

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

RE: FRANCIS P. PAINE/FRANCIS P. PAINE, JR.
PAINE'S TEXACO SERVICE STATION

AAD NO. 93-048/GWE

NOTICE OF VIOLATION NO. UST 93-00545

DECISION AND ORDER

This matter came before the Administrative Adjudication Division ("AAD"), of the Department of Environmental Management ("Department" or "DEM") on a request for a hearing on a Notice of Violation and Order ("NOV") issued on September 1, 1993 by the Division of Waste Management, Underground Storage Tank Program ("Division") to Francis P. Paine and Francis P. Paine, Jr., Paine's Texaco Service Station ("Respondents"). The hearing in this matter initially commenced on September 11, 1995. Prior to proceeding, Division requested and was granted a continuance pending a determination in an unrelated matter at AAD involving Division's burden of proof in such hearings. The Administrative Hearing was conducted on December 19, 1995 at the office of the Administrative Adjudication Division at One Capitol Hill, Providence, Rhode Island. Brian A. Wagner, Esq. represented Division and Michael A. Horan, Esq. represented Respondents.

The within matter is properly before the Hearing Officer pursuant to R.I.G.L. Chapter 12 of Title 46 entitled "Water Pollution", specifically Section 46-12-9, R.I.G.L. Section 42-17.1-2 and Chapter 42-17.6, statutes governing the AAD (R.I.G.L. Sec. 42-17.7-1 et seq.), the Administrative

Procedures Act (R.I.G.L. Sec. 42-35-1 et seq.), the Regulations for Underground Storage Facilities Used for Petroleum Products and Hazardous Materials ("UST Regulations"), and the Administrative Rules of Practice and Procedure for the Adjudication Division for the Department of Environmental Matters. The proceedings were conducted in accordance with the above-noted statutes and regulations.

The NOV cites Respondents for the following violations of the UST Regulations (1992)¹ as amended at their premises located at 344 Armistice Boulevard, Pawtucket, Rhode Island ("facility"): (1) failure to precision test UST #001 for the years 1986, 1987, 1988, 1991 and 1992, UST #002 for the years 1986, 1987, 1988, 1991 and 1992, UST #003 for the years 1987, 1988, 1991 and 1992, and UST #004 for the years 1986, 1987, 1988, 1991 and 1992 as required by Sections 10.06(A) and (B); (2) failure to comply with Section 10.10(A) relating to spill containment basin requirements as to UST #004; (3) failure to submit written verification of precision test results for said USTs for said years as required by Section 10.06(B) (9); and (4) failure to submit written verification of the installation of a spill containment basin on UST #004 as required by Section 10.10(C).

¹The 1985 UST Regulations were amended in 1992 and 1993 (August and December); however, the provisions requiring Precision Testing and submission of results thereof remained the same throughout.

Said NOV ordered Respondents (1) to submit to Department within 30 days (a) copies of all said precision test results identified as having not been submitted, and (b) copies of all documentation confirming that spill containment basins have been installed, (2) within 30 days bring the facility into full compliance with all UST Regulations; and (3) in lieu of the foregoing to close all UST systems at the facility in accordance with Section 15 of UST Regulations within 30 days. In addition, an administrative penalty of \$27,400.00 was assessed jointly and severally against Respondents.²

Respondent requested an adjudicatory hearing on the NOV on September 13, 1993. A Status Conference was held at the AAD on December 3, 1993, at which a Control Date of February 4, 1994 was established in order that the parties might pursue settlement negotiations. No request for an extension of the Control Date having been received by the AAD by March 25, 1994, a Prehearing Conference was scheduled.

The Prehearing Conference was held on May 6, 1994 and the requisite Prehearing Conference Record was prepared by the Hearing Officer who conducted same. Counsel agreed to the following stipulations of fact:

²Division brought out during the hearing that after the NOV was issued, it was provided with precision tests for 1985 for the four USTs as well as evidence of compliance with the spill containment requirements. Consequently, Division pursued 15 test violations only (instead of the 19 test violations and the spill containment violation as set forth in the NOV.)

