

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

**RE: JAMES W. FURIA  
NOTICE OF VIOLATION UST 94-002904**

**AAD No. 96-008/WME**

**DECISION AND ORDER**

This matter came before the Administrative Adjudication Division for Environmental Matters ("AAD") pursuant to a request for hearing on the Notice of Violation and Order ("NOV") issued on September 20, 1994 by the Division of Waste Management, Underground Storage Tank Program ("Division") of the Department of Environmental Management ("Department" or "DEM") to James W. Furia, Hopkins Service Station, ("Respondent")<sup>1</sup>. The Respondent filed a request for hearing at the AAD on March 15, 1996. The matter is properly before the Hearing Officer pursuant to R.I.G.L. Sections 42-17.1-2 and 42-17.6-4; the statutes governing the AAD (R.I.G.L. §42-17.7-1 et seq); the Regulations for Underground Storage Facilities Used for Petroleum Products and Hazardous Materials ("*UST REGULATIONS*"); the Administrative Rules of Practice and Procedure for the AAD; and the Rules and Regulations for Assessment of Administrative Penalties ("*PENALTY REGULATIONS*"). The proceedings were conducted in accordance with the above-noted statutes and regulations.

The NOV cites Respondent for the following violations of the *UST REGULATIONS* (1993), as amended, at his premises located at 2207 Hartford

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<sup>1</sup> The NOV was issued to James W. Furia and Vincenzo Furia on September 20, 1994. James W. Furia was not served until March 13, 1996 and it appears that the NOV was never served on Vincenzo Furia.

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Avenue, Johnston, Rhode Island ("facility"): (1) failure to precision test UST Nos. 001, 002, 003, 004, 005, and 006 for the years 1989, 1990, 1991, 1992, and 1993, as required by Sections 10.06(A) and (B); (2) failure to comply with Section 10.10(A) relating to spill containment basin requirements; (3) failure to submit written verification of precision test results as required by section 10.06 (B)(9); (4) failure to submit written verification of the installation of spill containment basins on said USTs as required by Section 10.10(C); and (5) failure to comply with Section 8.09 requiring the renewal of registration certificates for the years 1990 through 1993.

Said NOV ordered Respondent (1) to submit within (30) days (a) copies of all precision test results identified as having not been submitted, and (b) copies of all documentation confirming that spill containment basins have been installed on those tanks identified therein; and (2) within 30 days bring the facility into full compliance with all *UST REGULATIONS*; and (3) in lieu of complying with the foregoing, to close all UST systems at the facility in accordance with section 15 of the *UST REGULATIONS* within 30 days. In addition, an administrative penalty of \$55,420.00 was assessed against Respondent.

The Prehearing Conference was held on May 16, 1997 and the Prehearing Conference Record was entered on May 19, 1997. The hearing was conducted on March 24, 1998. Brian A. Wagner, Esq. represented Division, and Richard P. Sullivan, Esq. represented Respondent. The Post-Hearing

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Memorandum for the Division was filed on May 29, 1998. Respondent filed a Post-Hearing Memorandum, together with Respondent's affidavit, on July 24, 1998. Division, on July 29, 1998, filed an Objection and Reply to Respondent's Post-Hearing Memorandum. On August 3, 1998 Respondent filed a copy of his letter to attorney Wagner stating that the Respondent's Post-Hearing Memorandum was intended as an offer of settlement.

The following stipulations of fact were agreed to at the Prehearing conference:

1. Respondent, James W. Furia, is an owner of that certain parcel of real property located at 2207 Hartford Avenue, Johnston, Rhode Island, which property is otherwise identified as Johnston Assessor's Plat 54, Lot 10 (the "Facility" or "Site").
2. Respondent operates a retail gasoline/service station business at the Facility.
3. Respondent is an owner of at least six (6) USTs located at the Facility.
4. Respondent is an operator of at least six (6) USTs located at the Facility.
5. The Facility is identified by RIDEM as UST Facility ID No. 2904.
6. Precision tests were not performed on any tank at the Facility during the years 1989 through 1993, inclusive.
7. Respondent owes outstanding, past-due UST Registration fees for the Facility for the years 1990 through 1993, inclusive.

At the hearing, the parties stipulated to the following:

1. Three, five thousand gallon, gasoline underground storage tanks ("USTs") numbered 001, 002, and 003 located at the subject facility were installed during 1972.
2. One, eight thousand gallon, gasoline UST numbered 004 located at

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the subject facility was installed on about August 5, 1982.

