

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

**RE: RONALD GOBIN/ALLIANCE MOTOR SALES & SERVICE, INC.
NOV UST NO. 93-03586 AAD NO. 93-035/GWE**

DECISION AND ORDER

This matter came before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD") pursuant to the Respondent's request for hearing on the Notice of Violation and Order ("NOV") issued by the Division of Waste Management ("Division") on June 21, 1993. The hearing was conducted on May 2, 1995. Following the hearing, the parties attempted to resolve the matter through a negotiated settlement over a six-month period, which proved unsuccessful. Post-hearing memoranda were subsequently filed.

The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R.I. GEN LAWS Section 42-17.7-1 et seq), the Administrative Procedures Act (R.I. GEN LAWS Section 42-35-1 et seq), the Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters ("AAD Rules") and the Rules and Regulations for Assessment of Administrative Penalties ("1992 Penalty Regulations").

PREHEARING CONFERENCE

A prehearing conference was conducted on May 6, 1994 at which the parties agreed to the following stipulations of fact:

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1. The Facility is comprised of a repair service station and car sales known as Alliance Motor Sales and Service, Inc.. There are four (4) underground storage tank ("UST") systems located thereon.
2. The following information regarding the UST systems at the Facility has been registered with the Department:

UST ID#	DATE UST INSTALLED	CAPACITY (gal.)	CONTENT	SPILL CONTAIN.	LEAK DETECT.
001	unknown	1,000	unknown	unknown	unknown
002	unknown	1,000	unknown	unknown	unknown
003	unknown	1,000	unknown	unknown	unknown
004	unknown	250	waste oil	unknown	unknown

3. As of the date of the Notice of Violation and Order ("NOV"), the facility was not registered with the Department.
4. As of the date of the NOV, three of the four known USTs at the facility had been out-of-service and/or abandoned since the implementation of the UST Regulations in April, 1985.
5. As of the date of the NOV, no precision test results were ever submitted to the Department with regard to the subject facility by Respondents.
6. As of the date of the NOV, no spill containment basins had been installed on any UST at the facility.
7. As of the date of the NOV, no documentation had been submitted to the Department to verify the installation of spill containment basins on the USTs at the facility.
8. Since the date of the NOV, no precision tests have been performed or spill containment basins installed on any UST at the facility by Respondents.
9. At the Department's request, the facility was registered with the UST Program on September 24, 1993.
10. The facility's UST Registration form identifies UST numbers 001, 002 and 003 as being abandoned. UST number 004 is identified on the form as still being in use.

11. UST number 004 is presently not in use.

The exhibits proffered by the Division, marked as they were admitted at the hearing, are attached to this Decision as Appendix A. Respondent did not submit any exhibits.

BACKGROUND

The NOV¹ serves as the Division's pleading or complaint against Respondent Ronald Gobin as owner of the property and against Alliance Motor Sales and Service, Inc. and/or Ronald Gobin as the owner of certain underground storage tanks ("USTs") located at the facility and as the operator of the business located at the facility. The NOV alleges that there are three USTs located at the facility, "which tanks are used for the storage of petroleum products or hazardous materials"; that the facility is not registered; that the facility and/or tank owners and operators have not submitted verification of the installation of spill containment basins for any of the three USTs located at the facility; and that the facility and/or tank owners and operators have failed to precision test and/or to submit to the Department copies of precision test results for UST #001 for the years 1986, 1987, 1988, 1989, 1990, 1991 and 1992. The NOV also alleges that two of the USTs are no longer in use and are considered abandoned.

Based upon the Division's allegations, the NOV cites Respondents for

¹The status of the NOV as an exhibit is discussed further below.

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violating certain provisions of the Regulations for Underground Storage Facilities Used for Petroleum Products and Hazardous Materials (1992), as amended (the "UST Regulations"). Specifically, Respondents are cited for violating UST Regulation Section 8.00 relating to registration of UST facilities; UST Regulation Section 15.02 relating to the prohibition of abandoned tanks; UST Regulation Section 10.09(A) relating to spill containment basin requirements; UST Regulation Sections 10.05(B) and 10.08(H) relating to precision testing requirements; and UST Section 10.13 requiring the submission of written verification of compliance with Sections 10.05 and 10.09².

The above-cited sections are located in the 1992 UST Regulations with the effective date of July 21, 1992 and may not be found under those same citations in the regulations which would have been in effect for the years Respondent is alleged to have abandoned, failed to register, to test, to install and to submit verification. The earlier regulations, however, contain the same substantive requirements, though they are found in differently-numbered sections. This Decision will consider the substantive requirements of the sections the Respondent is alleged to

²At the hearing it became clear that when the NOV was served on Respondents, page 3 of the NOV was missing. The Division's citation for failure to submit written verification of compliance with Section 10.09 was set forth on the missing page. An examination of the Administrative Penalty Assessment Worksheet Summary which is attached to the NOV, indicates that the Division did not seek a penalty for failure to submit verification of compliance with Section 10.09.

have violated and, for purposes of reference, will use the 1992 UST Regulations' citations.