STIPULATIONS OF FACT:

1. The respondents, Francis P. Paine and Francis P. Paine, Jr. are the owners and/or operators of a certain parcel(s) of real property located at 344 Armistice Blvd., Pawtucket, Rhode Island, otherwise known as Pawtucket Assessor's Plat 18, Lots 648 and 649 (the "Facility").
2. The Facility is comprised of a retail gasoline station known as Paine's Texaco, which Facility has at least four underground storage tank ("UST") systems located thereon.
3. The Facility is registered with the Department of Environmental Management ("DEM") as UST Facility ID #000545.
4. Prior to the issuance of the Notice of Violation and Order ("NOV") the Department had information that indicated that UST #004 at the Facility had not been fitted with a spill containment basin; however, the Department has since been provided with evidence that spill containment has been installed on tank #004.
5. Respondent Paine had precision tests performed on the four (4) tanks in question on 12/17/85; 10/31/89; 2/1/90; and 9/16/93.
6. DEM issued Certificates of Registration to Respondent Paine for the tanks in question on April 21, 1992 and October 12, 1993 for the periods from July 1, 1991 to June 30, 1992 and from July 1, 1993 to June 30, 1994.
7. Division of Waste Management ("Division") of the Department of Environmental Management issued to subject Notice of Violation and Order against the Respondents dated September 1, 1993.
8. Respondents filed a timely appeal and request for hearing on said Notice of Violation.
9. DEM's Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters were filed with Rhode Island

Secretary of State's office on July 10, 1990, effective 20 days thereafter.

10. DEM's Rules and Regulations for Assessment of Administrative Penalties were filed with the Rhode Island Secretary of State's office on May 5, 1992, effective 20 days thereafter.

Counsel agreed at the Prehearing Conference that the following issues were to be considered at the hearing:

1. Whether the respondents failed to precision test certain UST systems at the Facility in accordance with the UST Regulations and applicable Rhode Island Law.
2. Whether the respondents failed to submit the results of precision tests to the Department for the subject UST systems at the Facility in accordance with the UST Regulations and applicable Rhode Island law.

Counsel for Respondents submitted the following additional issues to which there was no agreement:

1. DEM failed to exercise its administrative enforcement authority herein in a timely manner and is then estopped from any enforcement thereof, at this time. Statute of Limitations is raised as an issue.
2. DEM is estopped from asserting violations for any years prior to June 30, 1994 by the acceptance of Respondent's prior tests and the issuance of Certificates of Registration on April 21, 1992 and October 12, 1993.
3. DEM's Rules and Regulations for Assessment of Administrative Penalties fail to properly carry out and comply with the requirements of Section 42-17.6-6 of the Rhode Island General Laws.
4. DEM is estopped by Section 42-17.6-8 of the Rhode Island General Laws from assessing any administrative penalties for any alleged violations arising prior to May 25, 1992 when the DEM's Rules and Regulations for Assessment of Administrative Penalties became effective and lawfully enforceable.

5. DEM's proposed monetary penalty amounts herein are excessive and confiscatory in violation of Section 42-17.6-4 (a) of the Rhode Island General Laws.
6. DEM failed to give Respondent proper credit for the time periods covered by the four (4) precision tests submitted by Respondent for the tanks in question.
7. DEM's proposed monetary penalties are in excess of and in violation of the \$1,000.00 maximum amount for each failure to comply under Section 42-17.6-7 of the Rhode Island General Laws.

The Division offered eight (8) documents as exhibits. The list of Division's Exhibits is attached as "Appendix A". Division's Exhibits 1, 2, 3, 4, 6, 7 and 8 were admitted as full exhibits. Division's Exhibit 5 was marked for identification only. The list of Respondents' Exhibits is attached as "Appendix B". Respondents' Exhibits 7, 8, 9, 10, 11, 12, 13 and 14 were admitted as full exhibits. Respondents' Exhibits 1, 2, 3, 4, 5 and 6 were marked for identification only.

Susan W. Cabaceiras, a Senior Environmental scientist with the Division, was the first witness to testify for Division. As part of her duties, she drafted the NOV as well as the attached administrative penalty assessment worksheet summary. The proposed penalties were calculated by this witness. She testified that the precision testing violations as well as the spill containment violation were calculated as Type II Moderate under the 1992 administrative penalty regulations. These same regulations were utilized to

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calculate the penalties for the alleged violations that occurred prior to 1992. She explained that the 1987 penalty regulations are basically the same as the 1992 regulations. One of the differences is the assessment of penalties for Type II Moderate. The range for Type II Moderate under the 1987 regulations was \$1,500.00 to \$2,500.00 per violation. Since the range for Type II Moderate under the 1992 regulations is \$1000.00 to \$5000.00 per violation, the 1992 regulations were utilized as a matter of convenience.