3. Two, four thousand gallon, diesel USTs numbered 005 and 006 located at the subject facility were installed in or about 1955.
4. On or before April 24, 1998, Respondent shall submit to RIDEM a fully completed UST registration form documenting the above referenced installation dates.

The following documents were introduced into evidence by Division and admitted as full exhibits:

DIV. 1 Full	Withdrawn
DIV. 2 Full	Copy of Application for Underground Storage Facilities received by RIDEM on 11/14/88 (4 pp.).
DIV. 3 Full	Copy of 4/25/94 Certified Correspondence (Delivery Refused), from RIDEM to James Furia - regarding past due registration fees, with envelope showing refusal (3 pp.).
DIV. 4 Full	Copy of 5/10/94 Hand-delivered correspondence from RIDEM to James Furia - regarding past due registration fees (2 pp.).
DIV. 5 Full	Copy of 7/25/94 Certified Correspondence, (delivery Refused), from RIDEM to James Furia - "UST Warning Letter," with envelope showing refusal (4 pp.).
DIV. 6 Full	Copy of Notice of Violation and Order - dated 9/20/94 (8 pp., including Penalty Worksheet).

The following documents were introduced into evidence by Respondent and admitted as full exhibits:

Resp. 1 Full	ECT Petro Service Systems, Inc. Proposal dated April 10, 1995 in the amount of \$15,850.00 (1 pp.).
Resp. 2 Full	Copy of Xcel Environmental, Inc. Report of the June 6, 1995 testing of all six tanks indicating all six tanks passed (8 pp.).
Resp. 3 Full	Copy of Precision Testing Company document dated

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March 29, 1996 which is the tank tightness certificate for the two diesel tanks in question. (8 pp.).

- Resp. 4 Full Copy of Paid invoice dated July 1, 1996 from Precision Testing Company, Warwick, RI indicating Respondent paid \$900.00 for the precision test of the four underground gasoline tanks at his service station. (1p.)
- Resp. 5 Full Copy of Order of the U.S. Bankruptcy Court, District of Rhode Island, Numbered Bk 93-12950. (1p.)
- Resp. 6 Full Copy of three (3) checks made out to the Dellefemine Brothers Company, Inc., totaling \$8,250.00. One check dated July 7, 1982, the second check dated July 22, 1982 and the third check dated August 5, 1982. (2 pp.)
- Resp. 7 Full Copies of checks showing payment to EGT Petro Service Systems, Inc. in the amount of \$15,850.00. (1p.)

The Division called as its witness, Eric A. Beck, a DEM Principal Sanitary Engineer. Respondent's counsel called the Respondent, James A. Furia, as a witness.

The relevant facts of this matter have largely been admitted by Respondent. The Respondent is an owner of the subject Facility located at 2207 Hartford Avenue, Johnston, Rhode Island. The Respondent operates a retail gasoline/service station business at said Facility; and as part of that business, Respondent owns and operates six (6) registered underground storage tanks (USTs) for the storage/sale of petroleum products. The Respondent registered the facility and its USTs with the Department in November of 1988.

Division's review of the Facility's registration file in April, 1994

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uncovered that the Facility had not complied with certain regulatory requirements concerning the payment of annual UST registration fees, performance of precision testing, and the installation of spill containment basins. The Division sent written notifications of its findings to Respondent, but the Respondent either ignored or refused delivery of said communications. On or about September 20, 1994, Division issued the subject NOV.

The NOV as issued, cited the Respondent for:

- (1) Thirty violations for failure to perform precision test on USTs, and proposed a penalty of \$1,000.00 for each alleged violation plus an economic benefit assessment of \$450.00 for each violation.
- (2) Six violations for failure to install spill containment basins, and proposed a penalty of \$1,000.00 plus an economic benefit assessment of \$650.00 for each alleged violation.
- (3) Four violations for failure to review registration certificates, and proposed a penalty of \$250.00 for each alleged violation plus payment of registration fees for each of the six tanks as follows:
  - (a) \$25.00 for 1990, \$35.00 for 1991, \$35.00 for 1992, \$50.00 for 1993, plus a late fee of \$150.00 for 1993.

Section 10.06(B)(1) of the UST Regulations provides that tanks (such as those owned and operated by Respondent) must be precision tested in the 5<sup>th</sup>, 8<sup>th</sup>, 11<sup>th</sup> and 13<sup>th</sup> years after the year of installation and annually

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thereafter. Section 10.06(B)(2) of the UST Regulations provides that for any UST for which the date of installation is not known, a precision test shall be performed no later than May, 1986 and annually thereafter.

