

Department of Environmental Management

Administrative Adjudication Division

State of Rhode Island

RE: Campton Industries, INC.
AAD No. 95-011/SRE
Notice of Violation No. LS 3213
June 8, 1998

DECISION AND ORDER

This matter came before the Administrative Adjudication Division ("AAD") of the Department of Environmental Management ("DEM" or "Department") on a Notice of Violation and Order No. LS 3213 ("NOV") issued to Campton Industries, Inc. ("Respondent") by the Division of Site Remediation ("Division") dated November 28, 1995. The Respondent filed a request for hearing at the AAD on December 11, 1995.

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

The NOV alleges that Respondent violated Section 13 of the Oil Pollution Control Rules and Regulations (1990), as amended (the "Oil Regulations"), relating to storage and removal of oil spill cleanup debris, at property owned/operated by Respondent, located at 2949 Tower Hill Road, South Kingstown, Rhode Island, Assessor's Plat 18-2, Lot 7 (the "facility" or "site"). The NOV as issued ordered Respondent to forward to DEM documentation confirming the final disposal site of certain contaminated soil that had been stockpiled at the facility, and assessed an administrative penalty against Respondent in the amount of Sixteen Thousand Dollars. This total penalty consisted of (1) a \$10,000.00 penalty for failure to remove and properly dispose of contaminated soil by May 18, 1995 and (2) a \$6000.00 penalty for failure to provide documentation indicating proper disposal of contaminated soil by May 28, 1995. Division on September 29, 1997 filed a Partial Withdrawal of Violation withdrawing the violation and penalty for the alleged failure to provide documentation indicating proper disposal of contaminated soil. Therefore only the alleged failure to timely remove and properly dispose of contaminated soil is addressed herein.

The Prehearing Conference was held on July 10, 1996 and the Prehearing Conference Record was entered on July 11, 1996. The hearing was conducted on June 23, 24 and 25, 1997. Brian A. Wagner, Esq. represented Division, and Christian C. Potter, Esq. represented Respondent.

Following the hearing, post-hearing memoranda were filed by the Division and Respondent. Division and Respondent filed responses to post-hearing memoranda on October 23 and 24, 1997, respectively.

At the prehearing conference, Counsel agreed to the following stipulations of fact:

1. Respondent, Campton Industries, Inc., is a business corporation organized under the laws of the State of New Hampshire.
2. On or about April 17 and 18, 1995, respondent's facility at 2949 Tower Hill Road, South Kingstown, Rhode Island (the "Facility"), was undergoing excavation work in the vicinity of its underground storage tank ("UST") systems.
3. Respondent, Campton Industries, Inc., acquired the Facility on or about May 4, 1995.
4. Campton Industries, Inc. acquired the Facility by quitclaim deed from D.T.P., Inc., George Potter, Dorothy Potter and Lynne Potter.
5. The Department of Environmental Management sent notice to the previous owner to remove and properly dispose

of the stockpiled dirt.

The exhibits proffered by the parties, marked as they were admitted at the hearing, are indicated on Appendix A.

David Reynolds Sheldon was the first witness called by Division. He is presently employed by the Office of Compliance and Inspection of DEM. He was formerly employed by the Division of Site Remediation, essentially handling leaking UST cases. He was qualified by agreement as an expert in geology, hydrology and civil and environmental engineering, and in the investigation and remediation of underground contamination.

Mr. Sheldon testified that he visited the subject site on April 19, 1995 (pursuant to a complaint) to inspect the site and to take soil samples. While there, he observed that DelleFemine Construction was excavating the piping connected to the gasoline pumps in expectation of replacing them with Stage II vapor recovery material; that the piping was slightly corroded but in good condition; and that there was a heavy petroleum odor around the piping at certain points. John DelleFemine, a principal of DelleFemine Construction, was on site and he indicated that they were going to stockpile all the soil that was being excavated.

Mr. Sheldon also testified that he observed that the soil being removed by DelleFemine was not segregated and that it was being commingled and stockpiled together in one pile. It was placed on polyethylene sheeting at the site, and stored there for off-site disposal at a later date. This witness obtained soil samples (at two-foot depth) from five locations in the excavated portions of the piping system and transferred them to Environmental Science Services for analysis. The analysis showed that one of the samples he took confirmed the presence of petroleum contamination and the other four samples did not. It was Mr. Sheldon's opinion that, based on the results of the sample indicating petroleum contamination and his observations during the excavation of the soil, the material excavated was sufficiently petroleum contaminated to warrant off-site disposal.

Michael John Cote was the next witness called by Division. He is presently employed by the Office of Waste Management, Underground Storage Tank Section of DEM. He stated that he has been the project manager of the subject property from 1995 to the present time. His duties as such included review of the site investigation report to confirm the presence of petroleum contamination on the property and groundwater, making recommendations for further investigation, assessing the need for active remediation, and the overall handling of the documents and files regarding this matter.