HEARING SUMMARY

At the hearing the Division called one (1) witness, Susan W. Cabeceiras, a senior environmental scientist with the Underground Storage Tank Program in the Department of Environmental Management ("DEM"). Respondent presented one (1) witness, Ronald J. Gobin, a respondent and former owner of the property.

Ms. Cabeceiras testified that she drafted the NOV that was issued in this matter and stated that she was familiar with the facility identified in the NOV through her review of the Department's facility file and enforcement file. (Tr. 6). She explained that when the NOV was issued, the Department believed that there were three USTs located at the facility but that the registration application filed after the NOV's issuance indicated there were four tanks at the site. (Tr.9). The NOV was not amended to include the additional UST.

Although there was no testimony regarding the numbering identification of the tanks in the NOV as compared to their numbering identification in the registration information (that is, which tanks were numbered 001, 002 and 003 in the NOV and whether they bore the same tank numbers in the registration information), the Division indicates by way of a footnote in its post-hearing brief that the stipulations from the prehearing conference refer to the tank numbers from the UST

Registration Information (DEM 4 Full) and are not based on the tank numbers identified in the NOV. Division's Post-Hearing Memorandum, p.4, fn. 6.

The Notice of Violation

Respondent's First Motion to Dismiss

The first indication of a possible problem with the NOV occurred during my review of the AAD administrative file on the day before the hearing. I had noted that the copy of the NOV which the Division had sent to the AAD when the file was first opened did not have a page numbered "3". Another copy of the NOV in the file, which was the copy of the NOV that Mr. Gobin had attached to his hearing request, also did not contain a page numbered "3". Until the hearing I remained uncertain whether the problem was merely a typographical error resulting from misnumbered pages or whether it raised other issues.

At the hearing, after questioning Ms. Cabeceiras regarding the alleged violations, Division's counsel queried the witness about the administrative penalties set forth in the NOV. To refresh the witness' recollection regarding the penalties related to each tank (Tr. 11-12, 14), the Division presented a copy of the NOV to be marked for identification. The document which was offered was missing page eight, the second page of the Administrative Penalty Assessment Worksheet Summary, but contained a page "3". When the Division moved that DEM 5 for Id be admitted as a full exhibit, representing that the missing page eight would

be provided at the first opportunity, Respondent objected.

Respondent's objection to the document's admission into evidence was twofold: the first questioned whether Respondent had ever received page three of the NOV, although counsel acknowledged that he had no way to demonstrate that Mr. Gobin had not received the page (counsel also stated that a copy of the NOV which had been faxed from Division's counsel a day or so before the hearing was also missing page three, see Tr. 16); Respondent's second objection was that if the Division was offering the exhibit as a business record prepared from information in the Division's file, then an inadequate foundation had been laid. Following Respondent's objection to the admission of the document into evidence, I informed the parties of my review of the administrative file and the discovery that the two copies of the NOV in the file were also missing page three. (Tr. 17-18).

For convenience in reviewing this issue, I have attached a copy of page three of the NOV to this Decision, marked as Appendix B. The contents of page three are the following: it continued listing from page two the regulations the Respondent was alleged to have violated (the brief citation, "and 10.09."); it also set forth the "Order" portion of the NOV requiring Respondent to register the facility, submit documentation on installation of spill containment basins, initiate the closure process for the two abandoned tanks, and either precision test the remaining tank and install the spill containment basin or follow the closure process for the

tank. The assessment of the administrative penalty was at the top of page four.

Respondent's counsel, arguing that page three contained "the heart of the violations cited", moved to dismiss the NOV for lack of adequate notice. (Tr. 18-19). The Division objected and pursued a line of questioning with its witness, Ms. Cabeceiras, so it could "adequately dispose of the issues related to this allegedly missing page." (Tr. 19). A review of the contents of page 3 of the NOV in conjunction with Ms. Cabeceiras' testimony establishes that either Respondent had already complied with the "Order" section of the NOV set forth on page 3 or that particular paragraphs of the "Order" were now moot.

The questioning confirmed that the underground storage tanks had been removed from the ground; that the instruction to install spill containment basins was therefore moot; that a UST registration application was filed after the issuance of the NOV; and that in a meeting after the issuance of the NOV, Respondent was advised that the waste oil tank should be precision tested, however, the Division never received any results. (Tr. 20-23, 25). The Division then concluded the direct examination of its only witness.

The parties were advised that since the motion to dismiss was dispositive and involved issues of notice, the parties could further address the matter in their post-hearing memoranda. A ruling on the motion was reserved for consideration in this decision. I will address the merits of the

motion below.

