990, 1991
Tank 004 in the years 1987, 1988, 1990, 1991

The 1992 Penalty Regulations may appropriately be applied to the remaining founded violations which are:

1992 regulations 10.05(B) and 10.08(H).

The penalty amount assessed against Respondent for

failure to precision test at the Tower Hill facility under regulations 10.05(B) of the 1992 penalty rules is listed on the Administrative Penalty Assessment Worksheet Summary as $41,000. At the Wakefield gas station, the State presented a figure of $20,000. These monetary figures were calculated using all missed precision tests alleged in the violation not just the tests conducted in 1992.

Having determined the 1992 regulations do not apply to violations committed prior to the promulgation of those rules, it is necessary to cull out the precision test violations which occurred in 1992 and recalculate the penalty. Based upon the testimony and documented evidence presented, in particular the Administrative Penalty Assessment Worksheet Summary, the Hearing Officer finds three precision tests were not conducted in 1992 at the Tower Hill gas station and four tests at the Wakefield facility.

Using the appropriate penalty matrix provided in the rules, (see Water Pollution Control Penalty Matrix, 1992 UST Regulations, Appendix 8), the Department classified the infractions committed under 10.05(B) at the Wakefield station as a Type II minor violation and assessed $1,000 for each missed test. At the Tower Hill facility, violations were classified as Type I minor violations and assessed $2,000 per missed test. In addition, three tests deemed "leak related"

were classified as Type I minor and assessed $5,000 per missed test. (DEM 45) It is unclear from the evidence if these infractions occurred before or after the promulgation of the 1992 Penalty Rules.

The State presented two witnesses to discuss these penalty assessments. Susan Cabeceiras, the Department's main witness on this issue, opined that the penalty assessed to Respondent was made in accordance with the penalty rules (T. p. 54 Vol I). She based her opinion on a review of the Administrative Penalty Assessment Worksheet Summary found in the DEM file and attached to the NOVAO (T. p. 53-55 Vol I). Ms. Cabeceiras' testimony revealed that although she can generally recite the regulations, she had no personal knowledge of how this penalty was determined, what standards were used or who reviewed the assessed penalty. Her testimony was quite clear that she did not help compute the penalty or in any way participate in the assessment. (T. p. 83-84, Vol I). Furthermore, she stated that no Supervisor or Division Chief existed when the penalty was derived and that the only person who she was aware of who participated in the decision to establish the penalty amount was legal counsel Brian Wagner (T. p. 83-84, Vol I), T. p. 29 Vol III, T. p. 57, 68, 69 Vol I). Since Ms. Cabeceiras had no knowledge or even familiarity with how this particular penalty was calculated, the Hearing

Officer finds her testimony on this issue to be of little value.

Testimony revealed that failure to conduct precision tests is generally considered a Type II minor offense because the offense has a high but indirect effect on the environment (T. p. 54 Vol. I) (1992 Regulation 10(a)(1)(B)). The State has alleged that the penalty for infractions at Tower Hill constitute a Type I violation. Under the regulation, a Type I violation must have a direct impact on the environment.

To bolster their claim, DEM presented David Sheldon. Mr. Sheldon is a principal sanitary engineer employed by DEM for the past twelve years and who was been working in the underground storage tank section for the past six years. The main thrust of Mr. Sheldon's testimony was that gas contamination at Tower Hill had infected the groundwater in the area.

Mr. Sheldon testified that only preliminary data was available to verify the DEM's claim. He stated he had no engineering data or specific information to assert that the groundwater contamination resulted from a leak at the Tower Hill Station. In fact, the scientist proffered on cross-examination that the Department had identified other potential sources for the contamination in the area. (T. p. 143-146, Vol. I). Counsel for DEM then elicited from Mr. Sheldon that

in 1991 a NOVAO was issued to DTP alleging groundwater contamination from the Tower Hill Station and a Compliance Order was entered by the Superior Court. However, further testimony revealed that the Compliance Order was based upon a Judgment of Default, not on findings of fault by the Court (T. p. 34 Vol I). Mr. Sheldon then specifically stated that he could not conclude to a reasonable degree of scientific certainty that the underground tanks at Tower Hill were the source of any gasoline contamination in the area. (T. p. 144 Vol I).

