

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

IN RE: DTP, INC.
AAD NO.

FINAL DECISION AND ORDER

After careful review of all testimonial and documentary evidence of record, and in light of the Hearing Officer's assessment of the credibility of the witnesses, I make the following Findings of Fact and Conclusions of Law. The findings of fact and conclusions of law recommended by the Hearing Officer that are not adopted below are superfluous or rejected or modified as set forth below.

FINDINGS OF FACT

1. That a Prehearing Conference was held in regard to this matter on June 4, 1993 at the offices of the Department of Environmental Management, Administrative Adjudication Division, One Capitol Hill, Third Floor, Providence, RI 02908;
2. That a hearing was held with regard to this matter on June 14, 15 and 16, 1993 at the office of the Department of Environmental Management, Administrative Adjudication Division, One Capitol Hill, Third Floor, Providence, Rhode Island 02908;
3. That DTP, Inc. ("DTP" or the "Owner") is a Rhode Island corporation and is the owner of two certain parcels of property referred to herein as:
 - (a) The "Tower Hill Facility" located at 2949 Tower Hill Road, South Kingstown, Rhode Island, otherwise known as South Kingstown Assessor's Plat 18-2 Lot 7; and
 - (b) The "Wakefield Facility" located at 186 Main Street, Wakefield, Rhode Island otherwise known as South Kingstown Assessor's Plat 57-1, Lot 56;
4. On or About March, 1988, an Application for Underground Storage Facilities was submitted to the Department by Dorothy Potter, acting in her capacity as

president of DTP, in regard to the Tower Hill Road Facility and the Wakefield Facility;

5. The Underground Storage Tank Facility Registration information for both facilities also identifies DTP as the owner of certain underground storage tanks ("UST's" or "tanks") located at the facility;
6. That Dorothy Potter is the sole shareholder of DTP, Inc;
7. That George Potter is the manager of the Wakefield facility;
8. That Robert Potter is President of Pro-Oil, Inc. and manager of the Tower Hill Facility;
9. That Robert Potter had a lease with DTP, Inc. to manage Tower Hill in 1988;
10. The Tower Hill Facility is registered with the Department pursuant to UST Regulation 8.00 and is identified as UST Facility Registration No. 2778;
11. The Wakefield Facility is registered with the Department pursuant to UST Regulation 8.00 and is identified as UST Facility Registration No. 2779;
12. On or about December 21, 1988, the Department issued a Notice of Violation and Order (the "1988 NOV") against DTP, Inc;
13. That in response to this violation, Respondent filed a timely request for an adjudicatory hearing on December 28, 1988;
14. That the Department moved to amend the 1988 NOVAO on February 22, 1993;
15. The Department's motion to amend was granted by Order, dated March 17, 1993;
16. In accordance with the terms of the Order of March 17, 1993, the Amended Notice of Violation and Order was served on DTP, Inc. on March 22, 1993 and received by DTP, Inc. on March 24, 1993;
17. That on June 18, 1993 DEM filed a second amended violation referred to an "Amended Violation II";
18. That the amended violation was submitted without objection from the Respondent;
19. That Respondent timely answered Amended Violation II on July 2, 1993;
20. That this decision is based on allegations contained in Amended Violation II in accordance with R. I. Superior Ct. Rule 15 and applicable case law;