First, however, I will review the NOV's status as an exhibit. In response to a query from Respondent's counsel immediately prior to his cross-examination of Ms. Cabeceiras, the parties were informed that the NOV remained marked for identification. (Tr. 25). The Division did not renew its attempt to move the NOV into evidence nor did it seek any further clarification of the document's status. Notwithstanding what is clear on the record, the Division's Post-Hearing Memorandum takes the position that the motion to admit the NOV as a full exhibit was left pending with the outcome of Respondent's motion to dismiss. Division's Post-Hearing Memorandum, p. 9.

Despite the Division's position to the contrary, the issue was not left open at the hearing. It was apparent at the hearing that when the problems with page three resulted in two objections from Respondent and a motion to dismiss, the Division determined it was unnecessary to have the NOV admitted into evidence and no longer sought to have it admitted into evidence. See Tr. 19 (lines 14-20), 20-25, 27 (lines 18-24), 29 (lines 6-9; 13-24), 30 (lines 1-14) 33-34, 48.

The record is clear that the document remained marked for identification only, that the Division was fully aware of its status, that no ruling on its admissibility was left pending, and that the parties were told that post-hearing memoranda should contain legal argument supported by facts already in evidence and cannot be used to establish new

evidence. See Tr.25 (lines 13-21), 29 (lines 6-9), 46-47. In addition, Respondent's second motion to dismiss, discussed further below, argued that the Division had not met its burden of proof, listing, among other things, the Division's failure to place the NOV into evidence. (Tr. 31-32, particularly p. 32, lines 2-3).

Accordingly, the document offered at the hearing (DEM 5 for Id), which contains page 3 and lacks page 8, remains marked for identification only; the document attached to the Division's Post-Hearing Memorandum, which contains page 8 but lacks page 3, is of no legal consequence in this decision. To allow the Division (or any party) to offer an exhibit into evidence after the hearing has concluded and without re-opening the hearing (for which there has been no request) would deprive Respondent of due process rights to cross-examine the Division's witness regarding the new exhibit.

The AAD administrative file supports the conclusion that Respondent had not received page 3 of the NOV since copies filed with the AAD from two different and opposing sources were missing the page. Although the two copies have not been placed in evidence, I take official notice of the fact that the two copies of the NOV, one sent from the Division and one attached to Respondent's hearing request, do not contain page 3.

As for Respondent's motion to dismiss, the merits were argued both at hearing and by way of post-hearing memoranda. Respondent's

argument at the hearing is set forth above. For its part, the Division at hearing and in its brief, asserts that there is no detrimental harm to Respondent if he never received page three of the NOV because the tanks were removed and the facility was registered as required in the missing "Order" section that was listed on page three. Tr. 29-30; Division of Waste Management's Post-Hearing Memorandum, p. 9. The Division's Post-Hearing Memorandum specifies that "the only relief being sought by the Division at the time of the hearing were the monetary penalties proposed on Page 4 of the NOV for the violations alleged on Page 2 of the NOV." at 9-10.

Respondent correctly states in his post-hearing memorandum that § 42-17.6-3 requires that whenever the Director seeks to assess an administrative penalty, the notice shall include a concise statement of the alleged act or omission for which the penalty is sought and each law, rule, regulation, etc., which has not been complied with as a result of the alleged act or omission. Respondent's Post-Hearing Memorandum, p. 7. I also note that §42-17.1-2(u)(1) states that notice of an alleged violation of law will be deemed properly served if a copy is served on him or her personally, or sent by registered or certified mail, or if the person is served with notice by any other method of service authorized in civil actions under the laws of Rhode Island.

The Division does not address the inadequacy of the notice for the regulation cited at the top of page three which the Respondent is alleged

to have violated. The violation alleged was the failure to submit written verification of the installation of spill containment basins. Since there was improper service of page 3 which contained the notice that Respondent was alleged to have violated the requirement to submit verification of compliance with Section 10.09, that violation should be dismissed.

The Division's above stipulation that it is not seeking any action or relief from page three of the NOV removes the remaining deficiencies in the notice. The relief requested by the Division as set forth in the "Order" contained on page three of the NOV is therefore denied.

Having reviewed the NOV in its entirety and considered the legal arguments of the parties, I find that with the dismissal of the single violation regarding submission of verification and the denial of the relief requested on page three of the NOV, all defects in the notice have been resolved. Respondent's motion to dismiss for lack of adequate notice is otherwise denied.

Registration of the Facility

The NOV alleges that the facility was not registered with the Department as required by the UST Regulations. The UST Regulations require that the owner or operator apply for a certificate of registration in accordance with a deadline depending on the storage capacity or contents of the tanks. Facilities with tanks of any size storing No. 4, No. 5 or No. 6 fuel oils are required to register by January 1, 1993. The same deadline applies where there are tanks with a capacity of 1,100 gallons or

less on residential properties or where there are farm tanks with a capacity of 1,100 gallons or less. Facilities with all other tanks subject to the UST Regulations of any size storing petroleum products or hazardous materials must register by April 9, 1985. UST Regulations §8.03 (B).