Ms. Cabeceiras testified that after the NOV was issued, Division was provided with precision tests for 1985 for the four tanks, which reduced the penalties assessed from 19 to 15 tests. Division was also provided with evidence that the spill containment basin had been installed.

Division applied the 1985 test results to the 1986 test result requirement for three of the tanks, and the 1987 test results for the fourth tank. As a result of this information, the proposed administrative penalties were recalculated and a revised administrative penalty assessment worksheet summary (Div. 8 Full) was completed. The revised penalty worksheet summary excluded the violations and associated penalties relating to the alleged failure to install a spill containment basin on UST No. 004, and also excluded the precision testing violations and penalties for UST Nos. 001, 002 and 004 for 1986 and UST No. 003 for 1987. The penalty

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for the remaining 15 missed tests was then calculated in the same manner as originally calculated in the NOV (minus those violations excluded).

The revised worksheet listed the tanks in a different order than the NOV since the information was taken from a more recent UST Registration Application; however this did not affect the manner in which the penalties were calculated.

Ms. Cabeceiras testified that Division calculated the Economic Benefit from the Non-Compliance portion of the penalty worksheet (Section C) at \$350.00 per missed test by conducting an annual survey of all Rhode Island licensed testers to determine the average price of precision tests.

It was elicited in cross-examination of Ms. Cabeceiras that the administrative penalty calculation in the worksheet summary attached to the NOV listed the maximum allowable penalty, but contained no indication as to Type or Deviation of the alleged violation. It was further brought out in cross-examination of this witness that she made the determination that the Respondents' failure to precision test be considered a Type II violation prior to issuance of the NOV; and that it is Division's standard policy that such violations be considered Type II.

Ms. Cabeceiras was cross-examined extensively concerning the standards for determination as to type of violation and deviation from standard. This witness steadfastly maintained

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that Division has uniform standards to determine the type of violation, and that the instant violations are considered Type II Violations and as Moderate Deviation from the Standard. Further questioning also established that all of the factors set forth in 42-17.6-6 (except for financial ability) were taken into consideration as to the instant matter prior to issuance of the NOV.

Division called Respondent Francis P. Paine as its only other witness. It was brought out that Mr. Paine has operated the subject gas station for about 36 years.

Respondents then called Respondent Francis P. Paine as their sole witness. He testified that he has operated Paine's Texaco on Armistice Boulevard, Pawtucket, RI as a gasoline and service station continuously for approximately 36 years. He stated that DeBlois Oil Company ("DeBlois") has been his supplier since he commenced doing business; and that DeBlois had conducted tests on said tanks in 1985, just before DeBlois transferred ownership of said tanks to him in 1986.

It was Mr. Paine's testimony that prior to receiving a "warning letter" in March of 1993 (Div. Exhibit 6), he was not aware of any requirement for annual precision testing of the subject tanks. He denied that there were any rules and regulations annexed to the document entitled UST Transfer of

Certificate of Registration (Exhibit Div 3)³.

Respondents introduced copies of the Schedule C (Form 1040) portion of their Internal Revenue Service returns (entitled "Profit or Loss from Business") for the years 1991, 1992, 1993 and 1994 (Resp. Exhibits 9, 10, 11 and 14). Mr. Paine also testified that he prepared the summary of Respondents, Gasoline Purchases for 1990, 1991, 1992, 1993 and 1994 (Resp Exhibit 12) which figures represent the total gallonage of gasoline purchased each year.

It was Mr. Paine's further testimony that he and his son own the home at 190 Willison Way, Pawtucket, Rhode Island; that this property is presently worth approximately \$90,000.00; that there is no mortgage on same; that he has a bank account of approximately \$10,000.00 and a mutual fund of approximately \$17,000.00; that he presently works part-time at the business and "takes out" approximately \$100.00 per week; that he owns the business location which is worth approximately \$150,000.00; and that he has no other sources of income.

Respondents do not dispute that precision tests were not conducted on the four (4) tanks in question in the years

³This document indicates that Respondent signed this instrument as transferee (which was acknowledged before a Notary Public) wherein Paine's Texaco certified that "they have and will continue to fully comply with all provisions of Section 17. of the Regulations...(copy attached and made a part hereof)".

enumerated in the Administrative Penalty Assessment Worksheet Summary, revised 12/19/95 (Division's Exhibit 8).⁴ Respondents, however, contend that the original NOV and the revised Penalty Summary are legally defective and in violation of the applicable law, and that the violations and penalties are in excess of and without proper statutory authority.