Mr. Cote testified that the Department's files contained information indicating that the subject facility was contaminated. There were multiple wells in soil and bedrock on the subject property (to assess the need for active remediation), but the information regarding the pump island area was lacking. He was present at the facility on April 18, 1995 to observe the Stage II vapor recovery system installation. Since the excavation had not been completed the previous day (when David Sheldon took his samples), Mr. Cote took samples from the bottom of the trenches underneath the pump islands after the excavation was essentially completed. He then field-screened them with a HNU, a photoionization device ("PID"), to determine if there was volatile contamination in the soil. Since this indicated elevated PID numbers, ranging from 5 to 225 parts per million; he took the samples to the Environmental Science Service ("ESS") laboratory for analysis. The ESS laboratory results showed that there was contamination associated with gasoline in the samples submitted which exceeds what the Department generally considers acceptable. Soils containing such levels of petroleum contamination are ordinarily subject to disposal at an approved facility, and are not ordinarily permitted to remain at the site.

It was Mr. Cote's testimony that he observed that all the soils being removed from the trenches were being stockpiled on plastic, and he did not observe any other similar piles at the facility. Since clean soil or clean fill ordinarily would not be stockpiled on top of plastic sheeting; he did not sample the soil pile itself. Also, he did not require that an environmental consultant be engaged to separate the contaminated soils since he was assured by the contractor performing the services that the stockpile would be properly disposed of as contaminated soil at an approved facility. He explained that in such instances, it would be a financial hardship to require a consultant on the property to do that type of work. It is generally cheaper to have all of the soil disposed of as contaminated, rather than paying consultants to separate it. In such instances, the Department allows same, provided all of the soil is considered contaminated and disposed of properly. Mr. Cote opined that contamination resulting from filter changes at the pumps travels downward; and that if the soil samples taken one to two feet below the pump islands are contaminated, then the soil on top of it is contaminated.

Robert S. Potter was the final witness called by Division. He testified that he is employed as President of Pro Oil, Inc. (a gasoline distributorship), and that he has been so employed for nineteen years. He is also employed as President of H.C. Petroleum (a retail gasoline and fuel oil business), and has been so employed for fifteen years. He has been involved in the ownership, operation and management of various petroleum related businesses in Rhode Island for many years. He is an officer or director of Campton Industries, LLC; Skees Realty, Inc.; Rosemere Realty; and 1836 Realty Corporation; (all of which are involved in either the operation or ownership of properties involved in the operation of petroleum facilities); and also owns a location at 2211 West Shore Road (a petroleum facility) as a sole proprietorship.

It was brought out through this witness that Pro Oil, Inc. operated the subject facility for approximately six years, and that it transferred title to said property to Respondent in May, 1995. Mr. Potter, in his capacity as officer or director of one of his corporations, retained the services of DelleFemine Corporation to perform Stage II vapor recovery work at the subject facility in 1995. Mr. Potter acknowledged that he had previous experience with the removal of dirt contaminated with gasoline during the removal of underground storage tanks at a facility in Middletown, Rhode Island. This was overseen by one of the corporations of which he is either an officer or director.

After the Division rested its case, Respondent made an oral motion for judgment as a matter of law (which Respondent renewed at the conclusion of the case). The Hearing Officer reserved decision on the motion, and this Decision operates as a determination of same.

Terrence D. Gray, Chief of the Office of Waste Management of DEM, was the first witness called by Respondent. He was questioned at length concerning the procedures at the Site Remediation Division for notification of alleged violations and for issuance of NOVs. It was explained by this witness that the response time between the filing of violation and issuance of a Notice of Violation depends upon the environmental or public health threat posed by the violation; and if the type of violation does not pose a serious imminent threat (as in the instant matter), violators are generally given an opportunity to comply. Consequently, it would be five or six months before the determination is made that compliance is unlikely and that an NOV is necessary.

Mr. Gray also explained that the Oil Pollution Control Regulations' thirty-day limitations on keeping contaminated materials at a site is a legal requirement that is directly related to the protection of the public health, safety, welfare, or environment; and that the failure to remove contaminated soil from a property within the prescribed time is an act that poses an actual or potential for harm to the public health, safety, welfare, or the environment.