Evidence presented at hearing shows the Department is unable to document a connection between UST at Tower Hill and gasoline contamination. Since DEM has failed to establish a basis for upgrading the penalties at Tower Hill to Type I, the Hearing Officer finds the precision test violations at Tower Hill facility should be reduced to the same classification as Wakefield, Type II/minor.

Calculating the Tower Hill penalty for the three precision tests not conducted in 1992 using the Type II minor rate of $1,000 per violation, the Hearing Officer finds the correct fine levied against this facility is $3,000. Applying the appropriate arithmetic to the four missed tests at the Wakefield station, the Hearing Officer finds the correct penalty calculation is $4,000.

It should be noted that included in the penalty assessed to the Tower Hill facility in Amended Violation II was a fine for precision tests allegedly not submitted on tanks 001, 002 and 003 in 1992. As a result of the testimony of Robert Potter, documents presented by him at the hearing, admissions by Susan Cabeceiras that the 1992 tests on tanks 001-003 were valid as well as assertions from legal counsel that Respondent would not be charged with violating the 1992 regulation on those three tanks, the Hearing Officer found DEM had not met its burden with regard to those violations. Relying on that finding, the Hearing Officer has deleted those tests from the penalty calculation.

Contrary to the language set forth in RIGL 42-17-6.4 and the 1987 penalty rules which requires the Department to justify any pecuniary assessment, Section 12(C) of the 1992 regulations shifts the burden to Respondent to show that:

> 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.

Reviewing the corrected penalty in accordance with the applicable 1992 penalty regulations and applying the appropriate burden set forth in Regulation 12(C), the Hearing Officer finds the penalty assessed to DTP for violating regulation 10.05 (B), is within the parameters of the

regulations and should be affirmed.

The Respondent has been assessed a $300 penalty for failure to timely submit precision test results from the Tower Hill gas station conducted in 1992 to the Department as is required under 1992 regulation 10.08(H) (no such penalty was assessed at the Wakefield station). Failing to submit a precision test result to the Director was classified in the violation as a Type III minor violation (1992 Penalty Reg. 10(a)(1)(C)T. p. 8-15 Vol III) and was assessed a penalty of $100 per test. Reviewing the Water Pollution Control matrix (1992 Penalty Rules appendix p. 8) section 10 and 12 of the regulations and the applicable burden of proof, the Hearing Officer finds the State has determined this penalty in accordance with the criteria for assessment and calculation listed in the 1992 penalty regulations and should be affirmed.

An administrative penalty may only be assessed for an infraction that constitutes noncompliance with a legal requirement (1992 Regulation Subsection 8). In this matter the Hearing Officer has found the State was not able to prove Respondent violated sections 10.06, 10.07 and 10.13 of the 1992 regulations. The State assessed DTP a $15,000 penalty for violating 1992 regulation 10.06 and 10.07 but failed to assign any fine to section 10.13. Since this administrative penalty was assessed to violations which were shown to be

unfounded in accordance with the penalty regulations, the Hearing Officer has eliminated the $15,000 fine from the total penalty calculation.

The total penalty assessed to DTP for regulatory violations included an additional fine based on the "economic benefit for noncompliance". Cited in section 10(C) of the 1992 rules is the authority for the Department to offset the benefit to the violator for failure to adhere to the regulation. In this case DEM assessed DTP an economic advantage penalty at Tower Hill in the amount of $5,600 and $7,000 at the Wakefield facility. The fine was derived from counting the number of times the tests were not completed since 1987 multiplied by the average 1992 cost of a precision test. Reviewing the evidence, it is apparent that four precision tests were not performed at the Wakefield facility in 1992 and three tests at Tower Hill. Multiplying the number of tests not conducted in 1992 by $350, the average price for conducting a precision test in 1992, the economic advantage penalty result at the Tower Hill gas station is $1,050 and at the Wakefield facility is $1,400.