In light of the Division's contention that Respondent should have registered the facility in 1987 when the property was purchased (Division's Post-Hearing Memorandum, p. 4), it appears that the tanks in question fall under the heading of "All other tanks subject to these regulations of any size storing petroleum products or hazardous materials." UST Regulations §8.03 (B).

The Division asserts that it has proved that Respondent failed to comply with the regulatory requirements for registration of the facility through the following: at the hearing Respondent admitted he purchased the property in November 1987 (Tr. 36), thus admitting ownership of the facility; through the stipulations agreed to at the prehearing conference, Respondent has admitted that four (4) UST systems were located at the Facility (stipulation #1), that as of the date of the NOV, June 21, 1993, the Facility was not registered with the Department (stipulation #3), and that the Facility was finally registered on September 24, 1993 (stipulation #9). Division's Post-Hearing Memorandum, pp. 3-4.

Respondent counters that, notwithstanding the stipulations cited by the Division, the Division has failed to prove the violation.

Respondent's Post-Hearing Memorandum states that stipulation #2 from the prehearing conference contains the registration information regarding the UST systems at the facility and represents that the contents of tanks 001, 002 and 003 were unknown. In addition,

During the course of the hearings, the Department offered no evidence to demonstrate the prior contents of those tanks. No testimony was elicited from the Respondent, Ronald Gobin, which would have substantiated the tanks' contents. Moreover, no stipulation of fact resolves this question. at 2.

Respondents contend that since the Division did not elicit or present any evidence regarding the contents of USTs 001, 002 and 003, the Division has therefore failed to meet its burden to prove that the tanks in question are the tanks identified in and subject to the regulations.

Respondent's Post-Hearing Memorandum, p. 3.

I have carefully reviewed the testimony and find no testimonial evidence regarding the contents of the three (3) tanks other than through Mr. Gobin's testimony that when he stuck the tanks, presumably in November 1987 around the time he purchased the property, he found they were empty and contained only rust. (Tr. 36-37). The issue of the three tanks with the unknown contents is discussed below in the section entitled "Abandoned Tanks". An examination of the stipulations, particularly stipulation #2, and of the exhibit marked "DEM 4 Full", however, reveals evidence that tank 004 at the facility contained waste oil.

The UST Regulations provide that facilities with tanks that store petroleum products or hazardous materials shall apply for and obtain a certificate of registration by April 9, 1985. The UST Regulations define "Petroleum Product" to include waste oils. UST Regulations §7.54. I therefore find that the Division has met its burden to prove that Respondent violated the UST Regulations' requirement for registration of the facility as alleged in the NOV.

Abandoned Tanks

The NOV alleges that two (2) of the USTs at the facility are no longer in use and are considered abandoned in violation of the UST Regulations. Under the Regulations, "Abandonment" is defined to include the action of taking a UST or UST system out of operation for a period of greater than 180 consecutive days without the prior permission of the Director pursuant to Section 15.00. UST Regulations §7.01.

Section 15.00 of the UST Regulations, which prohibits the abandonment of UST or UST systems, applies to all facilities where petroleum product and/or hazardous materials are or were stored as defined in Section 5.00. Section 15.00 also prohibits the permanent closure of any UST or UST system without the prior approval of the Department. Section 5.00 specifies the applicability of the UST Regulations, that is that they apply to all proposed, new and existing underground storage tank facilities at which petroleum product and/or

hazardous materials are or have been stored underground in a tank or tank systems. Section 5.00 also details those tanks which are exempt from the regulations, including hydraulic lift tanks, septic tanks, flow through process tanks and underground storage tanks which store propane or liquified natural gas.

The Division asserts that it has proved this violation through the following: pursuant to the stipulations agreed to at the prehearing conference, Respondent has admitted that as of the date of the NOV (June 21, 1993), three (3) of the four (4) USTs at the facility had been out-of-service and/or abandoned since April 1985 (stipulation #4); that as of the date of the prehearing conference (May 6, 1994), the fourth UST was not in use (stipulation #11); and that at the hearing, Respondent testified that the tanks were removed in 1994 (Tr. 42). Division's Post-Hearing Memorandum, pp. 4-5.

Respondent has already raised the issue and established that there is no evidence in the record regarding the contents of three of the USTs located at the facility. Presumably, two of these three tanks are the ones cited in the NOV as being abandoned.

The UST Regulations apply to all proposed, new and existing underground storage tank facilities at which petroleum product and/or hazardous materials are or have been stored underground in a tank or tank systems; they also identify underground storage tanks which are exempt from the UST Regulations. The fact that there are three (3)

abandoned UST systems at the facility (stipulation #4), without anything more, does not compel the conclusion that they contained petroleum product or hazardous waste and are therefore subject to the regulations.

