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

RE: LANDRY & MARTIN OIL CO., INC. and LANMAR CORPORATION NOTICE OF VIOLATION OC&I/UST 00-00281 **AAD NO. 00-031/WME**

DECISION AND ORDER

This matter came before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD") pursuant to Respondents' request for hearing on the Notice of Violation and Order ("NOV") issued by the DEM Office of Compliance and Inspection ("OCI") on May 12, 2000. The hearing was held on July 30, 2001.

Following the hearing, the OCI and Respondents filed post-hearing memoranda; due to extensions for filing the briefs, the hearing was considered closed on November 2, 2001.

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

PREHEARING CONFERENCE

A prehearing conference was held on November 17 and 20, 2000. At the conference, the parties agreed to the following stipulations of fact:

1. The subject property is located at 362 Central Avenue in the City of Pawtucket, Rhode Island, otherwise identified as Pawtucket Assessor's Plat 8, Lots 345, 407 and 409 (the "Property" or "Facility").

2. LANMAR CORPORATION ("Lanmar") is the owner of the Property.

3. LANDRY & MARTIN OIL CO., INC. ("L&M") is an operator of the Facility.

4. L&M is the owner of certain underground storage tanks ("USTs") located at the Facility, except as to tank #009, which tanks are subject to the Regulations for Underground Storage Facilities Used for Petroleum Products and Hazardous Materials ("UST Regulations").

5. The Facility is registered with DEM in accordance with the UST Regulations and is identified by DEM as UST Facility No. 00281.

6. The USTs are registered with DEM as follows:

UST ID No.	Date Installed	Date Removed	Size (gallons) / Substance Stored
001	1985	8-26-98	20,000/fuel oil
002	1985	8-26-98	20,000/fuel oil
003	1965	8-26-98	25,000/diesel
004	1965	8-26-98	25,000/fuel oil
005	1965	8-26-98	20,000/diesel
006	unknown	10-12-93	1,500/fuel oil
007	unknown	10-12-93	1,500/fuel oil
008	unknown	10-12-93	2,000/gasoline
009	unknown	9-21-98	1,000/gasoline

7. Following the August 26, 1998 closure of UST Nos. 001-005, DEM required the removal of petroleum-contaminated soils from beneath the loading rack.

8. By letter dated November 5, 1998, DEM notified Respondents of certain deficiencies in the Facility's records relating to precision testing, spill containment and overfill protection and of the potential regulatory violations relating thereto. The letter requested that Respondents submit any records relating to these deficiencies to DEM.

9. By letter dated February 17, 1999, DEM notified Respondents that the required *Closure Assessment Report*, which was due by October 21, 1998, had yet to be received by DEM.

10. On March 8, 1999, DEM received a *UST Closure Assessment Report* for the Facility, which was prepared by Clean Environment, Inc. ("CEI") on behalf of Respondents (the "Closure Assessment").

11. By letter dated March 22, 1999, DEM required Respondents to perform a site investigation and to submit a Site Investigation Report ("SIR") to DEM on or before May 22, 1999.

12. By letter dated September 17, 1999, DEM notified Respondents that the SIR was overdue and that it must be submitted by October 1, 1999.

13. On November 22, 1999, DEM received a Limited Subsurface Investigation [sic] for the Facility, which was prepared by Beta Engineering, Inc. ("Beta") on behalf of Respondents.

14. Following the issuance of the NOV, Respondents provided DEM with two missing precision test results for UST no. 004 in 1994 and for UST no. 003 in 1996.

The exhibits, marked as they were admitted at the hearing, are attached to this Decision as Appendix A.

HEARING SUMMARY

At the hearing, the OCI called one (1) witness: **Tracey Tyrrell**, a Principal Environmental Scientist in the OCI's Underground Storage Tank Section.

Respondents did not present any witnesses.

I. The Notice of Violation

The NOV issued to Respondents on May 12, 2000 identifies property located at 362 Central Avenue in Pawtucket, Rhode Island. According to the NOV and as stipulated at the Prehearing Conference, Lanmar Corporation is the owner of the property and Landry & Martin Oil Co., Inc. is an operator of the Facility located on the property. The NOV indicates that eleven (11) USTs located on the site were registered with DEM; three were permanently closed on October 12, 1993, tanks 006, 007 and 008.

On August 26, 1998, five other USTs, tanks 001 through 005, were permanently closed. Another UST, tank 009, was permanently closed on September 21, 1998.

The NOV cites Respondents for violating UST Regulations Section 10.06(B) regarding precision testing requirements for USTs; Sections 10.10(A) and (C) regarding installation of spill containment basins and the submittal of written verification; Sections 10.10(B) and (C) regarding installation of overfill protection and the submittal of written verification; Sections 13.02(B)(5) and 13.04 regarding maintenance of daily written inventory and monthly reconciliation records and the Director's access to those records; and Section 14.08 (D) regarding submittal of SIRs within sixty (60) days of notification or within an alternate deadline approved by DEM. The pertinent parts of those sections are set forth below.

10.06 Leak Detection for Existing Tanks: the owners/operators of all existing facilities shall comply with one of the following leak detection requirements:

(A) Continuous Monitoring: ***

(B) Precision Testing:

(1) For USTs for which the date of installation is known and verifiable, perform a precision test of the tank system in accordance with the following schedule:

UST installed prior to January 1, 1965:
Initial Precision Test Due Date: May 1986
Subsequent Precision Test Due Dates: Annually

UST Installed on or after January 1, 1965:
Initial Precision Test Due Date: May 1987
Subsequent Precision Test Due Dates: 5, 8, 11, and 13 years after installation and annually thereafter

(2) For any UST for which the date of installation is not known, perform a precision test of the tank system no later than May 1986 and annually thereafter.

(3) ***
(4) ***
(5) ***
(6) ***
(7) ***
(8) ***

(9) Precision test results required in this section shall be caused to be submitted by the owner/operator to the Director within fifteen (15) calendar days of the date of test completion; or in the event of a leak/release, in accordance with Section 14.00, Leak Response.

(10) ***

Section 10.10 is referenced for several violations:

10.10 Spill and Overfill Protection:

(A) **Spill Containment Basins:** All underground storage tanks at existing facilities are required to have been fitted with spill containment basins around all fill pipes with the exception of above-ground fill pipes, by May 8, 1987. Spill containment basins installed after the implementation of these Regulations must be capable of holding a minimum of three gallons. All tanks containing No. 2, 4, 5, 6 heating oil required to be registered according to Section 8.00 of these Regulations must have spill containment basins installed by January 1, 1993.

(B) **Overfill Protection:** Except for USTs used to store heating fuels consumed on-site, all underground storage tanks at existing facilities shall be retrofitted with overfill protection by January 1, 1996.

(C) Written verification of this upgrade must be submitted by the owner/operator to the Director within fifteen (15) calendar days of installation.

Maintenance of certain facility records is required under Sections 13.02(B)(5) and 13.04.