Respondents argue that the NOV is legally defective in that it failed to set forth the Type of Violation and the amount or Degree of Deviation from Standard; that Respondents were not given proper notice as required by Statute and Regulations; that the Division did not proceed in the proper manner when it recalculated the penalty and by issuance of a Revised Worksheet Summary; and that the Regulations require that Division issue an amended Notice of Violation when it recalculates a penalty.

It is further argued by Respondents that the penalties and assessments are unlawfully calculated and unlawfully assessed in that Division failed to make any determination or undertake any consideration of Respondents' financial condition or Respondents' reasons for their alleged failure to comply; that Division's calculation and assessment of penalties in accordance with the 1992 Penalty Regulations prohibits any assessment of penalties for years prior to 1992,

⁴The Respondents, in their request for a hearing, did not deny the 15 remaining precision testing violations nor did they dispute same at the hearing.

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and therefore no penalties should be imposed for the years 1987, 1988 and 1991; that the penalties and assessments exceed the statutory limit, and there is no statutory authority for Division to assess the additional \$350.00 penalty for "Economic Benefit from Non-Compliance"; and that the failure to conduct precision tests and the failure to report and file test results should constitute one violation and not two separate violations (as alleged by Division).

It is Division's contention that it has met its burden of proving the alleged violations by a preponderance of the evidence; and that based on Respondents' admissions, it has clearly been established: (1) that Respondents failed to precision test certain UST Regulations and applicable Rhode Island law, and (2) that Respondents failed to submit the results of precision tests to Department for the subject UST systems at the Facility in accordance with the UST Regulations and applicable Rhode Island law.

Division further contends that it has met its burden of establishing the penalty amount and its calculation, and that Respondents have failed to meet their burden of proving that the penalty was not assessed in accordance with the Penalty Regulations or that said penalty is excessive.

Division argues that the Penalty Regulations relied upon by Division to calculate the penalty effectively meet the

requirements of the General Laws; that the Division's assessment of penalties using the procedures set forth in the 1992 Penalty Regulations was appropriate and, in any event, had no detrimental impact on Respondents; and that Division thoroughly evaluated all considerations required by law or rule in calculating the proposed penalty.

It is essentially Division's position that the penalties proposed in the NOV were properly calculated in accordance with the Penalty Regulations and that the Respondents have provided no reasonably acceptable defense to the allegations contained in the NOV.

The Division bears the burden of proving the alleged violations by a preponderance of the evidence. Once a violation is established and the Division has discharged its initial duty of establishing in evidence the penalty amount and its calculation thereof, the burden then shifts to Respondents to prove by a preponderance of the evidence that the penalty and/or the economic benefit portion of the penalty was not assessed in accordance with the Penalty Regulations, or that the penalty is excessive.

Initially, the Respondents were cited for nineteen missed precision test violations and one spill containment violation. At the hearing, Division withdrew four of the precision test violations and the spill containment violation. Division submits (and Respondents do not dispute) that the revised

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Penalty Worksheet Summary describes the same UST information and precision testing violations set forth in the NOV (minus the four dismissed violations), but that the tanks are listed in a different order because the information was taken from a more recent UST Registration Application. Consequently, only fifteen precision test violations remain for consideration herein.

There are two agreed issues (as demonstrated by the Prehearing Conference Record) that were submitted for consideration at the hearing, viz: (1) whether Respondents failed to precision test certain UST systems at the Facility, and (2) whether Respondents failed to submit the results of precision tests to Department.

Respondents submitted (as stated in the Prehearing Conference Record) seven additional issues which they felt should be considered. These issues raised numerous defenses concerning the legality of Division's enforcement action and the assessment of the proposed penalties. One of Respondents' suggested issues also asserted that Division failed to give Respondents proper credit for the time periods covered by the four precision tests submitted by Respondents for the tanks in question. Division's submission of the revised Penalty Worksheet Summary eliminates these violations (originally cited in the NOV) for these four tests; consequently, this issue is not addressed further herein.

Several of the issues suggested by Respondents in the Prehearing Conference Record raise the defense of estoppel, as well as the Statute of Limitations. Respondents, however, failed to present any valid arguments which would support their contentions in this regard.