It appears that the waste oil tank is not one of the tanks alleged in the NOV to have been abandoned, nor has the NOV been amended to include this fourth tank as being abandoned. Notwithstanding that the Division cannot pursue an alleged further violation without amending the original NOV or without complying with statutory requirements for issuance of a new notice of violation, I have conducted the below analysis of the evidence.

Stipulation #11, which references the fourth tank, was agreed to on May 6, 1994 and provides that "UST number 004 is presently not in use." No evidence is provided as to the time period prior to the prehearing conference that the tank was not in service. Ms. Cabeceiras testified that it was her belief that the tanks were removed on June 24, 1994. (Tr. 20). There is no evidence that the removal was without the prior permission of the Director.

Although there is clear evidence that the fourth tank contained waste oil, the Division has neither presented nor elicited any evidence that the fourth tank was out-of-service, and therefore considered abandoned, for a period in excess of 180 consecutive days.

In considering all of the evidence, I conclude that the Division has

not met its burden to prove that Respondent violated the UST Regulations' prohibition of abandoned tanks as alleged in the NOV.

Spill Containment Basins

The NOV alleges that the facility and/or tank owners and operators have failed to submit to the Department written verification of the installation of spill containment basins on the tanks³ and are in violation of the UST Regulations' requirements regarding installation of spill containment basins. The UST Regulations require that all underground storage tanks at existing facilities be fitted with spill containment basins around all fill pipes with the exception of above-ground fill pipes, by May 8, 1987. UST Regulations §10.09(A).

The Division asserts that it has proved this violation through the following: pursuant to stipulation #6 agreed to at the prehearing conference, Respondent has admitted that as of the date of the NOV (June 21, 1993) no spill containment basins had been installed on any UST at the facility. Division's Post-Hearing Memorandum, p. 7.

Respondent has already raised the issue and established that there is no evidence in the record regarding the contents of three of the USTs located at the facility. There is evidence, however, that the fourth tank contained waste oil. The fourth tank is therefore subject to the UST

³For reasons discussed above, this Decision will not consider any violation for failure to submit written verification of installation of spill containment basins.

Regulations' requirement regarding the installation of spill containment basins.

The Division has therefore met its burden to prove that the Respondents have violated the UST Regulations' requirement for installation of a spill containment basin on the waste oil tank as alleged in the NOV. The Division has not met its burden as to the remaining tanks, however.

Precision Testing

The NOV alleges that the facility and/or tank owners and operators have failed to precision test and/or to submit to the Department copies of the precision test results as required by the UST Regulations for one tank for the years 1986, 1987, 1988, 1989, 1990, 1991 and 1992. The UST Regulations provide two schedules for the precision testing of tanks when the date of installation of the tanks is known and verifiable. One schedule requires annual testing if the tank was installed prior to January 1, 1965; if the tank was installed on or after January 1, 1965, then the tanks were required to be tested in May 1987 and in years 5, 8, 11, and 13 after the installation and annually thereafter. UST Regulations §10.05 (B) (1).

For USTs for which the date of installation is unknown, precision testing was required no later than May 1986 and annually thereafter. UST Regulations §10.05 (B) (2).

In light of the Division's allegation in the NOV that Respondent

failed to precision test in 1986 and for each year through 1992, it appears that the Division considers the tanks in question to fall under the requirements of Section 10.05 (B) (2).

The Division asserts that it has proved this violation through the following: as evidenced by the UST Registration Form, marked "DEM 4 Full", the dates of installation of the four (4) USTs at the facility are unknown; pursuant to stipulations agreed to at the prehearing conference, Respondent has admitted that as of the date of the NOV, no precision test results were ever submitted to the Department by Respondent (stipulation #5); that from the date of the NOV until the prehearing conference, no precision tests have been performed by Respondent on any UST at the facility (stipulation #8); at the hearing, Ms. Cabeceiras testified that as of the date of the hearing, the Department had not received any precision test results for any of the tanks located at the facility (Tr. 10); and that under cross examination, Mr. Gobin agreed that from November 1987 until he ran into financial difficulties in January 1991, he "didn't do anything with this facility with regard to the underground storage tanks." (Tr. 45). Division's Post-Hearing Memorandum, pp. 5-6.

Although Mr. Gobin testified regarding his financial limitations during this period, Respondent did not otherwise address the Division's allegation of failure to precision test.

I have reviewed the testimonial and documentary evidence and

find that except for the failure to test in 1986, the Division has met its burden to prove that the Respondents have violated the UST Regulations' requirement to precision test one tank, the waste oil tank, as alleged in the NOV. The Division has not met its burden to prove failure to test in 1986 because Mr. Gobin had testified that he purchased the property in November 1987 (Tr. 36) and there was no evidence regarding any earlier ownership of the tanks or his operation of the facility prior to November 1987.