Applying the applicable burden of proof to the economic benefit assessment portion of the penalty, (see 1992 UST Regulation 10(C), the Hearing Officer finds that Respondent has not shown by preponderance of the evidence that the

penalty assessed by the Department was outside the scope of the regulations. In addition, the Hearing Officer finds that, using the appropriate arithmetic, the imposition of such a penalty for the 1992 violations is within the parameters outlined in section 10(C) of the regulations and should be affirmed.

In summary, having reviewed the penalty assessed to DTP for founded violations which occurred under the 1992 regulations, the Hearing Officer finds that (1) for violating 1992 UST regulation 10.05(B) at the Wakefield facility, Respondent owes an administrative fine in the amount of $4,000. (2) for violating 1992 UST regulation 10.05(B) at the Tower Hill Station, Respondent owes an administrative fine in the amount of $3,000. (3) for violating 1992 UST regulation 10.08(H) at the Tower Hill facility, DTP owes an administrative fine in the amount of $300. (4) That the penalty for economic benefit for noncompliance under the 1992 regulations at the Wakefield facility is $1,400; at Tower Hill facility, $1,050.

Deleting the monies assessed to DTP for violations that were unfounded, the Hearing Officer concludes that the entire penalty owed by DTP for infractions which occurred in accordance with the 1992 penalty rules is $5,400.00 at the Wakefield service station; and $4,350.00 at the Tower Hill

station for a total administrative fine of $9,750.00

Any violations which were committed when the 1987 penalty rules were in effect must be recalculated by the Department using the appropriate criteria and standards in place at the time the infractions occurred.

FINDINGS OF FACT & CONCLUSIONS OF LAW

After careful review of all testimonial and documentary evidence, and assessing the credibility of the witnesses the Hearing Officer makes the following Findings of Fact and Conclusions of Law on which this Recommended Decision and Order is based:

Findings of Fact:

1. That a Prehearing Conference was held in regard to this matter on June 4, 1993 at the offices of the Department of Environmental Management, Administrative Adjudication Division, One Capitol Hill, Third Floor, Providence, Rhode Island 02908.

2. That a hearing was held with regard to this matter on June 14, 15 and 16, 1993 at the offices of the Department of Environmental Management, Administrative Adjudication Division, One Capitol Hill, Third Floor, Providence, Rhode Island 02908.

3. That DTP, Inc. ("DTP" or the "Owner") is a Rhode Island corporation and is the owner of two certain parcels of

property referred to herein as:

(a) The "Tower Hill Facility" located at 2949 Tower Hill Road, South Kingstown, Rhode Island, otherwise known as South Kingstown Assessor's Plat 18-2, Lot 7; and

(b) The "Wakefield Facility" located at 186 Main Street, Wakefield, Rhode Island, otherwise known as South Kingstown Assessor's Plat 57-1, Lot 56.

4. On or about March, 1988, an Application for Underground Storage Facilities was submitted to the Department by Dorothy Potter, acting in her capacity as president of DTP, in regard to the Tower Hill Road Facility and the Wakefield Facility.

5. The Underground Storage Tank Facility Registration information for both facilities also identifies DTP as the owner of certain underground storage tanks ("UST's" or "tanks") located at the facility.

6. That Dorothy Potter is the sole shareholder of DTP, Inc.

7. That George Potter is the manager of the Wakefield facility.

8. That Robert Potter is President of Pro-Oil, Inc. and manager of the Tower Hill Facility.

9. That Robert Potter has a lease with DTP, Inc. to manage Tower Hill in 1988.

10. The Tower Hill Facility is registered with the Department pursuant to UST Regulation 8.00 and is identified as UST Facility Registration No. 2778.

11. The Wakefield Facility is registered with the Department pursuant to UST Regulation 8.00 and is identified as UST Facility Registration No. 2779.

12. On or about December 21, 1988, the Department issued a Notice of Violation and Order (the "1988 NOV") against DTP, Inc.

13. That in response to this violation, Respondent filed a timely request for an adjudicatory hearing on December 28, 1988.

14. That the Department moved to amend the 1988 NOVAO on February 22, 1993.

15. The Department's motion to amend was granted by Order, dated March 17, 1993.

16. In accordance with the terms of the Order of March 17, 1993, the Amended Notice of Violation and Order was served on DTP, Inc. on March 22, 1993 and received by DTP, Inc. on March 24, 1993.