There is no statute of limitations which specifically applies to DEM's enforcement actions or its authorization to impose administrative penalties. Consequently, the statute of limitations governing civil matters in the State of Rhode Island should govern the instant matter. Section 9-1-36 of the Rhode Island General Laws enumerates the statutes of limitations for various civil actions. There is no provision therein specifying DEM enforcement proceedings or penalty assessments. However, R.I.G.L. Section 9-1-13(a) provides: "Except or otherwise specifically provided, all civil actions shall be commenced within ten (10) years next after the cause of action shall accrue, and not after." It would appear that this provision should apply to DEM enforcement actions and administrative penalties. In any event, the instant action is not barred by the Statute of Limitations or otherwise; and Division should not be estopped from exercising its administrative enforcement authority.

The doctrine of equitable estoppel may be applied to an administrative authority under circumstances where justice would so require. However, such relief is extraordinary and

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should not be applied unless the equities clearly must be balanced in favor of the party seeking relief under this doctrine, Greenwich Bay Yacht Basin Association v. Brown, 537 A.2d 988 (R.I. 1988). Under this general standard, an examination of the Respondents' contentions clearly demonstrates that acceptance of Respondents assertions in their most favorable light fails to establish an adequate basis for application of the doctrine of equitable estoppel.

A review of the facts in this matter demonstrates that the doctrine of estoppel is not applicable to the instant proceedings. There is no evidence from which it can be inferred that Division either intended or expected that either the acceptance of tests or the issuance of a Certificate of Registration would cause Respondents not to precision test their USTs or comply with the UST Regulations. Such conduct by Division cannot be equated with compliance and should not be considered grounds for estoppel.

A careful reading of the pertinent statutes and regulations demonstrates that DEM's Rules and Regulations for assessment of Administrative Penalties properly carry out and are in compliance with the requirements of Section 42-17.6-6 of the Rhode Island General Laws. Although the Regulations do not contain the exact provisions as set forth in the statute, Section 4(a) of the Regulations provides that "These regulations shall be liberally construed to permit the

Department to effectuate the purposes of State Law."

Section 42-17.6-6 requires that the Director include, "to the extent practicable" the financial condition of Respondents as one of the considerations in determining the amount of the administrative penalty. It would be manifestly impracticable for Division to consider the financial condition of Respondents prior to issuance of the NOV. Accordingly, Respondents were given ample opportunity to present evidence of their financial condition at the hearing. The evidence presented at the hearing failed to support Respondents' arguments that the proposed penalty amount is excessive or confiscatory and does not indicate that Respondents have insufficient income and/or assets to pay a properly calculated penalty.

The evidence clearly establishes that Respondents have violated the precision testing requirements of the UST Regulations, and that the penalties were calculated in accordance with the pertinent statutes and Penalty Regulations. After appropriate consideration of all of the requisite factors, the violations undoubtedly should be considered Type II violations, the Deviation from the Standard should not be less than Moderate, and the economic benefit portion of the penalty should be upheld.

There appears little or no doubt that Division's decision (prior to the actual commencement of the hearing) to present

the testimony of Susan Cabeceiras may be attributed to a recent AAD decision (Richard Fickett, AAD No. 93-014/GWE, 12/9/95).⁵ This did not violate any statute or regulation, or prejudice Respondents in any way whatsoever.

Section 11(b) of the Penalty Regulations requires that an amended NOV be issued when the penalty is recalculated by the Director and the penalty issue cannot be informally resolved. In the instant matter, Division merely withdrew some of the violations contained in the NOV (4 precision tests and the spill containment), and the revised penalty assessment summary reflected the withdrawal of these charges. The remaining penalties were calculated in the same manner and were based on the same regulations; consequently, an amended NOV need not be issued.

Respondents' argument that penalties cannot be imposed for the years prior to 1992 (the date of enactment of the penalty regulations utilized by Division in calculating the penalties) lacks merit. The procedural aspects of the Penalty Regulations (in force at the time of issuance of the NOV) were properly utilized by Division; however, the same result would be achieved whether the 1987 Penalty Regulations or any later amendments thereof were utilized.

The \$1000.00 limitation on penalties imposed by R.I.G.L.

⁵The Fickett decision held (contrary to Division's contentions) that Division had the burden of establishing in evidence the penalty amount and its calculation thereof.