Administrative Penalty

The Division, according to the NOV, seeks the assessment of an administrative penalty against Respondents in the sum of Forty-Eight Thousand Four Hundred Ninety-Five (\$48,495.00) Dollars. The NOV states that the proposed penalty was calculated pursuant to the Rules and Regulations for Assessment of Administrative Penalties (1992), as amended. Although violations cited in the NOV may have occurred prior to the enactment of the 1992 Penalty Regulations, the parties were aware that the violations were being considered and the penalty assessed in accordance with the 1992 regulations.

As there was no objection to the application of the 1992 Penalty Regulations, and the NOV dated June 21, 1993 was issued after the effective date of the 1992 Penalty Regulations, I conclude that the 1992 Penalty Regulations are applicable to this matter. See In Re: James H.

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Dobson & Sandra J. Dobson/Wickford Service, Inc., AAD No. 93-052/GWE,

Decision and Order entered as a Final Agency Order on February 14, 1997.

Section 12(c) of the 1992 Penalty Regulations provides the following:

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

The Department's interpretation of this provision requires the Division to prove the alleged violation by a preponderance of the evidence and "includes establishing, in evidence, the penalty amount and its calculation." The violator then bears the burden of proving that the penalty and/or economic benefit portion of the penalty was not assessed in accordance with the Penalty Regulations. In Re: Richard Fickett, AAD No. 93-014/GWE, Final Decision and Order issued by the Director on December 9, 1995⁴, at 1.

⁴The timing of the Gobin hearing was similar to that in the Dobson matter. Both hearings occurred following the hearings on In Re: DTP, Inc., AAD No. N/A, Final Decision and Order dated March 8, 1996, appeal pending sub nom., DTP, INC. v. Keeney, C.A. 96-1656 (R.I. Super. Ct.); In Re: Robert DeLisle and Joyce DeLisle, East Greenwich Oil Company, Inc., AAD No. 93-026/GWE, Decision and Order entered as a Final Agency Order on October 5, 1995, reversed on other grounds sub nom. East Greenwich Oil Co. v. Keeney, C.A. PC95-5901 (R.I. Super. Ct., December 17, 1996); and In Re: Richard Fickett, AAD No. 93-014/GWE, Final Decision and Order issued by the Director on December 9, 1995, but prior to the issuance of any of the final decisions in those matters. As with Dobson, the precedential impact of those cases was unknown during the Gobin hearing conducted on May 2, 1995.

As stated above, I have found that the Division has proved by a preponderance of the evidence that Respondents violated the UST Regulations' requirement for registration of the facility as alleged in the NOV. No evidence was introduced or elicited, however, to establish the penalty amount and its calculation, or the economic benefit portion of the penalty, for this violation.

The Division has also met its burden to prove by a preponderance of the evidence that Respondents violated the UST Regulations' requirement for installation of a spill containment basin on the waste oil tank as alleged in the NOV. No evidence was introduced or elicited, however, to establish the penalty amount and its calculation, or the economic benefit portion of the penalty, for this violation.

The Division has proved by a preponderance of the evidence that Respondents failed to precision test the waste oil tank for the years 1987, 1988, 1989, 1990, 1991 and 1992 as alleged in the NOV. Ms. Cabeceiras testified that the precision testing violation was classified as a "Type 2 Moderate" violation under the regulations. (Tr. 14). Although this testimony established in evidence the penalty calculation, there was no evidence introduced or elicited as to the penalty amount or the economic benefit portion of the penalty for this violation.

Based upon the testimonial and documentary evidence of record and applying the requirements set forth in the Fickett ruling, I find that although the Division has proven the above violations by a preponderance of the evidence, there is insufficient evidence to establish the calculation and amount of the administrative penalty or the economic benefit portion of the penalty as required under Section 12(c) of the 1992 Penalty Regulations. I therefore do not reach consideration of Respondents' evidence or arguments that the penalty was not assessed in accordance with the Penalty Regulations.

Respondent's Second Motion to Dismiss

At the close of the Division's case, Respondent made a second motion to dismiss. He argued that there was insufficient testimony to establish the violations alleged by the Division and that the Division had not sustained its burden to prove the violations by a preponderance of the evidence. (Tr. 31-32). Respondents also contend in their Post-Hearing Memorandum that the Division's only evidence at the hearing regarding the assessment of the penalty was for the failure to submit precision test results, and "even as to that information...the Department never justified numerical amounts attributable to that particular violation." at 3. Respondent concludes that there was no evidence introduced by the Department to substantiate the assessment of the penalties in this case and that therefore the Department has failed to

meet its burden of proof. at 4-5. It appears that this argument is a continuation of the motion made at the hearing.

The Division's objection acknowledges that the witness' testimony was limited, but argues that "if one considers the testimony in combination with the stipulations that had already been made, that the Department has more than met its burden by a preponderance of the evidence..." (Tr. 33).