17. That on June 18, 1993 DEM filed a second amended violation referred to as "Amended Violation II".

18. That the amended violation was submitted without objection from the Respondent.

19. That Respondent timely answered Amended Violation II on July 2, 1993.

20. That this recommended decision is based on allegations contained in Amended Violation II in accordance with RICP Rule 15 and applicable case law.

21. That DTP has failed to precision test the following tanks at the Wakefield facility for the following tanks and years:

    Tank 001 in the years 1987, 1989, 1990, 1991, 1992
    Tank 002 in the years 1987, 1989, 1990, 1991, 1992
    Tank 003 in the years 1987, 1988, 1990, 1991, 1992
    Tank 004 in the years 1987, 1988, 1990, 1991, 1992

22. That DTP failed to precision test the following tanks at the Tower Hill facility for the following tanks and years:

    Tank 001 in the years 1987, 1989, 1990
    Tank 002 in the years 1987, 1989, 1990
    Tank 003 in the years 1987, 1989, 1990
    Tank 004 in the years 1987, 1988, 1989, 1992
    Tank 005 in the year 1992
    Tank 006 in the year 1992

23. That precision tests were conducted at the Tower Hill facility for the following tanks and years:

    Tanks 001, 002, 003 in 1992

24. That DTP failed to submit precision test results to the Director of DEM as required by the regulations for the following tanks and years:

(a) Wakefield Facility

Tank 001 in the years 1987, 1989, 1990, 1991, 1992
Tank 002 in the years 1987, 1989, 1990, 1991, 1992
Tank 003 in the years 1987, 1988, 1990, 1991, 1992
Tank 004 in the years 1987, 1988, 1990, 1991, 1992

(b) Tower Hill Facility

Tank 001 in the years 1987, 1989, 1990, 1992
Tank 002 in the years 1987, 1989, 1990, 1992
Tank 003 in the years 1987, 1989, 1990, 1992
Tank 004 in the years 1987, 1988, 1989, 1992
Tank 005 in the year 1992
Tank 006 in the year 1992

25. That the tanks at Tower Hill were closed from March 28, 1988 through December 1, 1988, a period of more than 240 consecutive days.

26. No request for an extended temporary closure of the Tower Hill facility beyond 180 days was ever submitted to the Director by DTP.

27. That the pumps located at the Tower Hill facility are not equipped with remote pumps and as such, do not require line-leak detection systems.

28. That the Tower Hill station is not equipped with pressured piping and therefore does not need to be filled with line-leak detection systems.

29. That Respondent was not required under the regulation to provide a line-leak detection system at the facility therefore written verification of compliance with this requirement was not necessary.

30. That the Department has assessed Respondent an administrative penalty in the amount of $118,900.00

31. That this penalty was derived from standards set forth in the 1992 penalty regulations.

32. That the penalty was devised from the administrative Penalty Assessment Worksheet Summary attached to the Amended Violation II.

33. That having failed to prove a violation of 1992 UST Regulation 10.06 and 10.07, the $15,000 alleged in the violation must be deleted from the penalty calculation.

34. That the violation occurring prior to promulgation of the 1992 regulations must be remanded to the Department for recalculation under 1987 Penalty Rules.

35. That the following founded violations can be assessed as penalty under the 1992 regulations:

    1992 UST reg. 10.05(B)
    1992 UST reg. 10.08(H)

36. That DEM assessed Respondent an additional penalty for obtaining an economic advantage for noncompliance.

37. That the economic advantage penalty for noncompliance under 1992 regulations at Tower Hill is $1,050 and at Wakefield, $1,400.

38. That four precision tests were not conducted at the Wakefield gas station in 1992

39. That the violations for failure to precision test are Type II minor violations.

40. That the penalty amount at Wakefield for tests not completed in 1992 is $4,000.

41. That three precision tests were not conducted at the Tower Hill Station in 1992.

42. That the violations at Tower Hill are Type II minor violations.

43. That DEM did not show any gas contamination from Tower Hill to justify upgrading the penalty to a Type I minor violation.

44. That the penalty amount at Tower Hill for tests not completed in 1992 is $3,000.

45. That Respondent's failure to submit written verification

of precision test to the Director of three precision tests conducted at the Tower Hill facility in 1992 resulted in a $300 penalty.