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§42-17.6-7 applies only when a different amount is not specified by statute. However, Section 46-12-13 of the Water Pollution Control Act (the principal statutory authority for UST Regulations) specifies that violators of said Act, or the Regulations issued pursuant thereto, shall be subject to a penalty of not more than \$25,000.00 for each day during which the violation occurs. Obviously, the proposed penalties of \$1350.00 per year, per violation in the instant matter do not exceed those allowed by statute or regulation.

The Division seeks to impose a penalty of \$1350.00 for each of the 15 precision tests not conducted. This amount represents a \$1000.00 base penalty plus a \$350.00 Economic Benefit from Non-Compliance penalty. There is no penalty for the failure to report test results; and the actual penalties imposed are significantly lower than the Maximum Penalty allowed by the Penalty Regulations based on the appropriate Type (Type II) and the proper Deviation from Standard (Moderate).

Division has met its burden of proving the alleged violations by a preponderance of the evidence and discharged its initial duty of establishing in evidence the penalty amount and its calculation thereof. The Respondents failed to prove by a preponderance of the evidence that the penalty and/or the economic benefit portion of the penalty was not assessed in accordance with the Penalty Regulations and/or

that the proposed penalty is excessive.

Based on the entire hearing record,⁶ the penalties assessed in the revised penalty worksheet summary conform with the applicable statutes and regulations, and are warranted in this matter.

FINDINGS OF FACT

After reviewing the documentary and testimonial evidence of record, I find as a fact the following:

1. The Respondents, Francis P. Paine and Francis P. Paine, Jr. are the owners and/or operators of a certain parcel(s) of real property located at 344 Armistice Blvd., Pawtucket, Rhode Island, otherwise known as Pawtucket Assessor's Plat 18, Lots 648 and 649 (the "Facility").
2. The Facility is comprised of a retail gasoline station known as Paine's Texaco, which Facility has at least four underground storage tank ("UST") systems located thereon.
3. The Facility was registered with the Department in 1985 and identified as UST Facility ID No. 0545.
4. Respondents are the owners and operators of four (4) gasoline USTs located at the Facility.
5. Respondents have owned the Facility as joint tenants since April, 1982.
6. Respondent Francis P. Paine has operated the Facility for approximately 36 years.
7. The Certificate of Registration for said Underground Storage Facility was transferred to Respondent Francis P.

⁶The Division's Response to Respondents' Post-Hearing Memorandum was not timely filed, and has not been considered by the Hearing Officer.

Paine in January, 1986.

8. DEM issued Certificates of Registration to Respondent Paine for the tanks in question on April 21, 1992 and October 12, 1993 for the periods from July 1, 1991 to June 30, 1992 and from July 1, 1993 to June 30, 1994.
9. Prior to the issuance of the Notice of Violation and Order ("NOV") the Department had information that indicated that UST #004 at the facility had not been fitted with a spill containment basin; however, the Department has since been provided with evidence that spill containment has been installed on tank #004.
10. The following information regarding the UST systems at the Facility is registered with the Department:

UST ID#	DATE UST INSTALLED	CAPACITY (GAL.)
001	1971	4,000
002	1963	2,000
003	1959	4,000
004	1959	2,000

11. Respondent Paine had precision tests performed on the four (4) tanks in question on 12/17/85; 10/31/89; 2/1/90; and 9/16/93.
12. The four (4) gasoline UST systems located at the Facility were not precision tested during the following years:
 - a. #001: 1988, 1991, 1992;
 - b. #002: 1987, 1988, 1991, 1992;
 - c. #003: 1987, 1988, 1991, 1992;
 - d. #004: 1987, 1988, 1991, 1992.
13. Respondents admit that the four (4) gasoline UST systems at the Facility were not precision tested as described in Paragraph 12 above.
14. The Respondents failed to submit to the Department any precision test results or other evidence of precision tests conducted at the Facility for the tanks and years cited in Paragraph 12 above as required by the UST Regulations.
15. Division has voluntarily withdrawn the alleged violations, and the associated penalties, relating to the alleged failure to install a spill containment basin on

UST No. 004 as well as the precision testing violations and penalties for UST Nos. 001, 002 and 004 for the year 1986 and UST No. 003 for the year 1987. The withdrawal of said previously cited violations leaves a total of fifteen (15) missed precision tests as the sole remaining violations.