13.02 Records: All owners/operators of new and existing facilities shall maintain on the facility premises or at an alternate location approved by the Director, for the period of time specified below, records of the following:

(A) Permanent Records: ***

(B) Routine Record-keeping: The following records shall be maintained for a minimum period of three years from the date made, or for such longer periods as required by the Director in the resolution of enforcement actions:

(1) ***
(2) ***
(3) ***
(4) ***

(5) During those days when the UST facility is in operation, a daily written inventory of the product or material stored, including the following minimum information:

(a) a record of all inflows;
(b) a record of all outflows;
(c) a daily reconciliation between inflows, outflows and volume on hand;
(d) written daily entries of any unusual occurrences that might affect the inflow, outflow or volume on hand;
(e) written entries explaining in detail any adjustments to the records.

13.04 Access to Records: The owner/operator shall make available to the Director, upon request, all records which the Director determines may be pertinent to the enforcement of these rules and regulations.

Respondents are also cited for violating section 14.08(D) regarding the timeframe for submittal of the results of the site investigation. I am setting forth some additional sections for context.

14.08 Site Investigation:

(A) ***

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

(1) The facility has closed USTs storing hazardous materials;
(2) ***
(3) An inspection of a tank closure reveals soil or groundwater contamination; or
(4) Other evidence of a release exists.

(C) The Director may require the site investigation be conducted by and a Site Investigation Report prepared under the supervision of a professional engineer, certified professional geologist or a person of appropriate qualifications and relevant professional experience that is acceptable to the Director.

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

As a consequence of the above-alleged violations, the OCI seeks the submission of the missing precision testing results as set forth in the Letter of Deficiency dated November 5, 1998; written verification of the installation of spill containment basins for USTs 001 through 005; written verification of the installation of overfill protection for USTs 001 through 005; and the daily inventory and monthly reconciliation records for USTs 001 through 005 and 009 for June, July and August 1998.

In addition to the above relief sought in the NOV, the OCI initially sought the imposition of a Fifty-one Thousand and Ninety ($51,090.00) Dollar administrative penalty, assessed jointly and severally, against the Respondents.

At the hearing, however, through the testimony of Tracey Tyrrell, it was established that, following the issuance of the NOV, some of the missing records were provided to the DEM and that the proposed administrative penalty should therefore be adjusted. Her testimony regarding the amended proposed assessment is discussed below.

II. <u>Precision Testing</u>

Tracey Tyrrell, a Principal Environmental Scientist in the Office of Compliance and Inspection's Underground Storage Tank and Hazardous Waste Section, testified that she supervises the drafting of NOVs, reviews those prepared by others for accuracy, and makes decisions on the assessment of penalties. In reviewing a NOV for accuracy, she stated that she verifies the facts stated in the Notice by referring to the Department's Facility file and to the UST Regulations and the Penalty Regulations. She also assesses the administrative penalty. Tr. July 30, 2001 at 7-8. Ms. Tyrrell stated that this NOV was drafted by a staff member

and that she had reviewed it for accuracy in conjunction with the Facility file. *Id.* at 10.

The witness testified that the UST Regulations require precision testing of tanks according to a schedule set forth in the Regulations and that the results be submitted to the Department. She found that precision tests for tanks located at the Facility had not been submitted that should have been in the Facility file: specifically, that tanks 001 and 002 were missing 1993 and 1996 precision testing results; tank 003 was missing 1990, 1991, 1993, 1995 and 1996 results; tank 004 was missing results for 1993 and 1994; tank 005 was missing results for 1993, 1994, 1996 and 1997; and tank 009 was missing results for 1990, 1991, 1992, 1993, 1994, 1995 and 1996. *Id.* at 11-16. Following the issuance of the NOV, precision testing results were submitted to the Department for tank 004 in 1994 and tank 003 in 1996. *Id.* at 18.

Ms. Tyrrell stated that UST No. 009, a 1,000 gallon gasoline tank according to the Facility file, was not exempt from the regulatory requirements for precision testing, installation of spill containment basins and overfill protection, and maintenance of daily and monthly inventory records for the tank. *Id.* at 26.

Under cross-examination, the witness stated that she first reviewed the Facility file after receiving a memorandum from the Office of Waste Management ("OWM") that referred it to the OCI for a formal enforcement action. *See* Resp 31. According to Ms. Tyrrell, the OWM had received an application for determination of eligibility for funds from the Underground Storage Tank Financial Responsibility Review Board and in its review of the Facility file, had discovered the alleged noncompliance. Tr. July 30, 2001 at 41-43. She acknowledged that when she received the memorandum on August 24, 1999, all the tanks in question had already been removed. *Id.* at 45, 48.

Respondents' counsel elicited from the witness that although several of the violations occurred prior to the effective date of the 1993 UST Regulations, she used the 1993 UST Regulations and the 1992 Penalty Regulations in reviewing the NOV. *Id.* at 53-54. Ms. Tyrrell clarified that she had also reviewed the previous Penalty Regulations and had found that there was no difference in the applicable penalty matrix set forth in the two iterations of the Penalty Regulations. *Id.* at 55-56.

Conclusion

I have reviewed the UST Regulations that were adopted in April 1985 (effective May 8, 1985) as well as those in effect in July 1992 and in August and December 1993 (I have not obtained copies of the 1987 and 1989 amendments). All four sets of regulations require that USTs installed after January 1, 1965 be precision tested in 1987 (the 1985 UST Regulations require testing within two years of the effective date of the Regulations) and in years 5, 8, 11, and 13 following the initial installation. After year 13, the tanks must be precision tested annually. Those tanks installed prior to 1965 must be precision tested within one year of the effective date of the 1985 Regulations and annually thereafter.

OCI 1, the Application for Underground Storage Facilities that was agreed as a Full exhibit at the Prehearing Conference, contains notations indicating that tanks 001 and 002 were installed in 1985 and tanks 003, 004 and 005 were installed in 1965 or perhaps earlier. OCI 1 at 1. The tanks installed in 1985, therefore, should have been tested on or before May 1987 and in the years 1990, 1993, 1996, 1998, and annually thereafter. If tanks 003 and 004 were installed prior to the year 1965 or if the date of installation was unknown, then they should have been tested in 1986 and annually thereafter. Tank 005, installed in 1965, should have been tested in 1987 and annually thereafter.

The OCI has proved by a preponderance of the evidence that Respondents failed to precision test USTs 001 and 002 in 1993 and 1996; UST 003 in 1990, 1991, 1993 and 1995; UST 004 in 1993; UST 005 in 1993, 1994, 1996 and 1997; and UST 009 in 1990, 1991, 1992, 1993, 1994, 1995 and 1996 as required by the UST Regulations.

III. Spill Containment Basins

Tracey Tyrrell testified that the UST Regulations required tanks 001 through 005 to have spill containment basins installed and that Facility owners/operators are required to submit written documentation of the installation of spill containment basins. Through her review of the Facility file, she determined that no spill containment basins had been installed for tanks 001, 002, 003, 004, and 005. Tr. July 30, 2001 at 20-21.

Notwithstanding the results of the above review, Ms. Tyrrell testified that Respondents later provided information regarding spill containment that if it had been received by the Department prior to the issuance of the NOV, would have been considered by the OCI. *Id.* at 30.