46. That the Department classified this infraction as a Type III minor violation.

47. That the administrative fine owed by DTP for infractions that occurred under 1992 penalty regulations is $5,400 at the Wakefield facility; $4,350 at the Tower Hill facility for a total administrative fine of $9,750.

CONCLUSIONS OF LAW

1. That a lawful notice of violation was issued in accordance with R.I.G.L. §42-17.1-2(v).

2. That Respondent made a timely request for a hearing in accordance with R.I.G.L. §42-17.1-2(u)(1).

3. That the Hearing Officer has the jurisdiction to render a recommended decision pursuant to R.I.G.L. §42-17.7-1 et seq.

4. That the hearing was conducted pursuant to Freshwater Wetlands Act R.I.G.L. §2-1-18 et seq. The Administrative Procedures Act 42-35 et seq. The statutes governing the Department of Environmental Management §42-17.1-1 et seq. The duly-promulgated Rules and Regulations for Underground Storage facilities used for Petroleum Products and Hazardous Materials and the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters promulgated July 1990.

5. That the State has the burden of proving each and every act or omission alleged by a preponderance of the evidence R.I.G.L. §42-17.6-4.

6. That Robert Potter leased the Tower Hill facility in 1988.

7. That any lease or agreement between Robert Potter and DTP, Inc. does not negate the Respondent's obligation to comply with DEM regulations in accordance with the final agency decision D'Allesandro.

8. That the State has met its burden to show by preponderance of the evidence that:

(a) DTP, Inc. violated 1985 UST Reg. 9(c) at the Wakefield facility on the following tanks and years:

Tank 001 in the years 1987, 1989, 1990, 1991
Tank 002 in the years 1987, 1989, 1990, 1991
Tank 003 in the years 1987, 1988, 1990, 1991
Tank 004 in the years 1987, 1988, 1990, 1991

(b) That DTP, Inc. violated 1985 UST reg. 9(c) at the Tower Hill facility on the following tanks and years:

Tank 001 in the years 1987, 1989, 1990
Tank 002 in the years 1987, 1989, 1990
Tank 003 in the years 1987, 1989, 1990
Tank 004 in the years 1987, 1988, 1989, 1990

(c) That DTP, Inc. violated 1992 UST reg. 10.05(B) at the Wakefield facility for the following tanks and years:

Tanks 001, 002, 003 and 004 in the year 1992.

(d) That DTP, Inc. violated 1992 UST reg. 10.05(B) at the Tower Hill facility for the following tanks and years:

Tanks 004, 005 and 006 in 1992.

9. The State was unable to prove by preponderance of the evidence as alleged in the violation that Respondent had not complied with precision tests under regulation 10.05(B) at the Tower Hill facility on tanks 001, 002, 003 in 1992.

10. That the State has failed to meet its burden of showing by a preponderance of the evidence that:

(a) Respondent violated 1985 UST reg. 9(a);
(b) Respondent violated 1992 UST reg. 10.06;
(c) Respondent violated 1992 UST reg. 10.07.

11. That the State has met its burden of showing by a preponderance of the evidence that Respondent violated 1985 UST reg. 9(e) and 1992 reg. 10.08(H) for failure to submit written verification of compliance with precision testing.

12. That the State has failed to meet its burden of showing by preponderance of the evidence that Respondent violated 1985 UST reg. 9(f) and 1992 UST reg. 10.13 which require written verification of line-leak detection system installations.

13. That the State has proven by preponderance of the evidence that Respondent violated 1985 UST reg. 15.

(a) The Tower Hill facility was closed from at least March 28, 1988 to December 1, 1988, a period of over 240 consecutive days.

(b) That Respondent never petitioned the Director to extend the temporary closure of the Tower Hill facility beyond 180 days.

14. That the Director of DEM is authorized by R.I.G.L. 42-17.6-2 to assess an administrative penalty.

15. That the ability of DEM to issue administrative penalties is codified in the Department of Environmental Management Rules and Regulations for the Assessment of Administrative Penalties promulgated in 1987 and 1992.