21. That DTP has failed to precision test the following tanks at the Wakefield facility for the following tanks and years;
- Tank 001 in the years 1987, 1989, 1990, 1991, 1992
 - Tank 002 in the years 1987, 1989, 1990, 1991, 1992
 - Tank 003 in the years 1987, 1988, 1990, 1991, 1992
 - Tank 004 in the years 1987, 1988, 1990, 1991, 1992
22. That DTP failed to precision test the following tanks at the Tower Hill facility for the following tanks and years;
- Tank 001 in the years 1987, 1989, 1990
 - Tank 002 in the years 1987, 1989, 1990
 - Tank 003 in the years 1987, 1989, 1990
 - Tank 004 in the years 1987, 1988, 1989, 1990, 1992
 - Tank 005 in the year 1992
 - Tank 006 in the year 1992
23. That precision tests were conducted at the Tower Hill facility for the following tanks and years;
- Tanks 001, 002, 003 in 1992
24. That DTP Failed to submit precision test results to the Director of DEM as required by the regulations for the following tanks and years;
- (a) Wakefield Facility
 - Tank 001 in the years 1987, 1989, 1990, 1991, 1992
 - Tank 002 in the years 1987, 1989, 1990, 1991, 1992
 - Tank 003 in the years 1987, 1988, 1990, 1991, 1992
 - Tank 004 in the years 1987, 1988, 1990, 1991, 1992
 - (b) Tower Hill Facility
 - Tank 001 in the years 1987, 1989, 1990, 1992
 - Tank 002 in the years 1987, 1989, 1990, 1992
 - Tank 003 in the years 1987, 1989, 1990, 1992
 - Tank 004 in the years 1987, 1988, 1989, 1990, 1992
 - Tank 005 in the year 1992
 - Tank 006 in the year 1992
25. That the tanks at Tower Hill were closed from March 28, 1988 through December 1, 1988, a period of more than 240 consecutive days;
26. No request for an extended temporary closure of the Tower Hill facility beyond 180 days was ever submitted to the Director by DTP;

27. That the pumps located at the Tower Hill facility are not equipped with remote pumps and as such, do not require line-leak detection systems;
28. That the Tower Hill station is not equipped with pressured piping and therefore line-leak detection systems are not required;
29. That Respondent was not required under the regulation to provide a line-leak detection system at the facility therefore written verification of compliance with this requirement was not necessary;
30. That the Department assessed Respondent an administrative penalty in the amount of \$118,900.00 dollars derived from standards set forth in the 1992 penalty regulations;
31. That the penalty was devised from the Administrative Penalty Assessment Worksheet Summary attached to the Amended Violation II;
32. That having failed to prove a violation of 1991 UST Regulation 10.06 and 10.07, the \$15,000.00 administrative penalty assessed in the NOVAO must be deleted from the penalty calculation;
33. That the violations occurring prior to the effective date of the 1992 Penalty Regulations were remanded to the Department for recalculation under 1987 Penalty Regulations;
34. That the following violations are assessed a penalty under the 1992 regulations:

1992 UST reg. 10.05(B)
1992 UST reg. 10.08(H);
35. That DEM assessed Respondent an additional penalty for obtaining an economic advantage for noncompliance;
36. That the economic advantage penalty for noncompliance under 1992 regulations at Tower Hill is \$1,050 and at Wakefield \$1,400;
37. That four precision tests were not conducted at the Wakefield gas station in 1992;
38. That the violations for failure to precision test are Type II minor violations;
39. That the penalty amount at Wakefield for tests not completed in 1992 is \$4,000.00;
40. That three precision tests were not conducted at the Tower Hill Station in 1992;

41. That the penalty amount at Tower Hill for tests not completed in 1992 is \$3,000.00 dollars;
42. That Respondent's failure to submit written verification of three precision tests conducted at the Tower Hill Facility in 1992 resulted in a \$300.00 dollar penalty;
43. That the Department classified this infraction as a Type III minor violation;
44. That the administrative fine owed by DTP for infractions that occurred under 1992 penalty regulations is \$5,400 at the Wakefield facility, \$4,350 at the Tower Hill facility for a total administrative fine of \$9,750;
45. That the Department submitted an Administrative Penalty Recalculation Worksheet to the Director on June 5, 1995;
46. That the recalculated penalty assessed fines for violations of the 1985 UST regulations as follows:

1985 UST Regulation 9(c) (Wakefield)	\$16,000
1985 UST Regulation 9(c) (Tower Hill)	\$13,000
1985 UST Regulation 15 (Tower Hill)	\$30,000
47. That the recalculated penalty assessed a separate fine for "Economic Benefit for Non-Compliance";

Wakefield	\$4,050.00
Tower Hill	\$5,600.00
48. That the recalculated penalty assessed no fine for violations of 1985 UST Regulation 9(e);
49. That the fine for violating 1985 UST 9 (c) at the Wakefield facility was calculated at \$1,000 per test for 16 tests;
50. That the penalty for violations of 1985 UST Regulation 9(c) at the Wakefield site is \$16,000 at a Type II minor level.
51. That the fine for violating 1985 UST 9(c) at the Tower Hill facility was calculated at \$1,000 per test for 13 tests;
52. That the penalty for violating 1985 UST Regulation 9(c) at the Tower Hill facility is \$13,000 at a Type II minor level;
53. That the penalty for violating 1985 UST Regulation 15 governing closure\ abandonment is a Type III minor level;
54. That the record reflects that Susan Cabeceiras, a witness specifically

found credible by the Hearing Officer, did address the penalty amount of \$500 per day for violation of UST Regulation 15 assessed by the Division;

55. That the Hearing Officer found as fact "That although Respondent failed to inform DEM [of the] tank closure at the Tower Hill facility, the Department did not consider the omission to be a serious offense";
56. That the Hearing Officer concluded as a matter of law that "[t]he record is devoid of any references that could justify DEM issuing the maximum per day penalty" for the proven violations of UST Regulation 15;
57. That the Division assessed DTP a separate fine for "Economic Benefit from Non-Compliance";
58. That the 1987 Penalty Rules do not provide for a separate penalty to off-set economic advantage;
59. That the administrative fine to be paid by DTP for violations of the 1985 Tank Regulations are as follows:

1985 UST Regulation 9(c)(Wakefield)	\$16,000
1985 UST Regulation 9(c)(Tower Hill)	\$13,000
1985 UST Regulation 9(15) (Tower Hill)	\$6,000

60. The total administrative fine to be paid by DTP for all violations is \$44,750.00 dollars.

CONCLUSIONS OF LAW

1. That a lawful notice of violation was issued in accordance with R.I. Gen Laws § 42-17.1-2(u);
2. That Respondent made a timely request for a hearing in accordance with R.I. Gen. Laws § 42-17.1-2(u)(1);
3. That the Department has the jurisdiction to render a Final Agency Decision pursuant to R. I. Gen. Laws § 42-17.7-1 et seq.;
4. That the hearing was conducted pursuant to Water Pollution Control Act. R. I. Gen Laws §46-12-1 et seq., the Administrative Procedures Act 42-35 et seq.; the statutes governing the Department of Environmental Management § 42-17.1-1 et seq., The Administrative Penalties for Environmental violations Act 42-17.6-1 et seq., and the duly promulgated Rules and Regulations for Underground Storage facilities used for Petroleum Products and Hazardous Materials and the Administrative Rules of Practice and Procedure for the

Administrative Adjudication Division for Environmental Matters promulgated July 1990;

5. That the Division has the burden of proving each and every act or omission alleged by a preponderance of the evidence . R. I. Gen. Laws § 42-17.6-4;
6. That witness credibility was properly assessed by the Hearing Officer;
7. That Robert Potter leased the Tower Hill facility in 1988;
8. That any lease agreement between Robert Potter and DTP, Inc. does not negate the Respondent's obligation to comply with DEM regulations in accordance with a prior final agency decision. D'Allesandro;
9. That the Division has met its burden to show by preponderance of the evidence that:

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

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

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

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

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

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

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

Tanks 004, 005 and 006 in 1992;

10. That during the course of the hearing Respondent provided evidence to show that Respondent had complied with precision testing requirements under regulation 10.05(B) at the Tower Hill facility on tanks 001, 002, 003 in 1992; therefore the Division failed to prove by a preponderance of the evidence the violation as alleged in the NOVAO concerning precision testing on those tanks

in 1992;