Paul W. Guglielmino, a Senior Sanitary Engineer with the Office of Waste Management of DEM, was the second witness called by Respondent. He testified that he drafted the NOV in the instant matter, including the penalty portion of same. He explained that he reviewed the Penalty Regulations in order to determine the Type of Violation and Deviation from the Standard. He selected Type I as the Type of Violation (for the failure to timely remove and properly dispose of contaminated soil) based on the definition of same in the Penalty Regulations, and selected Minor as the Deviation from the Standard based upon an evaluation of the factors required to be considered. A few of the factors considered by him were: (1) that the groundwater in the area of the facility is classified as GA by the Groundwater Regulations (which means that the groundwater is suitable for consumption without treatment; (2) there were nearby private drinking water wells in the area; (3) there were previous investigations conducted at the facility and the results indicated that gasoline contamination was present in the soils and water at the facility; (4) a major constituent in gasoline is benzene, (which is a known carcinogen); (5) the soil pile was not maintained properly and was uncovered on at least one occasion; (6) uncovered soil can dry out and blow around so it can be inhaled; (7) people (especially children) can play with the soil, place their fingers in their mouth, and ingest contaminated soil; and (8) there was no documentation in the file demonstrating that there was any attempt being made to come into compliance by removal of the soil or requesting an extension to maintain the soil.

It was further explained by Mr. Guglielmino that the \$10,000.00 penalty amount was selected from the block in the Site Remediation Matrix of the Penalty Regulations that fits for Type I Minor Deviation from the Standard. The top of the range (\$10,000.00) was assessed, rather than the bottom of the range (\$4,400.00), in order to try to maintain or bring a party into compliance, and a lower penalty would not sufficiently deter future violations, which could cost thousands of dollars to remove the contaminated soil.²

It was elicited in cross-examination of this witness by Division that the failure to timely remove contaminated soil is

properly considered a Type I Violation pursuant to the Penalty Regulations since the removal of contaminated soil from a facility is directly related to the protection of public health, safety, welfare and environment, and the failure to remove the soil in the instant case was a failure to take remedial action to mitigate a known or suspected harm.

Bruce Catterall, a Supervising Sanitary Engineer of the then Division of Site Remediation during April of 1995, was the last witness called by Respondent. He testified that he signed the letter in such capacity (Division's Exhibit 8 Full) which was sent to the party listed as the owner/operator of the subject property in the Division's office. This letter stated that a representative of this office witnessed soil removal during the installation of a Stage II Vapor Recovery System at the subject property; that at that time, soil contaminated with petroleum caused by prior leakage or spillage was required to be stockpiled for off-site disposal at an approved facility; that the regulations required proper disposal of said soil within thirty days, i.e. by May 18, 1995; that prior to said transport, the soil pile was to be stored on and completely covered by thick gauge polyethylene; and that documentation of said disposal be forwarded to Division by May 28, 1995, ten days after disposal.

It is Respondent's contention that the NOV is improper and in violation of Rhode Island General Law; that the Division failed to meet its burden of proving that the alleged violation occurred; and that Respondent was never given notice by DEM that said dirt pile had to be removed.

Respondent maintains that the penalty assessed was improperly classified as a "Type I" violation, and that it should be classified as a "Type II" violation.

It is argued by Respondent that its Motion to disqualify DEM's legal counsel should have been granted because Mr. Wagner should not have acted as an advocate at a trial in which he was likely to be a necessary witness.

Respondent also argues that the testimony of one of Division's witnesses that a Dellefemine representative (who was performing excavation work for the purpose of installing Stage II Vapor Recovery equipment at the subject site) told him that "all of the soil was going to be disposed of as contaminated" should have been excluded as inadmissible hearsay testimony.

It is Division's contention that the Respondent failed to comply with the duly promulgated regulatory requirements regarding the handling, storage and disposal of oil spill cleanup debris; that Division's notification of the soil storage violation at the facility meets and exceeds that which is required by law; and that the penalties proposed in the NOV were properly calculated in accordance with the Penalty Regulations.

Division maintains that the evidence amply shows that the soil excavated from the ground was oil spill cleanup debris that was required to be handled and disposed of in accordance with § 13 of the Oil Pollution Control Regulations; that by permitting said contaminated soil to be stored at the subject facility for more than thirty days, Respondent violated said regulation as alleged in the NOV; and that the administrative penalty proposed in the NOV for said violation should be imposed in this matter.

The Division has the burden of proving the alleged violation 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, the Respondent then bears the burden of proving by a preponderance of the evidence that the Division failed to assess the penalty in accordance with the Penalty Regulations, or that the penalty is excessive.

The documentary and testimonial evidence clearly establishes that Division has met its burden of proving the alleged violation by a preponderance of the evidence, and that Division more than satisfied its initial duty of establishing in evidence the penalty amount and its calculation thereof. The evidence introduced by Respondent was insufficient to meet its burden of proving by a preponderance of the evidence that the penalty was not assessed in accordance with the Penalty Regulations, or that the penalty is excessive.