16. That in accordance with the 1987 and 1992 penalty regulations, a penalty may be only assessed for a violation or failure to comply at the time it occurred constituted noncompliance with a legal requirement.

17. That having failed to prove a violation of regulations 10.06 and 10.07, the $15,000 penalty assessed must be deleted from the penalty calculation.

18. That the entire penalty assessment was based on 1992 penalty rules.

19. That the 1992 rules did not go into effect until May 25, 1992.

20. That any violation prior to the promulgated 1992 rules must be reviewed in accordance with the rules and regulations in existence at the time the violations occurred.

21. That difference standards and burdens are reflected in the 1992 and 1987 violations.

22. That this matter is remanded for recalculation of penalty under 1987 regulations for founded violations which occurred prior to promulgated 1992 regulations.

23. That under 1992 regulations, Section 12(C), it is Respondent's burden to show by preponderance of the evidence that the Director failed to assess the penalty or economic benefit portion of the penalty in accordance with the regulations.

24. That the following founded violations are to be assessed a penalty under 1992 regulations:
UST reg. 10.05(B) and UST reg 10.08(H).

25. That DEM assessed Respondent an additional penalty for economic advantage in accordance with 1992 reg. 10(C)(1) and 10(C)(2).

26. That the imposition of such a penalty is within the parameters and guidelines of the 1992 regulations.

27. That Respondent has not shown by preponderance of the evidence that an economic advantage assessment was outside the scope of the regulations.

28. That using the appropriate arithmetic, the imposition of an economic advantage penalty at Tower Hill of $1,050 and at Wakefield of $1,400 is within the parameters outline in Section 10(C)(1)(2) of the regulations.

29. That the Respondent violation 1992 reg. section 10.08(H); that the penalty of $300 for violating section 10.08(H) of the 1992 regulations was assessed in accordance with the criteria for assessment and calculation listed in section 10(a)(1)(c) of the 1992 penalty regulations.

30. That Respondent violated 1992 regulation section 10.05(B)

(a) that the penalty for violating section 10.05(B) at the Wakefield facility is $4,000.

(b) that the penalty for violating section 10.05(B) at the Tower Hill facility is $3,000.

31. That using the appropriate arithmetic, the imposition of a penalty for violating 1992 regulations is within the parameters outlined in section 10(c)(1)(2) of the regulations.

32. That Respondent has not shown by preponderance of the evidence that the penalty assessment under 10.05(B) is outside the scope of the regulations.

33. That the Respondent owes total fines of $9,750 in accordance with RIGL 42-17-6 and the 1992 Penalty Rules.

ORDERED

1) That the NOVAO be remanded to the Department for recalculation of the penalty assessed to any founded violations which occurred prior to the imposition of the 1992 Penalty Rules.

2) That this tribunal retain jurisdiction over NOVAO #726 if necessary to review the corrected penalty assessment.

3) That for violations occurring under the 1992 penalty rules, DTP must pay an administrative fine in the amount of $9,750.00.

4) That payment of the total administrative fine must be made within _____ days of the agency's final decision and order.

5) That payment of the administrative penalty is to be made to the State of Rhode Island, General Treasurer, and mailed to the Rhode Island Department of Environmental Management, Business Affairs, Attn: Robert Silvia, 22 Hayes Street, Providence, Rhode Island 02908.

Entered as a Recommended Decision and Order this 1st day of May, 1995.

Patricia Byrnes
Ad-Hoc Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, Third Floor
Providence, Rhode Island 02908

Entered as a Final Agency Decision and Order this 23rd day of May, 1995.

Timothy R.E. Keeney 4/8/96
Timothy R.E. Keeney
Director
Department of Environmental Management
9 Hayes Street
Providence, Rhode Island 02908

3/30/95

CERTIFICATION

I hereby certify that I caused a true copy of the within order to be forwarded, via regular mail, postage prepaid to George and Dorothy Potter, DTP, Inc., 83 Merry Mount Drive, Warwick, RI 02886; Peter McGinn, Esq., Tillinghast, Collins & Graham, One Old Stone Square, Providence, RI 02903 and via interoffice mail to Brian A. Wagner, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this _____ day of May, 1995.

_____