16. Division at the hearing submitted a revised Administrative Penalty Assessment Worksheet Summary, dated 12/19/95, which assessed the same penalty for the remaining fifteen missing precision tests as originally assessed in the NOV (as the USTs were identified in the Registration Application submitted by Respondents on 11/9/89).
17. Respondents' realized an economic benefit as a result of not paying for precision tests to be performed on the four (4) gasoline UST systems as described in Paragraph 13 above.
18. The average cost of precision testing a UST at the time of the issuance of the NOV was \$350.00.
19. A UST Certificate of Registration does not certify that the facility is being operated in compliance with the requirements of the UST Regulations.

CONCLUSIONS OF LAW

Based on the documentary and testimonial evidence of record, I conclude the following as a matter of law:

1. Francis P. Paine and Francis P. Paine, Jr. are the owners and/or operators of the subject Facility as defined by the Regulations.
2. The Division has jurisdiction over Francis P. Paine and Francis P. Paine, Jr.
3. The four (4) gasoline UST systems located at the Facility were required by the UST regulations to be tested during the following years:
 - a. Tank #001: 1987 and annually thereafter;
 - b. Tank #002: 1986 and annually thereafter;
 - c. Tank #003: 1986 and annually thereafter;
 - d. Tank #004: 1986 and annually thereafter.

4. The Division proved by a preponderance of the evidence that Francis P. Paine and Francis P. Paine, Jr. violated the UST Regulations requiring precision testing and submission of results of precision tests for each of the following USTs/years:⁷
 - #001: 1988, 1991, 1992
 - #002: 1987, 1988, 1991, 1992
 - #003: 1987, 1988, 1991, 1992
 - #004: 1987, 1988, 1991, 1992
5. The assessment of the administrative penalty for each of the violations established in Conclusion of Law No. 3 above was properly calculated in accordance with the Rules and Regulations for the Assessment of Administrative Penalties and totals \$20,250.00.
6. The Division properly classified Respondents' violations as Type II violations in accordance with the Rules and Regulations for Assessment of Administrative Penalties.
7. The Division properly classified Respondents' violations as having a Moderate Deviation from the Standard in accordance with the Rules and Regulations for Assessment of Administrative Penalties.
8. The Division properly calculated Respondents' economic benefit from noncompliance in accordance with the Rules and Regulations for Assessment of Administrative Penalties.
9. The penalties in the instant matter do not exceed the maximum penalties allowed by statute.
10. Division is not required by statute or regulation to include a detailed description of the penalty computation in the NOV.
11. The Division has met its burden of establishing in evidence the penalty amount and the calculation thereof.

⁷The Respondents' failure to precision test was a violation of:

- a. 1985 UST Regulations §9(c)(ii) and §9(d);
- b. 1992 UST Regulations §§10.05(B)(1) and (2); and
- c. 1993 UST Regulations (August and December) §§10.06(B)(1) and (2).

12. Respondents have failed to prove by a preponderance of the evidence that the penalties and economic benefit assessed as a result of the violations were not properly assessed in accordance with the Rules and Regulations for Assessment of Administrative Penalties.
13. Respondents have failed to prove by a preponderance of the evidence that the penalties and economic benefit assessed as a result of the violations are excessive.
14. The performance of annually required precision tests in some years in accordance with regulatory requirements does not mitigate Respondents' failure to perform other legally required precision tests.
15. Respondents have failed to show any injury that outweighs the public interest forwarded by the UST Regulations or Division's enforcement thereof sufficient to invoke the doctrine of equitable estoppel against the government.
16. Respondents have failed to show any affirmative conduct on the part of the Division upon which Respondents could have reasonably relied as a basis for not performing legally required precision tests.
17. Respondents have failed to show that they have suffered grave hardship as a result of their reasonable reliance on an affirmative act of the Division so as to estop the Division from enforcing the UST Regulations against Respondents.
18. Respondents failed to prove by a preponderance of the evidence the elements necessary to invoke the doctrine of estoppel against the Division.
19. The penalty assessment (as specified in the revised Administrative Penalty Assessment Worksheet Summary) is reasonable and warranted.

Based on the foregoing, it is hereby

ORDERED

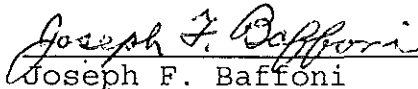
1. The Notice of Violation and Order and Penalty relating to Respondents' failure to conduct precision tests as modified by the Administrative Penalty Assessment Worksheet Summary, revised December 19, 1995, be and is

hereby SUSTAINED.