It is asserted by Respondent that since R.I.G.L. § 42-17.1-2(u) only empowers DEM to give notice of an alleged violation of law to the person responsible therefore when there are reasonable grounds to believe that "there is" a violation of any provision of law, the issuance of an NOV after a violation has been remedied is in direct contradiction of the powers and duties granted to DEM. A review of pertinent statutes demonstrates that the issuance of the NOV by Division was well within the authority granted to DEM by the legislature. Respondent's interpretation of 42-17.1-2(u)

is not only extremely narrow, but overlooks other sections of Chapter 17.1 and also other statutory authority empowering DEM to impose administrative penalties.

§ 42-17.1-2(v) empowers DEM to impose administrative penalties in accordance with the provisions of Chapter 17.6. § 42-17.6-2 authorized DEM to assess an administrative penalty on a person who fails to comply with any provision of any rule, regulation, order, permit, license, or approval issued or adopted by director, ...; and § 42-17.6-3 authorizes DEM to give written notice of its intention to assess an administrative penalty. DEM clearly has the authority to issue an NOV solely for the purpose of assessing an administrative penalty, even if the underlying violation itself has been remedied.

The documentary and testimonial evidence introduced by Division establishes that Division has met its burden of proving by a preponderance of the evidence that Respondent violated Section 13 of the Oil Pollution Control Regulations as alleged in the NOV. The Respondent has stipulated that on or about April 17 and 18, 1995, the subject facility was undergoing excavation work in the vicinity of its UST systems, and there is no genuine dispute that some of the soil being excavated was oil spill cleanup debris which required that it be handled and disposed of in accordance with the provisions of the Oil Pollution Control Regulations. The evidence establishes that the soil stockpiled from the Stage II excavations was contaminated and was voluntarily being treated as oil spill cleanup debris for economic reasons, and accordingly removed and properly disposed of as such at an off-site facility.

The Division met its burden of proving the alleged violation by a preponderance of the evidence despite the fact that Division did not take any samples directly from the commingled soil pile. The uncontradicted evidence presented by Division demonstrates that Respondent has violated the Oil Regulations as alleged in the NOV. This evidence included: (1) the on-site observations by Division personnel viz. heavy gasoline odors, use of polyethylene sheeting, commingling of all soil in one pile, no environmental consultant to screen and segregate soil, and the statements by the agent of Respondent handling the soil); (2) the results of the field screening and laboratory analysis of soil from the excavations; and (3) the ultimate disposal of the soil as gasoline- contaminated soil.

The Respondent's assertion that the Department was in dereliction of its duties because the Department failed to take remedial action to mitigate a known or suspected harm is disingenuous. The Respondent failed to identify any statute, regulation, or legal authority imposing such duty on the Department, nor was any logical argument advanced by Respondent to support its position. Classification of the failure to timely remove contaminated soil from the premises as a Type I violation does not obligate the Department to utilize its emergency powers to abate the problem. Nor should any such inaction by the Division mitigate the amount of the penalty assessed to Respondent.

Respondent also argues that the notification (the April 21, 1995 "Soil Letter") sent by Division to Dorothy Potter should have been sent to "Campton Industries", the operator of the property. Respondent overlooks the fact that, even if such notice is a prerequisite to the imposition of a penalty, such notice was actually given by Division. The "Soil Letter" sent by Division (viz: Division's Exhibit 8 Full) containing such notification was sent to an officer of DTP, Inc., the corporation which was still the registered owner of the Facility at the time the "Soil Letter" was sent by Division. Indeed, it is difficult to understand how Respondent could fault DEM for not sending such notice to Respondent, when at the time the Soil Letter was sent, Campton Industries, Inc. was not authorized to do business in the State of Rhode Island, was not the owner of the Facility, and had not registered itself as owner/operator (as required by UST Regulations).

Any sympathy that might be evoked because of one's unfamiliarity with the requirements of the pertinent regulations (although not a defense) is lacking in this matter. The evidence amply shows that the sole acting officer of Respondent, Mr. Robert Potter, was an officer and/or director and/or owner of a number of petroleum facilities for many years; that he has had prior involvement with the handling and disposal of petroleum contaminated soils at such facilities; and that he either knew or should have known of the obligation to remove the contaminated soil in this matter.

The Respondent asserts that since the Division's own testimony indicated that the pile was not an immediate threat, the alleged violation should be considered Type II rather than Type I. However, a review of the Penalty Regulations demonstrates that there is no such requirement that a violation must rise to the level of creating an imminent threat in order to establish a Type I violation.

