

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

**RE: FRANCIS P. PAINE/FRANCIS P. PAINE, JR.  
PAINE'S TEXACO SERVICE STATION      AAD NO. 93-048/GWE  
NOTICE OF VIOLATION NO. UST 93-00545**

**SUPPLEMENTAL RECOMMENDED DECISION AND ORDER**

This matter is before the Hearing Officer pursuant to the Director's partial remand of the Recommended Decision for further clarification of whether the Final Agency Decision rendered in DTP, Inc. was considered in determining the Findings of Fact and Conclusions of Law in the Recommended Decision with respect to economic benefit. The remand was for the limited purpose of clarifying the issue of economic benefit under the 1987 Administrative Penalty Regulations.

The Division filed a letter of response/ comment concerning the partial remand and forwarded a copy thereof to the Director. Respondents objected to the Division's unsolicited communication. The unsolicited filing of Division's response/comment (as well as the forwarding of a copy of same to the Director) may not conform with proper procedure, but it did not affect the Hearing Officer's decision in this matter. The clarification requested by the Director is all that required consideration following the remand, and the Respondents were not prejudiced in any way by Division's premature filing. A further hearing was held by AAD on September 17, 1996 at which time all parties were provided adequate opportunity to present arguments concerning the partial remand and subsequent communications.

FRANCIS P. PAINE/FRANCIS P. PAINE, JR.  
PAINE'S TEXACO SERVICE STATION  
AAD NO. 93-048/FWE  
SUPPLEMENTAL RECOMMENDED DECISION & ORDER  
PAGE 2

The NOV in Paine was issued on September 1, 1993, and involved precision testing violations for the years 1987, 1988, 1991 and 1992. The NOV stated that the administrative penalty for said violations was calculated pursuant to the Rules and Regulations for Assessment of Administrative Penalties (1992), as amended.

The rulings in DTP, Inc. concerning the issue of economic benefit under the 1987 Penalty Regulations were considered by this Hearing Officer in determining the Findings of Fact and Conclusions of Law with respect to economic benefit in the Recommended Decision. The rulings in DTP, Inc. are inapplicable for two reasons: (1) the commencement date of the enforcement action in Paine was subsequent to the effective date of the 1992 Penalty Regulations and (2) the penalty imposed in Paine (including the economic benefit penalty) was less than the minimum for Type II/Moderate violations under the 1987 Penalty Regulations.

The NOV in the instant matter was issued after the effective date of the 1992 Penalty Regulations. Section 4(b) of the 1992 Penalty Regulations provides that they are to be applied to all persons subject to enforcement action by the Department. Section 14 of the 1992 Penalty Regulations provides that they shall not be construed to govern any enforcement action which is commenced prior to the formal adoption thereof, or any administrative appeal taken therefrom. Since the enforcement action in Paine commenced after the effective date of the

FRANCIS P. PAINE/FRANCIS P. PAINE, JR.  
PAINE'S TEXACO SERVICE STATION  
AAD NO. 93-048/FWE  
SUPPLEMENTAL RECOMMENDED DECISION & ORDER  
PAGE 3

1992 Penalty Regulations, the manner of calculation for administrative penalties set forth in the 1992 Penalty Regulations applies to this proceeding.

Application of 1987 Penalty Regulations to the instant matter would adversely affect Respondents. The 1987 and the 1992 Penalty Regulations both contain provisions for the consideration of economic benefit as a component of any proposed administrative penalty. The 1987 Penalty Regulations provide that economic benefit is one of the general criteria to be considered, whereas the 1992 Penalty Regulations provide that economic benefit is to be considered and calculated independently from the other general criteria. The minimum penalty for a Type II/Moderate violation under the 1987 Water Pollution Control Penalty Matrix is \$1500.00, whereas the range for Type II/Moderate under the 1992 Water Pollution Control Penalty Matrix is \$1000.00 to \$5,000.00. Division used the 1992 Penalty Regulations and assessed the penalty at the minimum amount of \$1,000.00 plus an additional \$350.00 economic benefit penalty, for a total of \$1350.00. Thus the penalty imposed by using the 1992 Penalty Regulations resulted in a penalty that is \$150.00 less than if the 1987 Penalty regulations were utilized.