Conclusion

Through Ms. Tyrrell's testimony regarding the later-obtained information on spill containment, the OCI in effect withdrew its allegation that Respondents violated the regulatory requirements for installation of spill containment basins. The OCI stated in *RIDEM's Posthearing Memorandum* ("*OCI's Memorandum*") that the penalty, including the economic benefit portion of the penalty, for this particular violation should be reduced to zero. *OCI's Memorandum* at 9.

IV. Overfill Protection

According to Ms. Tyrrell, the UST Regulations require that overfill protection was to have been installed on tanks 001 through 005 by January 1, 1996 and that the Facility owners/operators are required to submit written documentation to the Department when the overfill protection has been installed. Through her review of the Facility file she determined that no records had been submitted to verify that overfill protection had been installed for tanks 001, 002, 003, 004, and 005. Tr. July 30, 2001 at 21-22.

Conclusion

The OCI has proved by a preponderance of the evidence that Respondents failed to install overfill protection on tanks 001 through 005 by January 1, 1996 and submit written verification as required by the UST Regulations.

V. Daily Written Inventory and Monthly Reconciliation Records

The witness also testified that the UST Regulations require that inventory records be kept and that they be provided to the Department upon request. Ms. Tyrrell determined there was a violation of this requirement since the Letter of Deficiency dated November 5, 1998 (OCI 5) had requested the inventory records for tanks 001, 002, 003, 004, 005 and 009 for the months June, July and August 1998 and no inventory records were contained in the Facility file. She confirmed that she has still not received the requested information. Tr. July 30, 2001 at 23-24.

Conclusion

The UST Regulations require that on those days that a Facility is in operation, it must maintain a daily written inventory of the product stored, including a record of all inflows and outflows and a daily reconciliation between inflows,

outflows and volume on hand. Those records must be made available to the Department upon request.

OCI 6, a letter from DEM employee F. Daniel Russell, Jr. to Landry & Martin Oil Co., Inc. dated May 30, 1997, reminded Respondents that a record of daily inventory and monthly reconciliation of product stored in all tanks, including the gasoline tank, must be maintained on the premises. The correspondence also referenced the Department's publication "Doing Inventory Control Right" that had been provided to Respondents during a leak detection compliance inspection performed on May 2, 1997. OCI 6 at 1.

Notwithstanding this reminder, Respondents failed to make the records available when so requested by the Department in the Letter of Deficiency dated November 5, 1998. OCI 5 at 2. Those records sought were for tanks 001, 002, 003, 004, 005 and 009 for the months June, July and August 1998.

The OCI has proved by a preponderance of the evidence that Respondents failed to maintain and provide inventory records for six USTs for a three-month period as required by the UST Regulations.

VI. <u>Site Investigation Report</u>

Ms. Tyrrell testified that the NOV alleges a violation for late submittal of a SIR. The report, due on or before May 22, 1999, was received by the Department on November 22, 1999. <u>Tr.</u> July 30, 2001 at 24-25.

Under cross-examination by Respondents' counsel and pursuant to my questioning for clarification, the witness explained that the document filed by Respondents may not have sufficiently met OWM's requirements for a SIR, but that all she considered was the delay in its filing, not any deficiencies in the report. *Id.* at 78-80.

Ms. Tyrrell testified in cross-examination that Respondent Landry & Martin's letter dated April 27, 1999 (OCI 10; see also Resp 22) "to request the installation of one observation well" may not have been responded to by the Department. Tr. July 30, 2001 at 81-83. She further explained under re-direct examination that approval for its installation was not required. According to the witness, it was an unusual request; the usual practice was for the consultant to recommend and the OWM to further recommend the installation as to the number and location of the wells. *Id.* at 88-89.

She stated that the sixty-day deadline for submittal of a SIR is often extended, but that the request must be approved prior to the expiration of the deadline. *Id.* at 89-90.

Conclusion

A review of the pertinent exhibits reveals the following sequence of events: a letter signed by Kevin Gillen for DEM employee Bruce T. Catterall, P.E., to Landry & Martin dated March 22, 1999, required that a site investigation be conducted and a Site Investigation Report (SIR) be submitted to the Department on or before May 22, 1999. OCI 9 at 1. Respondents then sent a letter dated April 27, 1999 "to request the installation of one observation well"; the correspondence did not seek an extension on the deadline for filing the SIR. OCI 10.

On September 17, 1999, a further letter was sent from the Department to Landry & Martin. Although somewhat confusing, the correspondence references the Report that was due on May 22, 1999, states that it is overdue, and requires that it be submitted by October 1, 1999. OCI 11 at 1. A "Limited Subsurface Investigation" Report was then filed with the Department on November 22, 1999. OCI 12; see also Resp 25. That report indicates that BETA Engineering observed the installation of one groundwater monitoring well on October 13, 1999 and

collected a groundwater sample from the well on October 19, 1999. OCI 12 at 2-3. No earlier activity is noted in the Report.

Respondents assert in *Respondent's Posthearing Memorandum* ("*Respondents' Memorandum*") that the Department in its September 17, 1999 letter did in fact extend the time for submittal of the report to October 1, 1999. *Respondents' Memorandum* at 8. According to Respondents, prior to their receipt of the September 17, 1999 letter, "Respondent was awaiting a response from DEM to Respondent's letter dated April 27, 1999 requesting permission for the installation of an observation well." *Id.*

The OCI states that Respondents' above assertions are false and misleading because DEM's approval for the installation of an observation well is not required and because the Department did not approve an alternate deadline for submittal of the SIR. *RIDEM's Reply Brief to the Respondent's Posthearing Memorandum ("OCI's Reply Brief")* at 16. Further, the September 17, 1999 letter cannot have been considered an alternate deadline because it did not comply with the regulatory requirements to make the extension valid since it was not "pre-approved". The September letter was sent almost four months after the May 22, 1999 deadline had passed. *OCI's Reply Brief* at 18-19.

So, was the October 1st date an alternate deadline or a grace period? The OCI provided testimonial evidence that it was not an alternate deadline and cites UST Regulations that would have required that the new date be "pre-approved by DEM".

Respondents have asserted in their *Memorandum* that they awaited approval for the installation of the observation well and thought the October 1, 1999 date an extension, "an alternate deadline". *Respondents' Memorandum* at 8. But no evidence, only argument was presented on these two issues. The AAD held in

In Re: Gerald L. & Antoinette Bucci, AAD No. 92-022/IE, Final Agency Order entered on March 31, 1995 at 7-8, that statements of counsel, whether written or oral, are not evidence. *Citing* Wood v. Ford, 525 A.2d 901, 903 (R.I. 1987). That same AAD decision quoted the Rhode Island Supreme Court's statement in another case, Rhode Island Consumer's Council v. Smith, 111 R.I. 271, 302 A.2d 757 (1973), that an administrative agency may not base a finding or determination on information that is not legally probative. Bucci at 8.

The only evidence provided by Respondents is that they requested approval for installation of a monitoring well and that the September DEM letter was received seeking the late SIR. That letter required compliance by October 1, 1999. It did not state what would happen if Respondents failed to submit the SIR by that date.