Section 10 of the Penalty Regulations provides that the amount of the penalty is to be calculated based on the factors

enumerated therein, and that the factors set forth in R.I.G.L. § 42-17.6-6 shall be considered when calculating the Type of Violation and Deviation from the Standard as set forth therein. The penalty is based on the gravity of the violation as calculated according to the “Penalty Matrix” developed for each regulatory program of DEM. The applicable penalty range is reached by first determining the “Type of Violation” and the “Deviation from the Standard” of the alleged violation.

“Type of Violation” refers to the nature of the legal requirement allegedly violated. Type I violations include those violations of legal requirements which are directly related to the protection of the public health, safety, welfare or environment and include, but are not necessarily limited to, acts which pose an actual or potential for harm to the public health, safety, welfare or the environment. Type II violations include those violations of legal requirements which are important but indirectly related to the protection of the public health, safety, welfare or environment and include, but are not necessarily limited to, acts which pose an indirect actual or potential for harm to the public health, safety, welfare or the environment.

“Deviation from the Standard” refers to the degree to which the violation is out of compliance with the legal requirement allegedly violated and is based upon an evaluation of one or more of the factors specified therein except to the extent already considered.

The failure to timely remove the contaminated soil is a failure to take remedial action to mitigate a known or suspected harm. The thirty day limitation on storing contaminated materials constitutes a legal requirement that is directly related to the protection of the public health, safety, welfare or environment, and the failure to timely remove the contaminated soil is an act which poses an actual or potential for harm to the public health, safety, welfare or the environment.

The Respondent’s questioning of DEM’s representatives failed to elicit any inconsistencies as suggested by Respondent, but only served to explain how Division assessed the administrative penalty in this and other matters. No evidence whatsoever was offered to prove that the Division failed to assess the penalty in accordance with the Penalty Regulations or that the penalty is excessive. On the contrary, the evidence introduced by Division clearly establishes that the penalty was assessed properly and is not excessive. The Division’s testimony adequately demonstrates that the violation should be considered Type I Minor, and that the maximum amount for same should be imposed under the circumstances.

The Respondent’s Motion to disqualify DEM’s legal counsel (which was made during the hearing) was properly denied; and to the extent that it was renewed by Respondent’s Post-Hearing Memorandum, the motion to disqualify Mr. Wagner is again denied. Respondent has cited no legal authority mandating Mr. Wagner’s dismissal as Division’s counsel, nor is the disqualification of Mr. Wagner mandated by the rules of the court.

Article V, Rule 3.7(a) of the Supreme Court Rules, provides:

Lawyer as witness.—(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

A review of the transcript of the hearing reveals that Mr. Terrence Gray, Chief of the Division of Site Remediation, did not state “that Mr. Wagner was responsible for the calculation of the penalties issued in the NOV. T:II-269 as represented by Respondent in its Post-Hearing Memorandum. The testimony of Mr. Gray, as well as that of other Division’s employees who were called by Respondent to testify, demonstrates that Attorney Wagner was not responsible for the calculation of the penalty. Mr. Guglielmino drafted the NOV, including the penalty, which was then circulated to various DEM staff members (including Mr. Wagner) for review and comment.

The Respondent argues that it should have been allowed to call Mr. Wagner as a witness; however, Mr. Wagner was not listed as a potential witness in Respondent's Prehearing Memorandum nor was he actually called as a witness. Certainly an attorney should not combine the roles of advocate and witness; but based on Mr. Wagner's role in this matter, he could not have anticipated that he would be called upon in any capacity other than as an advocate. In any event, Mr. Wagner's participation in this matter did not make it likely that he would be a witness, nor could he be considered a necessary witness within the meaning of Rule 3.7. Others on the staff of Division were called as witnesses by Respondent, and Respondent had ample opportunity to question other witnesses on the issues brought into question by Respondent. State v. Usenia 599 A.2d 1026 (R.I.1991).

There is no reason to believe that if Mr. Wagner were to testify, that his testimony would be contested or that the credibility of his testimony would be an issue. Based on the nature of this case and the probable tenor of any testimony by Mr. Wagner, and the unlikely probability that his testimony would conflict with that of other witnesses, Respondent was not prejudiced in any way. The Respondent called Terrence D. Gray, Paul W. Guglielmino and Bruce Catterall (all part of Division's staff) to testify and questioned them extensively. Based on their testimony, there is no valid reason why Mr. Wagner's role should be considered as anything but an advocate. It certainly would have imposed an extreme hardship on Division if Mr. Wagner had been "dismissed" as the attorney for Division as requested by Respondent.

The Respondent, both at the hearing and in its Post Hearing Memorandum, objected to the admission into evidence Mr. Cote's statement the DelleFemine representative told him at the facility on April 18, 1997 "that all the soil was going to be disposed of as contaminated". Respondent argues that because Mr. Cote was unable to identify the name of the DelleFemine representative who made the statement, and because DelleFemine was an independent contractor for Respondent, that the introduction of the statement through Mr. Cote is inadmissible hearsay. This same argument was raised and rejected in United States v. Davis, 882 F.Supp. 1217 (D.R.I.1995) and should be rejected in the instant matter.