As with the first motion, ruling on this motion was reserved for consideration in this decision. The merits of the arguments have been considered above in my review of the evidence in light of the Division's burden of proof. The Division has proved some of the violations that were alleged in the NOV. It has not established in evidence the required elements for assessment of an administrative penalty. Failure to establish the penalty, however, is not a basis for dismissal of the underlying violations. It merely means that the Division is not entitled to the relief--the assessment of the penalty--which it had requested in the NOV. In consideration of the above, Respondents' second motion to dismiss is therefore denied.

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

FINDINGS OF FACT

1. Respondent Ronald J. Gobin was the owner of the property from

November 1987 to on or about December 1993.

2. In the UST Registration Form (DEM 4 Full) filed with the Division in September 1993, Mr. Gobin was identified as the facility owner and operator of Alliance Motor Sales and Service, Inc..
3. The facility is comprised of a repair service station and car sales known as Alliance Motor Sales and Service, Inc.. There are four (4) underground storage tank ("UST") systems located thereon.
4. The facility was not registered with the Department until September 1993.
5. The following information regarding the UST systems at the facility has been registered with the Department:

UST ID#	DATE UST INSTALLED	CAPACITY (gal.)	CONTENT	SPILL CONTAIN.	LEAK DETECT.
001	unknown	1,000	unknown	unknown	unknown
002	unknown	1,000	unknown	unknown	unknown
003	unknown	1,000	unknown	unknown	unknown
004	unknown	250	waste oil	unknown	unknown

6. No evidence was presented at the hearing regarding the contents of tanks 001, 002 and 003 identified in paragraph 5 above.
7. UST number 004 contained waste oil.
8. As of June 21, 1993, three of the four known USTs at the facility had been out-of-service and/or abandoned since the implementation of the UST Regulations in April, 1985.
9. The facility's UST Registration Form identifies UST number 004 as still being in use.
10. As of May 6, 1994, UST number 004 was not in use.
11. The USTs were removed on or about June 24, 1994.
12. As of June 21, 1993, no spill containment basins had been installed on any UST at the facility.

13. As of June 21, 1993, no precision test results were ever submitted to the Department with regard to the subject facility by Respondents.
14. The dates of installation of the four (4) USTs at the facility are unknown.
15. The waste oil tank was not precision tested in 1987, 1988, 1989, 1990, 1991 and 1992.
16. Official notice is taken that the two copies of the NOV in the AAD administrative file, one sent from the Division and one attached to Respondent's hearing request, do not contain page 3.
17. Respondent was not served with page 3 of the NOV.
18. Testimony from the Division established that Respondents' failure to precision test was classified as a "Type 2 Moderate" violation.
19. No evidence was introduced or elicited to establish the penalty amount or the economic benefit portion of the penalty for failure to precision test.
20. No evidence was introduced or elicited to establish the calculation of the penalty, the penalty amount or the economic benefit portion of the penalty for failure to register the facility.
21. No evidence was introduced or elicited to establish the calculation of the penalty, the penalty amount or the economic benefit portion of the penalty for failure to install a spill containment basin on the waste oil tank.

CONCLUSIONS OF LAW

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

1. The Division has not met its burden to prove by a preponderance of the evidence that tanks 001, 002 and 003 contained petroleum product and/or hazardous materials.

2. Pursuant to UST Regulation §7.54 "Petroleum Product" is defined to include waste oil.
3. The Division proved by a preponderance of the evidence that tank 004 contained petroleum product.
4. The Division proved by a preponderance of the evidence that Respondents failed to register the facility in violation of the UST Regulations.
5. Pursuant to UST Regulations §7.01 "Abandonment" is defined to include the action of taking a UST or UST system out of operation for a period of greater than 180 consecutive days.
6. The Division has not met its burden to prove that any of the tanks were abandoned in violation of the UST Regulations.
7. The Division proved by a preponderance of the evidence that Respondents failed to install a spill containment basin on the waste oil tank in violation of the UST Regulations.
8. The Division has not met its burden to prove that Respondents' failure to install spill containment basins on tanks 001, 002 and 003 was a violation of the UST Regulations.
9. Pursuant to UST Regulations §10.05(B)(2), when the date of installation of a UST is unknown, the tank is required to be tested no later than May 1986 and annually thereafter.
10. In accordance with the UST Regulations, the waste oil tank was required to be precision tested in 1986, 1987, 1988, 1989, 1990, 1991 and 1992.
11. The Division proved by a preponderance of the evidence that Respondents failed to precision test the waste oil tank in 1987, 1988, 1989, 1990, 1991 and 1992 in violation of the UST Regulations.
12. The Division has not met its burden to prove that the Respondents are liable for the failure to precision test the waste oil tank in 1986 in violation of the UST Regulations.
13. Respondents were not properly served with page 3 of the NOV as required in §42-17.1-2 (u).
14. The 1992 Penalty Regulations are applicable to this matter.