DTP, Inc. (March 8, 1996) held that any violation which occurred prior to the effective date of the 1992 Penalty Regulations was to be reviewed in accordance with the rules and regulations in existence at the

FRANCIS P. PAINE/FRANCIS P. PAINE, JR.  
PAINE'S TEXACO SERVICE STATION  
AAD NO. 93-048/FWE  
SUPPLEMENTAL RECOMMENDED DECISION & ORDER  
PAGE 4

time the violation occurred. Application of the 1992 Penalty Regulations to pre-1992 violations was reviewed extensively in In Re: James H. Dobson & Sandra J. Dobson/Wickford Service, Inc. AAD No. 93-052/GWE (February 14, 1997). The final agency decision in Dobson, as well as the final agency decision in Robert DeLisle and Joyce Delisle, East Greenwich Oil Company, Inc., AAD No. 93-026/GWE (October 5, 1995) and Richard Fickett, AAD No. 93-014/GWE (December 9, 1995) all applied the 1992 Penalty Regulations to pre-1992 violations. These cases and the instant matter are analogous. These enforcement actions were commenced subsequent to the effective date of the 1992 Penalty Regulations and accordingly, the 1992 Penalty Regulations apply to the calculation of penalties in these matters.

After further review of the documentary and testimonial evidence of record and in response to the partial remand by the Director, I find the following as

**ADDITIONAL FINDINGS OF FACT**

20. This enforcement action was commenced subsequent to the effective date of the 1992 Penalty Regulations.
21. A Type II/Moderate violation under the 1987 Penalty Regulations would require a minimum penalty of \$1500.00.
22. A Type II/Moderate violation under the 1992 Penalty Regulations requires a minimum penalty of \$1,000.00. Combined with the economic benefit of \$350.00, the total penalty is \$1350.00.
23. The penalty calculated under the 1992 Penalty Regulations is less than it would have been under the 1987 Penalty Regulations.

FRANCIS P. PAINE/FRANCIS P. PAINE, JR.  
PAINE'S TEXACO SERVICE STATION  
AAD NO. 93-048/FWE  
SUPPLEMENTAL RECOMMENDED DECISION & ORDER  
PAGE 5

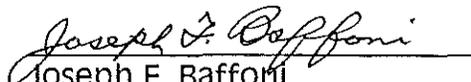
Based on the documentary and testimonial evidence of record and in response to the partial remand by the Director, I make the following

**ADDITIONAL CONCLUSIONS OF LAW**

20. That the 1992 Penalty Regulations are applicable to the calculation of administrative penalties in this matter.
21. That Section 10(c) of the 1992 Penalty Regulations provides for a separate and additional penalty for economic benefit.
22. That the penalty and the economic benefit portion of the penalty were properly assessed in accordance with the 1992 Penalty Regulations.
23. There is no prejudice to Respondents by applying the manner of calculation of administrative penalties provided for in the 1992 Penalty Regulations to the instant violation.

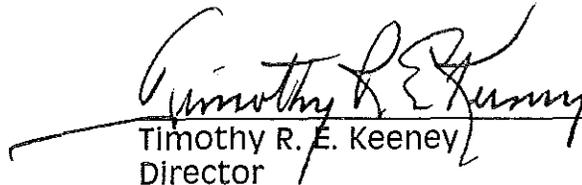
Based on the foregoing, the Recommended Decision and Order is incorporated herein by reference thereto and is supplemented as provided herein. The two documents combined constitute my full recommended Decision and Order.

Entered as a Supplemental Recommended Decision and Order this 14<sup>th</sup> day of March, 1997.

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

FRANCIS P. PAINE/FRANCIS P. PAINE, JR.  
PAINE'S TEXACO SERVICE STATION  
AAD NO. 93-048/FWE  
SUPPLEMENTAL RECOMMENDED DECISION & ORDER  
PAGE 6

The Recommended Decision and Order dated June 20, 1996 and this Supplemental Recommended Decision and Order are entered as a Final Agency Order this 3 day of April, 1997.



Timothy R. E. Keeney  
Director

Department of Environmental Management  
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 Michael F. Horan, Esq., 393 Armistice Blvd., P. O. Box A, Pawtucket, RI 02861 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 April, 1997.