DelleFemine, as independent contractor for Respondent, was Respondent's "agent" for purposes of excavating, handling and storing the soil being removed to install Stage II Vapor Recovery system, and the statement by the DelleFemine representative was made by him as a statement by a party's agent or servant concerning a matter within the scope of the party's agency or employment, made during the existence of the relationship, and was admissible pursuant to Rule 801(d)(2) of the Rhode Island Rules of Evidence.

FINDINGS OF FACT

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

1. On or about April 17 and 18, 1995, D.T.P. Inc. George Potter, Dorothy Potter and/or Lynne Potter were the owners of the subject UST Facility located at 2949 Tower Hill Road, South Kingstown, Rhode Island (the "Facility").
2. On or about April 17 and 18, 1995, the Facility was undergoing excavation work in the vicinity of its UST systems.
3. The excavation work in question was performed by DelleFemine Corporation.
4. The excavation work in question was performed for the purpose of installing Stage II Vapor Recovery equipment at the Facility.
5. The excavation work in question was performed at the direction of Robert S. Potter, either individually or in his capacity as the officer/director of one of several corporate entities controlled by Mr. Potter.
6. At the time of the excavation, Robert S. Potter was president of Pro Oil, Inc., a Rhode Island corporation that was operating the Facility at the time.
7. At the time of the excavation, Robert S. Potter was the sole acting officer and director of Campton Industries, Inc., a New Hampshire corporation that was negotiating to purchase the Facility.

8. During the course of the excavation work (on April 17 and 18, 1995) a quantity of soil was removed from the ground and stored in a single pile on top of polyethylene sheeting at the Facility.
9. An environmental consultant was not present at the Facility during the excavation of the soil.
10. Respondent did not sample the soil immediately upon excavation for laboratory analysis.
11. Respondent made no attempt to field screen the soil during excavation for the purpose of separating clean soil from contaminated soil.
12. All of the soil excavated from the Facility was commingled in one large pile.
13. Heavy gasoline odors were observed in and about the soils at the Facility during the course of the excavation.
14. Field screening of soil from the excavation trenches from which the soils were removed showed the presence of high levels of volatile organic compounds ("VOCs").
15. Laboratory analysis of soil samples taken from the excavation trenches show the presence of gasoline related compounds, including benzene, a known human carcinogen.
16. DelleFemine representatives informed RIDEM personnel that all of the soils were being stockpiled at the Facility for off-site disposal as contaminated soils.
17. Following excavation of the soil, the soil pile was covered with polyethylene sheeting.
18. DelleFemine's handling of the soil, storing it on and covering it with polyethylene sheeting, is consistent RIDEM's regulatory requirements for the handling of oil spill cleanup debris.
19. The handling and disposal of unsampled soil as oil spill cleanup debris is a legitimate industry practice where the cost of disposal is likely to be less than the cost of separating clean soil from contaminated soil.
20. By certified letter, dated April 21, 1995, RIDEM notified the registered owner of the Facility that the soil pile from the excavation had to be handled, stored and disposed of as oil spill cleanup debris on or before May 18, 1997.
21. Following receipt of RIDEM's April 21, 1995 letter, the soil pile was observed to be covered with polyethylene sheeting.
22. RIDEM's written notification to DTP, Inc. was available for public review as part of RIDEM's file on the Facility.
23. The petroleum contaminated soil pile from the excavation remained on-site at the facility under varying degrees of cover from April 18, 1995 through October 17, 1995.
24. As of April 26, 1995, the manner in which the soil was handled and stored indicates that it was all being treated as oil spill cleanup debris.
25. On May 4, 1995 ownership of the Facility was transferred to Respondent, Campton Industries, Inc.
26. On October 17, 1995, nearly 36 tons of soil was removed from the Facility by Tartaglia Trucking under a Hazardous Special Waste and Asbestos Manifest signed by Robert S. Potter, President, Campton Industries, Inc., and identifying the waste as unleaded gasoline contaminated soil.
27. RIDEM did not receive documentation of the removal and disposal of the soil pile until after the issuance of the NOV.
28. RIDEM did not learn that the Facility had been purchased by Respondent until the NOV was issued.
29. As of the date of issuance of the NOV, November 28, 1995, Respondent had not notified RIDEM of its acquisition of the Facility as required by the UST Regulations.

30. Respondent, a New Hampshire corporation, was not authorized to conduct business within the State of Rhode Island until March 16, 1996.