11. That the Division has failed to meet its burden of proving by a preponderance of the evidence that:
 - (a) Respondent violated 1985 UST reg. 9(a);
 - (b) Respondent violated 1992 UST reg. 10.06;
 - (c) Respondent violated 1992 UST reg. 10.07.
12. That the Division has met its burden of proving by a preponderance of the evidence that Respondent violated 1985 UST reg. 9(e) and 1992 reg. 10.08(H) for failure to submit written verification of compliance with precision testing;
13. That the Division has failed to meet its burden of proving by preponderance of the evidence that Respondent violated 1985 UST reg. 9(f) and 1992 UST reg. 10.13 which require written verification of line-leak detection system installations;
14. That the Division has met its burden of proving by preponderance of the evidence that Respondent violated 1985 UST reg. 15;
 - (a) The Tower Hill facility was closed from at least March 28, 1988 to December 1, 1988, a period of over 240 consecutive days.
 - (b) That Respondent never petitioned the Director to extend the temporary closure of the Tower Hill facility beyond 180 days.
15. That the Director of DEM is authorized by R. I. Gen. Laws § 42-17.6-2 to assess an administrative penalty;
16. That the ability of DEM to issue administrative penalties is codified in the Department of Environmental Management Rules and Regulations for the Assessment of Administrative Penalties promulgated in 1987 and 1992 (Penalty Regulations);
17. That having failed to prove a violation of regulations 10.05 and 10.07, the \$15,000 penalty assessed for such violations must be deleted from the penalty calculation;
18. That any violation that occurred prior to the effective date of the 1992 Penalty Regulations must be reviewed in accordance with the rules and regulations in existence at the time the violations occurred;
19. That different burdens of proof are reflected in the 1992 and 1987 violations;
20. That this matter was remanded for recalculation of penalty under 1987 Penalty Regulations for violations which occurred prior to the effective date of the 1992 Penalty Regulations;

21. That under 1992 Penalty Regulations, Section 12(C), it is Respondent's burden to show by preponderance of the evidence that the Director failed to assess the penalty or economic benefit portion of the penalty in accordance with the regulations;
22. That the following violations are to be assessed a penalty under 1992 Penalty Regulations: UST 10.05(B) and UST 10.08(H);
23. That the Division assessed Respondent a penalty for economic advantage in accordance with 1992 reg. 10(C)(1) and 10(C)(2) and the penalty assessed is within the parameters and guidelines of the 1992 Penalty Regulations;
24. That Respondent has not shown by preponderance of the evidence that an economic advantage penalty assessed in accordance with the 1992 Penalty Regulations was outside the scope of the regulations;
25. That using the appropriate arithmetic, the imposition of an economic advantage penalty at Tower Hill of \$1,050 and at Wakefield of \$1,400 is within the parameters outlined in Section 10(C)(1)(2) of the regulations;
26. That the Respondent violated UST 1992 Reg. 10.08(H), and the penalty of \$300 dollars was assessed in accordance with the criteria for assessment and calculation listed in section 10(a)(1)(c) of the 1992 penalty regulations;
27. That Respondent violated section 10.05(B) of the UST Regulations;
 - (A) that the penalty for violating section 10.05(B) at the Wakefield facility is \$4,000.
 - (B) that the penalty for violating section 10.05(B) at the Tower Hill facility is \$3,000.
28. That using the appropriate arithmetic, the penalty assessed under the 1992 Penalty Regulations is within the parameters outlined in section 10(c)(1)(2) of the regulations;
29. That Respondent has not shown by preponderance of the evidence that the penalty assessment under 10.05(B) is outside the scope of the regulations;
30. That the Respondent owes a total of \$9,750 in penalties in accordance with R. I. Gen. Laws. § 42-17-6 and the 1992 Penalty Regulations;
31. That in accordance with 1987 Penalty Rules Section 9 and 11 and R. I. Gen. Laws § 42-17.6-4 the Division has the burden to prove by a preponderance of the evidence that the penalty was assessed in accordance with the Administrative Penalties for Environmental Violations Act and the Penalty Regulations. This burden includes proving that the amount of the penalty imposed is within the parameters of the Penalty Regulations and is not

excessive;