The Application for Underground Storage Facilities submitted by Respondent in 1988 did not specify a date of installation for any of the USTs. Since no installation date was specified on the application, the Division interpreted this to mean that the date of installation was unknown. Accordingly, the Division presumed that all of the subject USTs were more than thirteen (13) years old and therefore subject to annual testing requirements. Based on the foregoing, Division cited Respondent for a total of thirty (30) missed precision tests.

At the hearing, the Respondent presented evidence (and it was stipulated by the parties) that UST #004 was installed in 1982. Based on said installation date, UST #004 was required to be tested in 1990 (8<sup>th</sup> year), 1993 (11<sup>th</sup> year) and 1995 (13<sup>th</sup> year) and annually thereafter. As a result, although the stipulation (in the Prehearing Conference Record) that no tests were performed on the USTs between 1989 and 1993 still remains accurate, since UST #004 was not legally required to be tested during 1989, 1991 and 1992, the total number of alleged precision test violations that require consideration should be reduced from thirty (30) (as alleged in the NOV) to twenty-seven (27).

The Respondent also submitted evidence that his actual cost for

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precision testing at the Facility was \$225.00 per tank. The Division acknowledged in its Post-Hearing Memorandum that it does not object to using this new information to re-calculate Respondent's economic benefit for his missed precision tests. Therefore the proposed economic benefit for each of the alleged precision testing violations should be reduced from \$450.00 to \$225.00.

Section 10.10(A) of the UST Regulations provides that all USTs at existing facilities are required to have been fitted with spill containment basins by May 8, 1987. Section 10.10(C) provides that written verification of same must be submitted to DEM by the owner/operator within fifteen (15) calendar days of installation.

At the hearing, Respondent also provided evidence that spill containment basins had been installed on four (4) of the six (6) subject USTs approximately six months after Respondent received the NOV. The information regarding the installation of the four spill containment basins was not submitted until Respondent submitted his Pre-Hearing Memorandum in May of 1996 (approximately one year later). The Respondent did not submit any evidence concerning his cost for installation of the four spill containment basins. Division acknowledges that installation of said spill containment basins eliminates the need for the economic benefit penalty for these four tanks. Therefore the total number of proposed economic benefit penalties for alleged spill containment basin

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violations should be reduced from six (6) to two (2).

It is Respondent's position that this matter, in its entirety, has been caused by cash flow problems created by low income and other debts. Respondent maintains that pursuant to R.I.G.L. §42-17.6-6, the penalty imposed should not exceed what Respondent can afford either now or in the future. He argues that his financial situation makes it difficult for him to pay even a reduced penalty.

It is Division's position that the violations have been properly established, and that the penalties proposed (as modified pursuant to Division's proposed amendment) were properly calculated. Division contends that the evidence presented by Respondent regarding his ability to pay the proposed penalty concerned solely the issue of cash-flow problems created by other debts, and that a proper consideration of same in accordance with R.I.G.L. §42-17.6-6(g) and Penalty Regulations §10(a)(2)(J) demonstrates that the proposed penalty should be imposed in full in this matter. The Division argues that the Respondent's financial condition does not warrant elimination of any of the penalties assessed in the NOV (as amended). It is suggested by Division that a delayed payment date and/or a reasonable payment schedule that takes into account the retirement of Respondent's other debts should be all that is needed to eliminate Respondent's ability to pay as an issue.

The Division has the burden of proving the alleged violations by a

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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 and/or the economic benefit portion of the penalty in accordance with the Penalty Regulations, or that the penalty is excessive.

The evidence introduced by Division (as well as the admissions by Respondent) clearly demonstrates that the Respondent failed to comply with certain regulatory requirements relating to the performance of regular leak detection testing, the installation of spill containment basins, and the payment of annual UST registration fees. The Respondent, in his Post-Hearing Memorandum, admits the facts as alleged by Division, except as modified by the new evidence relating to the age of one of the USTs, the installation of four spill containment basins, and the actual cost to the Respondent for precision testing.

The Division, in its Post-Hearing Memorandum, recommended that the Administrative Penalty Assessment Worksheet Summary and the proposed penalty assessed in Section F. of the NOV be amended based on said new evidence presented by Respondent. This amendment should be granted since it accommodates the modifications suggested by Respondent, and comports with the evidence. The proposed penalty assessed in Section F of the NOV and the Administrative Penalty Assessment

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Worksheet Summary are therefore amended as set forth in Appendix A. Accordingly, this Decision deals with the alleged violations and the proposed penalties for same as amended in Appendix A.