31. Robert S. Potter, Respondent's sole acting officer at the time of the events in question, has been involved in petroleum related industries in the state of Rhode Island for more than nineteen (19) years.

32. Robert S. Potter, Respondent's sole acting officer at the time of the events in question, is an officer and/or director of at least seven (7) corporations engaged in petroleum related activities in the state of Rhode Island.

33. Robert S. Potter, Respondent's sole acting officer at the time of the events in question, is the owner of at least one UST facility as a sole proprietor.

34. At the time of the events in question, Robert S. Potter, Respondent's sole acting officer, had previous experience with at least one LUST site within the State of Rhode Island wherein the removal of oil spill cleanup debris was involved.

35. The groundwater in the vicinity of the Facility is classified as "GA" in accordance with the Rules and Regulations for Groundwater Quality.

36. A "GA" groundwater classification indicates that the ground water is suitable for public or private drinking water use without treatment.

37. Private drinking water wells are located in the vicinity of the Facility.

38. The soil pile was not completely covered during the entire period that it was at the Facility.

39. Division has voluntarily withdrawn the alleged violation, and the associated penalty, relating to the failure to provide documentation indicating proper disposal of contaminated soil.

CONCLUSIONS OF LAW

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

1. Campton Industries, Inc., as the owner and operator of the USTs and the property upon which the USTs are located at the time of the issuance of the NOV, is a party that is responsible for the proper handling of oil spill cleanup debris in accordance with OIL POLLUTION CONTROL REGULATIONS, §§ 12 and 13.

2. DEM has jurisdiction in this matter.

3. The evidence presented at hearing proves, by a preponderance of the evidence, that the soil excavated at the Facility on April 17 and 18, 1995, should be classified as oil spill cleanup debris as defined by OIL POLLUTION CONTROL REGULATIONS, § 5.

4. The evidence presented at hearing proves, by a preponderance of the evidence, that Respondent elected to handle, store and dispose of the excavated soil as oil spill cleanup debris in accordance with OIL POLLUTION CONTROL REGULATIONS, § 13.

5. The Department has no statutory or regulatory obligation to notify persons of regulatory obligations or violations prior to the issuance of a NOV other than that which is required for the promulgation of regulations in accordance with the Administrative Procedures Act.

6. The Department duly notified the registered owner of the Facility of its obligations regarding the handling, storage and disposal of the excavated material under Section 13 of the OIL POLLUTION CONTROL RULES AND REGULATIONS.

7. The evidence proves, by a preponderance of the evidence, that Respondent's corporate president, Robert S. Potter, is a sophisticated, experienced and longstanding businessman in the petroleum industry in the state of Rhode Island

and, accordingly, is presumed to have actual, constructive and/or statutory notice of the requirements of Section 13 of the OIL POLLUTION CONTROL RULES AND REGULATIONS.

8. Respondent, by and through its president, Robert S. Potter, knew or should have known of the requirement to remove the soil pile on or before May 18, 1995.

9. Respondent's failure to remove petroleum contaminated soil from the Facility within thirty (30) days of its generation constitutes a violation of Section 13(a)(6) of the OIL POLLUTION CONTROL RULES AND REGULATIONS.

10. The Division has met its burden of establishing in evidence the penalty amount and the calculation thereof.

11. The Respondent's violation for failing to timely remove petroleum contaminated soil from the Facility is properly classified as a Type I violation in accordance with § 10(a)(1) of the Rules and Regulations for Assessment of Administrative Penalties.

12. The Respondent's violation for failing to timely remove petroleum contaminated soil from the Facility is properly classified as having a Minor Deviation from the Standard in accordance with § 10(1)(2) of the Rules and Regulations for Assessment of Administrative Penalties.

13. The administrative penalties in the within matter do not exceed the maximum penalties allowed by statute or regulation.

14. The Respondent has failed to prove by a preponderance of the evidence that the administrative penalty was not assessed in accordance with the Penalty Regulations or that it was excessive.

15. The penalty assessment in the amount of Ten Thousand (\$10,000.00) Dollars (as calculated for the Respondent's failure to timely remove and properly dispose of contaminated soil) is within the parameters and guidelines of the Penalty Regulations; and is reasonable and warranted.

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED

1. That the Notice of Violation and Order No. LS3213 issued to the Respondent dated November 28, 1995, relating to Respondent's failure to timely remove and properly dispose of contaminated soil is SUSTAINED.

2. Respondent's motion for judgment, made at the hearing, is DENIED.

3. That the portion of the Notice of Violation and Order No. LS3213 relating to the alleged failure to provide documentation indicating proper disposal of contaminated soil having been withdrawn by Division, the Six Thousand (\$6,000.00) Dollar penalty assessment is DELETED.