Further evidence from both parties might have clarified whether OWM's regular practice followed the rule's requirements for pre-approval of alternate dates and whether Respondents could reasonably have concluded that the October 1st date constituted an alternate deadline. Even so, Respondents did not submit the SIR by October 1st and did not seek an extension. There was no evidence that Respondents made any effort between April 27, 1999 and September 17, 1999 to have the site investigation conducted and the report prepared. Based upon the limited evidence of record and section 14.08(D) of the UST Regulations, I conclude that the October 1, 1999 date was a grace period wherein if Respondents had complied by that date, they likely would not have faced this violation in the NOV. They failed to comply and the OCI has pursued the violation of the sixty (60) day requirement that is set forth in the Regulations.

The OCI has proved by a preponderance of the evidence that Respondents submitted the Report, accepted by the Department as the required SIR, six months

later than required by the Department and the UST Regulations, in violation of the UST Regulations.

VII. <u>Assessment of an Administrative Penalty</u>

As indicated in the NOV, the OCI originally sought the imposition of an administrative penalty in the amount of Fifty-One Thousand and Ninety ($51,090.00) Dollars to be assessed, jointly and severally, against each named Respondent. The NOV states that the penalty was assessed pursuant to R.I. GEN. LAWS § 42-17.6-2 and was calculated pursuant to the Penalty Regulations.

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

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

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

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

The penalty amount and its calculation were established in evidence through the introduction of the Penalty Summary and Worksheet (OCI 13) and the testimony of Tracey Tyrrell, a Principal Environmental Scientist in the OCI's Underground Storage Tank Section. Ms. Tyrrell testified that she had prepared the document and had assessed the administrative penalty in this matter based upon the Penalty Regulations and the statute governing assessment of administrative penalties. Tr. July 30, 2001 at 27; 29-30.

The six-page Penalty Summary and Worksheet established in evidence the $51,090.00 total proposed administrative penalty as well as whether the violations were classified as Type I, II or III and whether the Deviation from Standard was considered Minor, Moderate or Major. OCI 13 at 1 (numbered page 8).

The Penalty Summary and Worksheet identified the violations of UST Regulations section 10.06(B) – failure to precision test – as a Type II violation: "INDIRECTLY related to the protection of the public health, safety, welfare or environment." Several factors were listed as having been considered in determining whether the several violations were Minor, Moderate or Major Deviations from Standard: the extent to which the act or failure to act was out of compliance; environmental conditions; the amount of the pollutant; the toxicity or nature of the pollutant; the duration of the violation; whether the person took reasonable and appropriate steps to prevent and/or mitigate the non-compliance; and the degree of willfulness or negligence, including but not limited to, how much control the violator had over the occurrence of the violation and whether the violation was foreseeable. The Worksheet calculated the penalty for failure to precision test one UST for seven years as a Type II, Major Deviation from Standard with a penalty of $5,000. The penalty for failure to precision test one UST for five years and one UST for four years was calculated to be a Type II Moderate

Deviation from Standard and assessed a $2,000 penalty. The failure to test three USTs for two years was identified as a Type II Minor Deviation from Standard with a $700 penalty. OCI 13 at 1-2 (numbered pages 8-9).

The economic benefit portion of the penalty for the failure to comply with UST Regulations section 10.06(B) was calculated at $470.00 for each of the 22 missing tests, for a total economic benefit from non-compliance with this regulation of $10,340.00. *Id.* at 1 (numbered page 8).

Ms. Tyrrell testified that the Department later received precision test results for one tank for the year 1994 and for another UST for the year 1996 and that the penalty and economic benefit portion of the penalty should therefore be adjusted. The receipt of the 1994 precision test results for UST No. 004, where previously a Type II Minor Deviation from Standard had been identified on three USTs, lowered the penalty $100. She explained that the Type and Deviation from Standard remained the same because two USTs had been out of compliance for two years. She stated that, due to the number of violations on USTs Nos. 003 and 005, even with acknowledging the testing results for UST No. 003 for 1996, it remained categorized as a Type II Moderate Deviation from Standard with the same $2,000 penalty. She testified that with these two test results, the penalty for all violations of the precision testing requirements should be amended to $7,600.00. Tr. July 30, 2001 at 32-35.

The witness testified that not only should the economic benefit portion of the penalty be adjusted because the two test results had now been provided, new information as to Respondents' actual costs for precision testing should also be taken into consideration. She stated that the original calculation had been based

upon 22 missing tests, which should now be calculated at 19 [sic] [1], at a cost of $300 for each missing test instead of the $470 average cost per test that the Department had used in its calculation. This reduced the economic benefit portion of the penalty for the failure to precision test from $10,340 to $5,700.00.

Id. at 36-37.

When cross-examined as to the rationale for identifying one of the UST violations for failure to precision test as a Major Deviation from Standard, two as Moderate Deviations from Standard and three USTs as Minor Deviations from Standard, the witness explained that the classification was set differently for each tank depending on the number of years of testing that were missing. *Id.* at 72.

The Penalty Summary and Worksheet identified the violations of UST Regulations sections 10.10(A) and (C) – failure to install spill containment basins and submit written verification -- as a Type II Moderate Deviation from Standard and assessed a $5,000 penalty with an additional economic benefit portion of the penalty of $4,800.00. OCI 13 at 1.

Ms. Tyrrell testified that Respondents later provided information regarding spill containment that if it had been received by the Department prior to the issuance of the NOV, would have been considered by the OCI. She stated that even though the spill containment did not meet "the letter of the regulation" for tanks 001 through 005, the penalty would have been adjusted. The witness acknowledged that if they had had the information, then the $5,000 penalty and the $4,800 economic benefit portion of the penalty set forth in the NOV would have been zero. Tr. July 30, 2001 at 30-31.

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[1] Apparently since UST No. 004 now only had missing precision test results for 1993, the OCI was not pressing the violation.

The Penalty Summary and Worksheet identified the violations of UST Regulations sections 10.10(B) and (C) – failure to retrofit five USTs with overfill protection by January 1, 1996 and submit written verification -- as a Type II Moderate Deviation from Standard and assessed a $5,000 penalty with an additional economic benefit portion of the penalty of $4,250.00. OCI 13 at 1. The exhibit indicates that the OCI considered the same factors as listed above for the failure to precision test the USTs in determining that the violation was a Moderate Deviation from Standard. *Id.* at 4 (numbered page 11).

The Penalty Summary and Worksheet identified the violations of UST Regulations sections 13.02(B)(5) and 13.04 – failure to maintain and provide inventory records for six USTs for three months -- as a Type II Minor Deviation from Standard and assessed a $9,000 penalty. *Id.* at 1 (numbered page 8). The exhibit indicates that the OCI again considered the factors listed above. *Id.* at 5 (numbered page 12).

Finally, the Penalty Summary and Worksheet identified the violation of UST Regulations section 14.08(D) – the six-months late submittal of the SIR -- as a Type I violation: "DIRECTLY related to the protection of the public health, safety, welfare or the environment." The OCI listed all of the factors above except for "the amount of the pollutant", in determining the violation was a Moderate Deviation from Standard. *Id.* at 6 (numbered page 13). A $5,000 penalty was assessed for this violation. *Id.* at 1 (numbered page 8).