32. That the Division has met its burden to prove the monetary penalty for violations of the 1985 UST Regulation 9(c) at the Tower Hill facility is within the parameters of the regulations and is not excessive;
33. The Division has met its burden to prove that the monetary penalty for violations of 1985 UST Regulation 9(c) at the Wakefield facility is within the parameter of the regulations and not excessive;
34. That in the recalculated Penalty Worksheet, the Department did not assess a penalty to the respondent for violations of 1985 UST Regulation 9(e);
35. That the 1987 Penalty Water Pollution Control Matrix requires that each day of the violation be considered a separate occurrence;
36. That Division has met its burden to show that the penalty for violations of UST Regulation 15 is a Type III minor violation but failed to meet its burden to prove that the maximum amount selected within that range is in accordance with the 1987 Penalty Regulations;
37. That economic benefit for non-compliance is one of the several factors provided in Section 9 of the regulations to be considered by the Division in determining the appropriate amount of the administrative fine under the 1987 Penalty Regulations;
38. That the 1987 Penalty Rules and the applicable statutes do not provide for a separate penalty to off-set economic advantage;
39. That Section 10(c) of the 1992 Penalty Regulations provides for a separate and additional penalty for economic benefit;

ORDERED

1. That Respondent is ordered to pay the following administrative fines
 - (a) For violations of 1985 Regulation 9(c)(Wakefield) \$16,000
 - (b) For violations of 1985 Regulation 9(c)(Tower Hill) \$13,000
 - (c) For violations of 1985 Regulation 15 (Tower Hill) \$6,000
 - (d) For violations of 1992 Regulation 10.05(b)(Wakefield) \$4,000
 - (e) For violations of 1992 Regulation 10.05(b)(Tower Hill) \$3,000
 - (f) For violations of 1992 Regulation 10.08(h)(Tower Hill) 300
 - (g) For violations economic benefit penalty

(1992 Penalty Reg 10(c)(Wakefield) \$1,400

(h)For violations economic benefit penalty (1992 Penalty Reg. 10c)
(Tower Hill) \$1,050

The total penalty for all founded violations is \$44,750

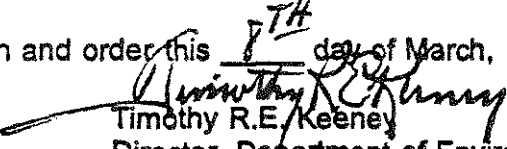
2. That payment of the administrative fine is to be made within 30 days of the agency's final decision and order.
3. That payment of the administrative penalty is to be made to:

State of Rhode Island, General Treasurer, and mailed to:

Rhode Island Department of Environmental Management
Business Affairs
22 Hayes Street
Providence, RI 02908

Attn: Glen Miller

Entered as a Final Agency Decision and order this 7TH day of March, 1996.


Timothy R.E. Keeney
Director, Department of Environmental
Management

I hereby certify that I caused a true copy of the within Final Agency Decision to be forwarded, via regular mail, postage prepaid to George and Dorothy Potter, DTP, Inc., 83 Merry Mount Drive, Warwick, Rhode Island, 02886; Peter McGinn, Esq., Tillinghast, Collins, & Graham, One Old Stone Square, Providence, Rhode Island 02903 and via interoffice mail to Brian Wagner, Esq., Office of Legal Services, 235 Promenade Street, Providence, Rhode Island 02908 on this 11th day of March, 1996.