4. The Respondent shall pay to the Department an administrative penalty in the amount of Ten Thousand (\$10,000.00) Dollars for its failure to timely remove and properly dispose of contaminated soil.

Said penalty shall be paid within ten (10) days of the entry of the Final Agency Order in this matter, and shall be in the form of a certified check, made payable to the General Treasurer, State of RI for deposit in the Environmental Response Fund and shall be forwarded to:

Office of Management Services

RI Department of Environmental Management

235 Promenade Street, Third Floor

Providence, Rhode Island 02908

Attention: Glen Miller
Entered as a Recommended Decision and Order this 10th day of March, 1998.

Joseph F. Baffoni
Hearing Officer

Entered as a Final Agency Order this 8th day of June, 1998.

Andrew H. McLeod
Director

June 10, 1998

Christian C. Potter, Esquire

1850 Warwick Avenue

Warwick, Rhode Island 02889

and

Brian A. Wagner, Esquire

Department of Environmental Management

Office of Legal Services

235 Promenade Street

Providence, Rhode Island 02908

IN RE: CAMPTON INDUSTRIES 95-011/SRE

Dear Attorneys:

Enclosed, please find a corrected certification of the Final Agency Decision and Order signed by the Director on June 8, 1998.

The date of March on the original certification was not changed prior to the mailing date of June 9, 1998 and therefore is incorrect.

Kindly replace your copy with the newly certified one which reflects the proper date.

Sincerely,

Bonnie L. Stewart

Administrative Clerk

APPENDIX A

EXHIBITS:

For Division:

Div. 1 for Id

Copies of Quit-Claim Deeds—from D.T.P. Inc., George L. Potter, Dorothy T. Potter and Lynne Potter to Campton Industries, Inc.

received for recording 5/5/95 (5 pgs.).

- Div. 2 Full Copy of Notice of Violation and Order—No. LS3213 issued to Campton Industries, Inc. and Robert S. Potter, dated November 28, 1995 (10 pgs.).
- Div. 3 Full Copy of LUST Closure Inspection Report Checklist—prepared by David R. Sheldon, dated 4/17/95 (2 pgs.).
- Div. 4 Full Copy of Correspondence dated 11/30/95—from Campton Industries, Inc. to DEM, with attached Bill of Lading (2 pgs.).
- Div. 5 for Id Copy of Corporate Documentation for Campton Industries, Inc.—dated received by N.H. Secretary of State 2/24/95, received by Division of Site Remediation 11/1/95 (1 pg.).
- Div. 6 Full Copy of Memo to DEM File—from M. Cote, dated 4/26/95 (1 pg.).
- Div. 7 Full Copy of Memo to DEM File—from M. Cote, dated 10/13/95 (1 pg.).
- Div. 8 Full Copy of Certified Correspondence dated 4/21/95—from DEM to Dorothy Potter, DTP, Inc. with return receipt (2 pgs.).
- Div. 9 Full Copy of correspondence dated 1/27/95—from Robert S. Potter to Bruce Catterall, DEM (1 pg.).
- Div. 10 Full Copy of Site Notes dated 4/18/95 (2 pgs.).
- Div. 11 Full Copy of cover letter & Data Report from Lab Analysis—from ESS to David Sheldon, dated 4/28/95, identified as ESS Project ID No. 951692 (19 pgs.).
- Div. 12 Full Copy of cover letter & Data Report from Lab Analysis—from ESS to Mike Cote, dated 4/28/95, identified as ISS Project ID No. 951691 (13 pgs.).
- Div. 13 Full Curriculum Vitae for Michael Cote.
- Div. 14 Full Curriculum Vitae for David Sheldon.
- Div. 15 Full Certified copy of R.I. Sec. of State's Certificate of Authority for Campton Industries, Inc.
- Div. 16 for Id Copy of letter from UST section to Campton Industries, dated December 1, 1995.
- Div. 17 for Id Copy of State of RI, UST Registration Form, Registration #2778.

For Respondents:

Resp. 1 Full	Copy of invoice from Tartaglia Trucking issued to Campton Industries, dated October 25, 1995, for the removal of soil from the subject property.
Resp. 2 Full	Copy of Hazardous Special Waste and Asbestos Manifest from BFI, dated October 18, 1995.
Resp. 3 Full	Curriculum vitae for Michael A. Delrossi
Resp. 4 Full	Copy of letter from David Sheldon to Bruce Catteral dated October 20, 1995.

Footnotes

- 1 The NOV was issued to Campton Industries Inc. and Robert S. Potter; however, a request for a hearing was not timely filed by Robert S. Potter.
- 2 The violation for failure to timely submit documentation of contaminated soil disposal was later withdrawn by Division, so the testimony of this witness concerning the penalty for this violation need not be considered.