Under cross-examination by Respondents' counsel and pursuant to my questioning for clarification, the witness stated that the Limited Subsurface Investigation Report (Resp 25) submitted by the Respondents was usually not considered compliance with the SIR requested by the OWM, however the sole

issue she looked at in determining the Type of Violation and Deviation from Standard was the lateness of the filing. Tr. July 30, 2001 at 77-80.

Due to the receipt of the two test results and the information on spill containment, Ms. Tyrrell recalculated the administrative penalty for all violations at $26,000.00 with the economic benefit portion of the penalty as $9,950.00; for a total amended penalty of $35,950.00.[2] *Id.* at 38.

When cross-examined as to the general application of the factors set forth in statute and regulation to determine the penalty, Ms. Tyrrell confirmed that one of the factors they always consider in assessing a penalty is to deter future noncompliance. This would not only apply to existing tanks at the facility involved, but to tanks that might be later installed and to deter other facilities from violating the Regulations. *Id.* at 65.

Ms. Tyrrell stated that she did not take into consideration Respondents' remedial action at the site that had occurred prior to the issuance of the NOV. Specifically, she did not consider that the old tanks had been removed; that soil testing had been done; and that action had been taken for removal of contaminated soil. She testified that the only matter that she had considered was the fact that the SIR was submitted late. *Id.* at 66-67.

The witness was also questioned whether the OCI considered Respondents' financial condition. Ms. Tyrrell responded that they only look at the issue when it is raised by the Respondent since the Department cannot demand financial records. She did not believe that these Respondents had previously raised the issue. *Id.* at 68, 70.

[2] Based upon Ms. Tyrrell's testimony, my recalculation of the penalty and economic benefit portion of the penalty totals $36,550.00. I am unaware whether the OCI's witness erred in her testimony or whether other factors were considered in reducing the penalty by $600.00. OCI's Memorandum and Reply Brief repeat the witness' calculations without explanation for the discrepancy.

Conclusion

Pursuant to § 12(c) of the Penalty Regulations, Respondents had the burden to prove by a preponderance of the evidence that the administrative penalty was not assessed in accordance with the Penalty Regulations. While Respondents may have been able to prove that a portion of the initial assessment had been improperly calculated as to missing precision tests and the economic benefit therefrom, Ms. Tyrrell's testimony recognized the additional documentation provided by Respondents and, in effect, amended the alleged violations and penalty calculations accordingly.

Respondents' Memorandum questioned the OCI's calculation of precision testing violations as "Major" for certain years, and "Moderate" in others. *Respondents' Memorandum* at 9. I find that OCI's witness adequately explained the reasoning for the distinction, with certain tanks having more years of violations than others.

For several of the violations, the failure to precision test, to install overfill protection and to timely submit the SIR, Respondents argue that the OCI inappropriately identified the violations as Moderate rather than Minor. At the hearing and in its *Memorandum*, Respondents questioned whether the OCI had appropriately considered section 10(a)(2)(G) of the Penalty Regulations: "Whether the person took reasonable and appropriate steps to prevent and/or mitigate the non-compliance." *Id.* Respondents argue that since Ms. Tyrrell had testified that she did not give any consideration to any of the remedial action taken by Respondents prior to issuance of the NOV, that the OCI had therefore not complied with this section of the Penalty Regulations. *Id.*

The OCI responded in its *Reply Brief* that the Penalty Matrix Worksheet (OCI 13 at numbered pages 9-13), reveals that each violation was considered for

whether Respondents failed to prevent non-compliance or to mitigate noncompliance, particularly after receiving the Letter of Deficiency. *OCI's Reply Brief* at 7-8.

Respondents' actions to close the old tanks, remove the contaminated soil and install new tanks cannot be interpreted as preventing or mitigating the failure to precision test several tanks for several years, the failure to keep proper inventory records or the failure to timely submit the SIR. Removal of old tanks might mitigate against the failure to install spill containment basins or overfill protection, depending on the circumstances. Here, however, the closure of tanks 001 through 005 on August 26, 1998 and tank 009 on September 21, 1998 occurred over two and a half years after the January 1, 1996 deadline established in the UST Regulations. Respondents' actions may have been to install better tanks and clean up the site, but they did not address the areas of noncompliance cited in the NOV.

Respondents have also complained that the OCI could not have properly considered R.I. GEN. LAWS § 42-17.6-6(a) and (b) that provide as follows:

> **Determination of administrative penalty. –** In determining the amount of each administrative penalty, the director shall include, but not be limited to, the following to the extent practicable in his or her considerations:
> (a) The actual and potential impact on public health, safety and welfare and the environment of the failure to comply;
> (b) The actual and potential damages suffered, and actual or potential costs incurred, by the director, or by any other person

Respondents assert that the OCI could not have considered the "actual and potential impact" and "actual and potential costs" without giving any consideration "to all of the remedial work performed by Respondent and without giving any consideration to the Closure Assessment and Limited Subsurface Investigation (SIR) reports." *Respondents' Memorandum* at 6.

The OCI has answered this claim by stating that the above factors were addressed when the OCI made its determination of "Type of Violation" and

"Deviation from Standard". Whether the violation is a "Type I" or "Type II" violation depends on if the acts posed a direct or indirect "actual or potential for harm to the public health, safety, welfare or the environment" (emphasis provided). *OCI's Reply Brief* at 8-9. Notwithstanding this assertion, the OCI concedes that Ms. Tyrrell had testified under cross-examination that the "actual or potential for harm" was not considered prior to the issuance of the NOV. In further discussing the issue, the OCI cites the witness' testimony that none of Respondents' remedial action was taken into consideration before issuing the NOV. *Id.* at 9-10.

I believe that OCI's counsel has misconstrued his own witness' testimony. My recollection of the hearing during this portion of her testimony, in the context of the remainder of her testimony, was that the so-called "remedial action" taken by Respondents was not considered because she deemed the efforts irrelevant to the violations for which Respondents were charged. She never testified, as far as I have been able to determine, that the "actual or potential for harm" had not been considered prior to the issuance of the NOV.

I have independently considered the cited violations and their actual or potential for harm to the public health, safety, welfare or the environment. The "Type of Violation" is determined based upon the particular nature of the violation. A failure to precision test means that it remains unknown whether the tank has retained its integrity and the requirement is considered as indirectly protecting against actual or potential for harm to the environment. It is generally classified as a Type II violation. Installation of spill containment basins and overfill protection are also to indirectly protect the environment from actual or potential harm. Maintenance of inventory records provides some assurance that petroleum product is not leaking from the tanks; the maintenance of those records also indirectly protects the environment. The requirement of the SIR stands in more direct

protection of the environment since it provides test results that reveal whether an actual harm to the environment has occurred.

Here, the SIR concluded that, based upon the results of soil and groundwater sampling, there was no indication of a petroleum release to the groundwater and no petroleum-related organic compounds in the soil or groundwater. OCI 12 at 3 (numbered page 2). In this instance the SIR demonstrated that no actual harm had occurred. But the **requirement** for timely submission of a SIR serves to directly protect the environment by allowing the Department and Respondents to more quickly address actual harm and to prevent further harm from occurring if there is contamination. A violation of this requirement, therefore, is generally classified as "Type I".