2. The Respondents shall jointly and severally pay to the Department the sum of Twenty Thousand Two Hundred and Fifty Dollars (\$20,250.00) in administrative and economic benefit penalties as set forth in the Revised Penalty Worksheet. Said Penalty shall be paid within thirty (30) days of the date of the Final Decision and Order, and shall be in the form of a certified check made payable to the "General Treasury - Water & Air Protection Program Amount", and shall be made directly to:

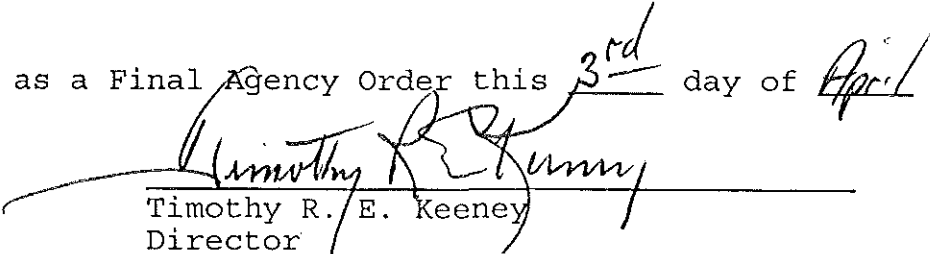
Glenn Miller
RI Department of Environmental Management
Office of Business Affairs
9 Hayes Street
Providence, Rhode Island 02908

Entered as a Recommended Decision and Order this 20th
day of JUNE, 1996.



Joseph F. Baffoni
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, Third Floor
Providence, Rhode Island 02908

Entered as a Final Agency Order this 3rd day of April
, 1996.


Timothy R. E. Keeney
Director
Department of Environmental Management
235 Promenade Street, 4th Floor
Providence, Rhode Island 02908

PAINÉ
AAD NO. 93-048/GWE

APPENDIX A

EXHIBIT LIST

- Div. 1 Full Property Title - dated 4/7/82 (2 pp.).
- Div. 2 Full UST Registration Information - dated 4/9/85 (3 pp.).
- Div. 3 Full UST Transfer of Registration - dated 1/21/86 (1 p.).
- Div. 4 Full UST Registration Information - dated 11/9/89, signed by Frank Paine (4 pp.).
- Div. 5 (Id) UST Registration Information - dated 1/18/90, signed by Frank Paine (5 pp.).
- Div. 6 Full Certified Correspondence - dated 3/26/93 (3 pp.).
- Div. 7 Full Notice of Violation and Order, date September 1993 and attached Administrative Penalty Assessment Worksheet (6 pp.).
- Div. 8 Full Administrative Penalty Assessment Worksheet Summary, Revised 12/19/95 (1 p.).

PAINÉ
AAD NO. 93-048/GWE

APPENDIX B

EXHIBIT LIST

Resp. 1 (Id) Tank System Tightness Test Results dated
12/17/85 (1 p.).

Resp. 2 (Id) Tank System Tightness Test Results dated
10/31/89 (10 p.).

Resp. 3 (Id) Tank System Tightness Test Results dated
2/1/90 (1 p.).

Resp. 4 (Id) Invoice and contract - Rhode Island Hydration
Co., dated 1/23/90 (1 p.).

Resp. 5 (Id) Invoice - Rhode Island Hydration Co., dated
2/15/90 (1 p.).

Resp. 6 (Id) Tank System Tightness Test Results dated
9/16/93 (1 p.).

Resp. 7 Full DEM Certificate of Registration #00545 dated
4/21/92 (1 p.).

Resp. 8 Full DEM Certificate of Registration #00545 dated
10/12/93 (1 p.).

Resp. 9 Full Respondent Paine's Schedule C Form 1040
(1991).

Resp. 10 Full Respondent Paine's Schedule C Form 1040
(1992).

Resp. 11 Full Respondent Paine's Schedule C Form 1040
(1993).

Resp. 12 Full Summary of Respondent's Gasoline Purchases for
1990, 1991, 1992 and 1993.

Resp. 13 Full UST Application dated 11/9/89 (6 pp.).

Resp. 14 Full Respondent Paine's Schedule C. Form 1040
(1994)