15. Pursuant to Section 12(c) of the 1992 Penalty Regulations, the Division is required to prove the alleged violations by a preponderance of the evidence and establish in evidence the penalty amount and its calculation.
16. The Division established in evidence the calculation of the penalty for failure to precision test the waste oil tank but did not establish in evidence the amount of the penalty or the economic benefit portion of the penalty.
17. The Division has not established in evidence the calculation of the penalty, the penalty amount or the economic benefit portion of the penalty for failure to register the facility.
18. The Division has not established in evidence the calculation of the penalty, the penalty amount or the economic benefit portion of the penalty for failure to install a spill containment basin on the waste oil tank.
19. Failure to establish in evidence the calculation of the penalty, the penalty amount or the economic benefit portion of the penalty is not a basis for dismissal of the underlying violations.

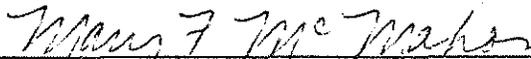
Wherefore, based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED

1. Respondents' first motion to dismiss is GRANTED as to page 3 of the NOV, and DENIED as to the remaining portion of said motion.
2. Respondents' second motion to dismiss is DENIED.
3. The NOV issued to Respondents is hereby SUSTAINED in part as to the liability for Respondents' failure to register the facility, failure to install a spill containment basin on the waste oil tank and failure to precision test the waste oil tank for the years 1987 through 1992, but DENIED as to the assessment of an administrative penalty therefor.

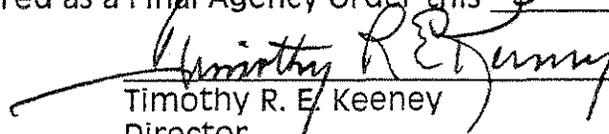
RONALD GOBIN/ALLIANCE MOTOR SALES & SERVICE, INC.
AAD NO. 93-035/GWE
DECISION AND ORDER
Page 30

Entered as an Administrative Order this 10th day of March, 1997
and herewith recommended to the Director for issuance as a Final Agency
Order.



Mary F. McMahon
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
235 Promenade Street
Providence, RI 02908

Entered as a Final Agency Order this 3rd day of April March, 1997.

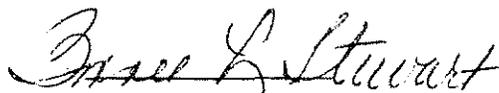


Timothy R. E. Keeney
Director
Department of Environmental Management
Administrative Adjudication Division
235 Promenade Street
Providence, RI 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within order to be
forwarded, via regular mail, postage prepaid to Scott J. Partington, Esq.,
BIGOS & PARTINGTON, 97 Cottage St., Pawtucket, RI 02860 and via
interoffice mail to Brian A. Wagner, Esq., Office of Legal Services, 235
Promenade Street, Providence, Rhode Island 02908 on this 4th day of
~~March~~, 1997.

April



APPENDIX A

LIST OF EXHIBITS

The below-listed documents are marked as they were admitted into evidence:

Division's Exhibits:

- | | |
|--------------|---|
| DEM 1 Full | <u>Correspondence</u> - dated 4/1/92 (1 pg.) |
| DEM 2 for Id | <u>Intra-Office Memoranda</u> - dated 4/19/93 (1 pg.) |
| DEM 3 Full | <u>Correspondence</u> - dated 4/13/92 (1 pg.) |
| DEM 4 Full | <u>UST Registration Information</u> - dated 9/14/93 (3 pgs.) |
| DEM 5 for Id | <u>Notice of Violation and Order</u> - dated 6/21/93 (6 pgs.) |

and 10.09.

E. Order:

Pursuant to R.I. Gen. Laws section 42-17.1-2(u) you are hereby ORDERED to:

- (1) Within thirty (30) days of the date of this NOV, submit to the Department:
 - (a) A UST Registration Application, clearly identifying the current owner and operator of the facility and identifying the owner of all UST's located at the facility.
 - (b) Copies of all documentation confirming that spill containment basins have been installed on those tanks identified in Section C, above.
- (2) Within 30 days, initiate the closure process for the two abandoned tanks by submitting the completed application and scheduling a date for the removal of these tanks not later than 5 days after the Departments approval of the closure application.
- (3) Within 30 days of receipt of this Notice of Violation and Order ("NOV"), bring the facility into full compliance with all UST Regulations including, but not limited to, performance of the following activities:
 - (a) Precision test the UST (tanks & piping) system of the active tank located at the facility that have not been tested within one calendar year of the date of this NOV or as otherwise required by Sections 10.05(B), 10.06 and 10.08(H) of the UST Regulations;
 - (b) Install a spill containment basin on the active UST system located at the facility that currently lack such equipment as required by Section 10.09 of the UST Regulations.
- (4) In lieu of complying with paragraph (3) above, within thirty (30) days of receipt of this NOV, close all active UST systems at the facility in accordance with Section 15 of the UST Regulations.