Respondents' other issue, that of their actual and potential costs incurred, is considered below in my discussion of section 10(c) of the Penalty Regulations, "The Economic Benefit from Non-Compliance".

Based upon the evidence of record, I conclude that the OCI appropriately considered the factors set forth in R.I. GEN. LAWS § 42-17.6-6(a) and (b).

Respondents, at the hearing and in their *Memorandum*, also raised the issue of financial condition both in the assessment of the administrative penalty and in the determination and assessment of economic benefit from non-compliance. Respondents argue that, contrary to Ms. Tyrrell's testimony that the issue is considered only when it is raised by a Respondent, R.I. GEN. LAWS § 42-17.6-6 (g) requires it to be considered - period. *Respondents' Memorandum* at 7.

The OCI responded in its *Reply Brief* that a more accurate reading of the statute provides that "[i]n determining the amount of each administrative penalty, the director shall include, but not be limited to, the following **to the extent practicable** in his or her considerations (g) [t]he financial condition of the person

being assessed the administrative penalty ” (emphasis provided in *OCI's Reply Brief*). at 13. The OCI argues that it is not "practicable" for the Department "to effectively evaluate any respondent's financial condition prior to the issuance of a NOV because the Department has no means to compel the production of that information at that time." The Respondent knows whether or not financial ability is even an issue. As such, "coupled with the fact that it is the violator's burden to prove that the proposed penalty is excessive, compels the violator to come forward with that type of information." *Id.* 14.

Respondents may not have had their financial condition considered prior to issuance of the NOV, but the issue is certainly a factor that may be considered during the administrative appeal process. The final assessment of an administrative penalty occurs when a hearing on the NOV is waived or, if there has been a request for hearing before the AAD, then thirty (30) days following the issuance of the Final Agency Order by the Director. See R.I. GEN. LAWS § 42-17.6-4 and § 42-17.6-5. Financial considerations often cannot be "practicably" considered prior to the issuance of the NOV. The AAD has previously held that financial information can and should be considered at the hearing, both in determining whether a violation was willful and in determining whether a proposed penalty is excessive. In Re: Anthony J., Joseph F., Thomas R. Connetta/Marguerite Sweeney, AAD No. 94-020/SRE, Final Agency Order entered on August 21, 1997 at 32-34; In Re: Sanford Neuschatz, AAD No. 00-002/SRE, Final Agency Order entered on March 4, 2002 at 23-24, *appeal pending sub nom.*, Neuschatz v. Reitsma, C.A. PC02-1589 (R.I. Super. Ct.). There is no question that I would have considered Respondents' financial condition in preparing this recommended decision for the Director. Respondents, however, failed to introduce any evidence of their financial status or difficulties.

Respondents had also argued that their "substantial costs and expenses incurred" to bring the site into compliance "certainly offset and exceeded by far any economic benefit that may have accrued to Respondent by non-compliance." *Respondents' Memorandum* at 10. The OCI's response is that Respondents have misinterpreted section 10(c) of the Penalty Regulations. That section provides:

> The Economic Benefit from Non-Compliance. The penalty shall include an amount intended to offset the economic benefit of non-compliance.
>
> (1) Such an amount may include, but not be limited to:
> (A) the cost of complying;
> (B) the cost of equipment needed to comply;
> (C) any associated operation and maintenance costs;
> (D) the costs of studies needed to achieve compliance;
> (E) any other delayed or avoided costs including, interest, market or competitive advantage over other regulated entities which are in compliance.

The OCI asserts that the section is set up so that the economic benefit portion of the penalty is the benefit that the owner/operator enjoyed by failing to comply. That is, by failing to conduct precision tests and to install overfill protection, "the Respondents were able to spend the money it saved from not complying with the regulatory requirements on other aspects of their business, thereby reaping an "economic benefit" from non-complying." *OCI's Reply Brief* at 21.

I consider OCI's interpretation of this section to be the only reasonable one. Respondents' asserted costs were ones it incurred to be in compliance with other sections of the UST Regulations or with other pertinent regulations. If they had not expended the sums, they may have faced further violations. Their economic benefit was the sums they failed to expend when they failed to comply with the regulatory requirements to precision test the USTs and to install overfill protection.

In addition, in both of Respondents' assertions regarding financial condition and the "substantial costs" incurred, no evidence was presented. As discussed

above, the AAD has previously ruled in accordance with Rhode Island Supreme Court caselaw, that argument by counsel is not evidence and is not legally probative.

Although Respondents' counsel had questioned Ms. Tyrrell about some of the factors considered in determining the Deviation from Standard for the violations, no evidence was presented or elicited to demonstrate that the calculation of the penalties, as amended at the hearing, was not in accordance with the Penalty Regulations. I therefore conclude that Respondents have failed to meet their burden to prove that the proposed amended administrative penalty was not assessed in accordance with the Penalty Regulations.

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

FINDINGS OF FACT

1. LANMAR CORPORATION is the owner of the property located at 362 Central Avenue in the City of Pawtucket, Rhode Island, otherwise identified as Pawtucket Assessor's Plat 8, Lot 345, 407 and 409 (the "Facility").

2. LANDRY & MARTIN OIL CO., INC. is an operator of the Facility.

3. LANMAR CORPORATION and LANDRY & MARTIN OIL CO., INC. are the Respondents in this matter.

4. The Facility is registered with DEM in accordance with the UST Regulations and is identified by DEM as UST Facility No. 00281.

5. Nine (9) USTs were registered with DEM as follows:

UST ID No.	Date Installed	Date Removed	Size (gallons) / Substance Stored
001	1985	8-26-98	20,000/fuel oil
002	1985	8-26-98	20,000/fuel oil
003	1965	8-26-98	25,000/diesel
004	1965	8-26-98	25,000/fuel oil
005	1965	8-26-98	20,000/diesel

006	unknown	10-12-93	1,500/fuel oil
007	unknown	10-12-93	1,500/fuel oil
008	unknown	10-12-93	2,000/gasoline
009	unknown	9-21-98	1,000/gasoline

6. Prior to the issuance of the NOV, Respondents failed to submit precision test results to the DEM as follows:

   UST No. 001 for 1993 and 1996;
   UST No. 002 for 1993 and 1996;
   UST No. 003 for 1990, 1991, 1993, 1995 and 1996;
   UST No. 004 for 1993 and 1994;
   UST No. 005 for 1993, 1994, 1996 and 1997;
   UST No. 009 for 1990, 1991, 1992, 1993, 1994, 1995 and 1996.

7. Following the issuance of the NOV, Respondents provided DEM with missing precision test results for UST No. 004 in 1994 and for UST No. 003 in 1996.

8. Respondents failed to perform precision tests for UST No. 001 for the years 1993 and 1996; UST No. 002 for the years 1993 and 1996; UST No. 003 for the years 1990, 1991, 1993 and 1995; UST No. 004 for the year 1993; UST No. 005 for the years 1993, 1994, 1996 and 1997; and for UST No. 009 for the years 1990, 1991, 1992, 1993, 1994, 1995 and 1996.

9. The OCI established in evidence that the failure to conduct precision tests was calculated as follows:

UST Nos. 001 and 002	Type II Minor Deviation from Standard
UST Nos. 003 and 005	Type II Moderate Deviation from Standard
UST No. 009	Type II Major Deviation from Standard

10. The OCI did not establish in evidence the calculation and the amount of the penalty and economic benefit portion of the penalty for the failure to precision test UST No. 004 in 1993.

11. The OCI established in evidence that the amount of the amended penalty for the failure to conduct precision tests was $7,600.00.

12. An administrative penalty in the amount of $7,600.00 for the failure to conduct precision tests on one UST for seven years, two USTs for four years and two USTs for two years is not excessive.

13. The OCI established in evidence that the economic benefit portion of the penalty should be calculated at the cost of $300.00 each for 19 missing tests, for an economic benefit of $5,700.00.

14. An assessment of the economic benefit portion of the penalty in the amount of $300.00 each for 19 missing tests is not excessive.

15. Prior to the issuance of the NOV, Respondents failed to submit written verification of the installation of spill containment basins on five (5) USTs at the Facility.

16. Following the issuance of the NOV, Respondents provided information regarding spill containment for the five (5) USTs in question.

17. The OCI established in evidence that the penalty, including the economic benefit portion of the penalty, for this alleged violation should be zero.

18. Respondents failed to install overfill protection for UST Nos. 001, 002, 003, 004 and 005.

19. The OCI established in evidence that the failure to install overfill protection on five (5) USTs and/or submit written verification thereof was calculated to by a Type II Moderate Deviation from Standard.

20. The OCI established in evidence that the amount of the penalty for the failure to install overfill protection on five (5) USTs and submit written verification thereof was $5,000.00.

21. An administrative penalty in the amount of $5,000.00 for the failure to install overfill protection on five (5) USTs is not excessive.

22. The OCI established in evidence that the economic benefit portion of the penalty was calculated at $850.00 for each missing system, for an economic benefit of $4,250.00.

23. An assessment of the economic benefit portion of the penalty in the amount of $850.00 for each missing system is not excessive.

24. In the Letter of Deficiency dated November 5, 1998, the Department requested that Respondents provide inventory records for UST Nos. 001, 002, 003, 004, 005 and 009 for the months June, July and August 1998.

25. Respondents failed to produce inventory records for USTs 001, 002, 003, 004, 005 and 009 for the months of June, July and August of 1998.

26. The OCI established in evidence that the failure to maintain and provide inventory records for six (6) USTs for a three (3) month period was calculated to be a Type II Minor Deviation from Standard.

27. The OCI established in evidence that the amount of the penalty for the failure to maintain and produce inventory records for six (6) USTs for a three (3) month period was $500.00 for each tank for each missing month ($500 x 6 x 3) for a total administrative penalty for this violation of $9,000.00.

28. An administrative penalty in the amount of $9,000.00 for the failure to maintain and produce inventory records for six (6) USTs for a three (3) month period is not excessive.

29. By letter dated March 22, 1999, the Department required Respondents to perform a site investigation and to submit a Site Investigation Report ("SIR") to DEM on or before May 22, 1999.

30. On November 22, 1999, the Department received a Limited Subsurface Investigation report for the Facility, which was prepared by BETA Engineering, Inc. on behalf of Respondents.

31. The OCI established in evidence that the late submittal of the SIR was calculated to be a Type I Moderate Deviation from Standard.

32. The OCI established in evidence that the amount of the penalty for the six-months late submittal of the SIR was $5,000.00.

33. An administrative penalty in the amount of $5,000.00 for the six-months late submittal of the SIR is not excessive.

34. The OCI also established in evidence that the subtotal of the administrative penalty for all violations was $26,000.00 with the subtotal for an economic benefit portion of the penalty of $9,950.00. The total proposed administrative penalty is $35,950.00.

CONCLUSIONS OF LAW

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

1. The OCI has proved by a preponderance of the evidence that Respondents failed to perform precision tests for UST No. 001 in 1993 and 1996; UST No. 002 in 1993 and 1996; UST No. 003 in 1990, 1991, 1993 and 1995; UST No. 004 in 1993; UST No. 005 in 1993, 1994, 1996 and 1997; and UST No. 009 in 1990, 1991, 1992, 1993, 1994, 1995 and 1996 in violation of UST Regulations § 10.06(B).

2. Respondents have failed to prove that the penalty and economic benefit portion of the penalty for the failure to precision test was not assessed in accordance with the Penalty Regulations.

3. The OCI has proved by a preponderance of the evidence that Respondents failed to install overfill protection on five (5) USTs in violation of UST Regulations § 10.10(B).

4. Respondents have failed to prove that the penalty and economic benefit portion of the penalty for the failure to install overfill protection on five (5) USTs was not assessed in accordance with the Penalty Regulations.

5. The OCI has proved by a preponderance of the evidence that Respondents failed to maintain and provide inventory records for six (6) USTs for a three (3) month period in violation of UST Regulations § 13.02(B)(5) and § 13.04.

6. Respondents have failed to prove that the penalty for the failure to maintain and provide inventory records for six (6) USTs for a three (3) month period was not assessed in accordance with the Penalty Regulations.

7. The OCI has proved by a preponderance of the evidence that the Respondents submitted the SIR six (6) months after the Department's deadline in violation of UST Regulations § 14.08(D).

8. Respondents have failed to prove that the penalty for the failure to submit the SIR within sixty (60) days of the March 22, 1999 request was not assessed in accordance with the Penalty Regulations.

9. Respondents have failed to prove that the subtotal of the penalty for all violations of $26,000.00 and the subtotal of the economic benefit portion of the penalty of $9,950.00, for a total administrative penalty of $35,950.00, is excessive.

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

it is hereby

ORDERED

1. An administrative penalty in the amount of Thirty-Five Thousand Nine Hundred Fifty ($35,950.00) Dollars is hereby ASSESSED, jointly and severally, against each Respondent.

2. Respondents shall make payment of the administrative penalty within thirty (30) days from the date of entry of the Final Agency Order in this matter. Payment shall be in the form of a certified check or money order made payable to the "General Treasurer -- Water and Air Protection Program Account," and shall be forwarded to:

R.I. Department of Environmental Management
Office of Management Services
235 Promenade Street, Room 340
Providence, RI 02908
Attn: Glenn Miller

Entered as an Administrative Order this 27th day of January, 2003 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, Third Floor
Providence, Rhode Island 02908
401-222-1357

Entered as a Final Agency Order this 28th day of January 2003.

Jan H. Reitsma
Director
Department of Environmental Management
235 Promenade Street, Fourth Floor
Providence, Rhode Island 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within Decision and Order to be forwarded, via regular mail, postage prepaid to: Michael F. Horan, Esquire, P.O. Box A, Pawtucket, RI 02861-0901; via interoffice mail to Bret Jedele, Esquire, Office of Legal Services and Dean H. Albro, Chief, Office of Compliance and Inspection, 235 Promenade Street, Providence, RI 02908 on this _______ day of January, 2003.

____

If you are aggrieved by this final agency order, you may appeal this final order to the Rhode Island Superior Court within thirty (30) days from the date of mailing of this notice of final decision pursuant to the provisions for judicial review established by the Rhode Island Administrative Procedures Act, specifically, R.I. Gen. Laws §42-35-15.

APPENDIX A

LIST OF EXHIBITS

OCI'S EXHIBITS

OCI 1 Full	Copy of Application for Underground Storage Facilities - dated 3/12/85 (3 pages).
OCI 2 for Id	Copy of Closure Inspection Sheet & Closure Inspection Checklist (Tank Nos. 006-008) - dated 10/12/93 (2 pages).
OCI 3 Full	Copy of Closure Inspection Sheet & Closure Inspection Checklist (Tank Nos. 001-005) - dated 8/26/98 (2 pages).
OCI 4 Full	Copy of Closure Inspection Sheet & Closure Inspection Checklist (Tank No. 009) - dated 9/21/98 (2 pages).
OCI 5 Full	Copy of Correspondence - dated 11/5/98 from Eric Beck of DEM to Michael Martin of Landry & Martin (2 pages).
OCI 6 Full	Copy of Correspondence - dated 5/30/97 from F. Daniel Russell, Jr. of DEM to Michael Martin of Landry & Martin (2 pages including return receipt).
OCI 7 Full	Copy of Correspondence - dated 2/17/99 from Kevin Gillen of DEM to Michael Martin of Landry & Martin (1 page plus return receipt).
OCI 8 Full	Copy of Cover Page & Cover Letter from UST Closure Assessment Report - dated February 1999, received by RIDEM 3/8/99 (2 pages).
OCI 9 Full	Copy of Correspondence - dated 3/22/99 from Bruce Catterall of DEM to Michael Martin of Landry & Martin (3 pages).
OCI 10 Full	Copy of Correspondence - dated 4/27/99 from Michael Martin of Landry & Martin to Kevin Gillen of DEM (1 page).
OCI 11 Full	Copy of Correspondence - dated 9/17/99 from Stephen Muschiano of DEM to Michael Martin of Landry & Martin (1 page).
OCI 12 Full	Copy of Cover Page & Cover Letter from Limited Subsurface Investigation - dated November 1999, received by RIDEM 11/22/99 (4 pages).
OCI 13 Full	Copy of Penalty Summary & Worksheet(s) - from NOV dated 5/12/2000 (6 pages).
OCI 14 for Id	Copy of Notice of Violation issued to Landry & Martin Oil Co., Inc. and Lanmar Corporation dated May 12, 2000, with two return receipts.

<u>RESPONDENTS' EXHIBITS</u>

Resp 1 Full	Copy of Precision Testing Company - Paid Invoice #101792 for 10/17/92 - Precision Testing of 3 tanks.
Resp 2 Full	Copy of Precision Testing Company - Paid Invoice #010494 for 1/4/94 - Precision Testing of 1 tank.
Resp 3 for Id	Copy of Precision Testing Company - Tank Tightness Test Certificate for 3 tanks on 10/13/94.
Resp 4 for Id	Copy of Precision Testing Company - Tank Tightness Test Certificate for 1 diesel tank on 10/13/94.
Resp 5 for Id	Copy of Precision Testing Company - Precision Testing of 1 tank on 4/1/95 with paid invoice.
Resp 6 Full	Copy of Precision Testing Company - Paid Invoice #12396B for 1/23/96 - Precision Testing of 1 tank.
Resp 7 Full	Copy of Precision Testing Company - Paid Invoice #022196 for 2/21/96 - Precision Testing of 1 tank.
Resp 8 for Id	Copy of Precision Testing Company - Tank Tightness Certificate for 3/4/97 testing of one tank with paid invoice.
Resp 9 for Id	Copy of Precision Testing Company - Tank Tightness Certificate dated 3/10/97 with paid invoice.
Resp 10 for Id	Copy of Whitco Testing Co. Tank Tightness Test of 2 tanks on 3/19/98 with paid invoice.
Resp 11 Full	Copy of R.I. Dept. of Environmental Management Paid Invoice for Underground Storage Tank Registration Fee for 5 tanks dated 8/25/93.
Resp 12 Full	Copy of R.I. Dept. of Environmental Management Paid Invoice dated 6/4/93 for Underground Storage Tank Past Due Notice.
Resp 13 Full	Copy of R.I. Dept. of DEM application of Landry & Martin Oil Co., Inc. for Underground Storage Facilities Certificate of Registration dated 3/12/85.
Resp 14 for Id	Copy of R.I. DEM Underground Storage Tank Registration Form from Landry & Martin Oil Co., Inc. dated 3/25/97.
Resp 15	Copy of Certified letter from R.I. DEM Underground Storage Tank

Full	section to Appellant dated 5/30/97 of results of 5/2/97 leak detection compliance inspection.
Resp 16 Full	Copy of 5/15/97 letter from Underground Storage Tank division to Appellant requesting registration of 1000 gallon tank.
Resp 17 for Id	Copy of 10/27/97 letter from Appellant to Underground Storage Tank division confirming installation of overfill protection, tank registration and tank testing having been completed (for 1000 gallon tank).
Resp 18 for Id	Copy of Underground Storage Tank Registration Invoice dated 11/20/97 to Appellant for six tanks.
Resp 19 for Id	Copy of 8/24/98 letter from Appellant to Underground Storage Tank division for addition of one 1000 gallon gasoline tank to closure application.
Resp 20 for Id	Copy of Appellants' Compliance Application to the Rhode Island U.S.T. Review Board dated 8/24/98.
Resp 21 for Id	Copy of 12/1/98 letter from Appellant to Attorney for Precision Testing Company for copy of all tests performed between 1990 and 1998.
Resp 22 Full	Copy of 4/27/99 letter from Appellant to U.S.T. division for request for installation of one observation well.
Resp 23 for Id	Copy of 9/17/99 letter from DEM Office of Waste Management to Appellant inquiring about report on groundwater monitory [sic] well.
Resp 24 Full	Copy of U.S.T. Closure and Assessment Report of Clean Environment, Inc. dated February 1999 for work in August 1998.
Resp 25 Full	Copy of Limited Subsurface Investigation report of Beta Engineering Inc. dated November 1999 for work done on 10/19/99.
Resp 26 Full	Copy of U.S.T. Closure Inspection Sheet dated 8/26/98.
Resp 27 for Id	Copy of Commonwealth of Massachusetts Uniform Hazardous Waste Manifest dated 8/24/98.
Resp 28 for Id	Copy of ECC Certificate of Disposal/Recycling Manifest #MAK048500 dated 8/26/98.
Resp 29 Full	Photograph of cement dike installation around all fill pipes and vent pipes about 1977-1978.
Resp 30 for Id	Photograph of overspill and overfill protection for 1000 gal. gasoline tank.
Resp 31	Interoffice Memo dated August 23, 1999 to Paula Therrien from Kevin

Full Gillen.