The Respondent does not dispute his noncompliance or untimely compliance with the regulatory requirements as modified by the requested amendments. The evidence introduced by Division (as well as Respondent's admissions) clearly establishes that the Division has more than met its burden of proving the violations (as amended) by a preponderance of the evidence. Division also met its burden of establishing in evidence the penalty amounts and the manner in which those penalties were calculated.

Clearly, the precision testing violations should be considered Type II/Moderate, the spill containment violations should be considered Type II/Moderate, and the annual registration fee violations should be considered Type III/Minor. The penalty assessment for Type II/Moderate violations (pursuant to the water Pollution Control Matrix) ranges from \$1000.00 to \$5000.00. The penalty assessed (in the amount of \$1000.00) for each of said violations is the minimum penalty to be assessed pursuant to said Matrix. The penalty assessment for Type III/Minor violations ranges from \$100.00 to \$500.00. The penalty assessed for same in the amount of \$250.00) is mid-range. The economic benefit portions of said penalty meets the criteria for assessment of the penalties for same.

The evidence introduced by Division was not contradicted, and no evidence was offered by Respondent to refute the penalty calculations. I therefore find that Respondent has not met his burden to prove that the \$42,395.00 administrative penalty was not assessed in accordance with the Penalty Regulations. The evidence presented by Respondent at the hearing essentially concerned his outstanding financial obligations and his payments of same at the time of the hearing. A Respondent's ability to pay a penalty is a factor that the Director is required to consider, where practicable, by both statute and regulation.

R.I.G.L. §42-17.6-6(g) requires that the Director include, "to the extent practicable" the financial condition of Respondent as one of the considerations in determining the amount of the administrative penalty.

R.I.G.L. §42-17.6-8 mandates that the Director promulgate rules and regulations for the assessment of administrative penalties.

The Penalty regulations were duly adopted in accordance with the express legislative mandate contained in Section 8 above, and as such, must be characterized as legislative rules, which carry with them the force and effect of law. *Allard v. Department of Transportation*, 609 A. 2d 930 (R. I. 1992). Such legislative rules have the force and effect of law, and a presumption of validity attached to them. *Great American Nursing Centers v. Noberg*, 567 A. 2d 354 (R. I. 1989).

The Penalty Regulations properly carry out and are in compliance

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with the requirements of Section 42-17.6-6. Although the Regulations do not contain the exact provisions as set forth in the statute, Section 4(a) of the Regulations provides that "These Regulations shall be liberally construed to permit the Department to effectuate the purposes of State Law".

It would be manifestly impracticable for Division to consider the financial condition of Respondent prior to issuance of the NOV. The Respondent was given ample opportunity to present evidence of his financial condition at the hearing. The Respondent's testimony regarding his ability to pay the proposed penalty revolved primarily around the issue of cash flow problems created by other debts. He testified that the other payments he was required to make as of the time of the hearing were related to a bankruptcy proceeding, back taxes and a loan for work performed at the Facility in 1995. According to Respondent's testimony, the bankruptcy and back taxes should have been paid prior to this decision, and the loan should be paid off in the not too distant future.

Approximately 16 weeks after the conclusion of the administrative hearing, Respondent submitted a Post-Hearing Memorandum in which counsel set forth argument and details concerning Respondent's financial condition. Although ample opportunity was afforded and Mr. Furia did testify, these details and documents were not introduced into evidence, either testimonial or documentary, at the administrative hearing. Included

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with the Memorandum were an affidavit of Respondent, loan payment information, tax returns, tax bills and a newspaper article – all marked as Exhibits by Respondent's counsel. The arguments of counsel and the assertions concerning Respondent's financial condition lack probative value. Statements of counsel do not constitute evidence, regardless of the form in which they are presented. An administrative agency may not base a finding or determination on information that is not legally probative. *Wood v. Ford*, 525 A.2d 901 (R.I. 1987).

Moreover, the information presented post-hearing could easily have been adduced at the administrative hearing and been subject to cross – examination for a full and fair disclosure of facts as required by §42-35-10 of the Administrative Procedures Act. Instead, the Post-Hearing Memorandum contained statements by counsel concerning Respondent's assets and living arrangements and Respondent submitted other exhibits that are not part of the administrative record. Respondent's counsel subsequently characterized the submissions as an "offer of settlement" and to date, never requested that the "exhibits" be admitted into evidence. Section 42-35-9(g) of the Administrative Procedures Act requires that administrative findings shall be based exclusively on the evidence and matters officially noticed. As directed by statute, I have grounded this decision solely on the documentary and testimonial evidence of record in this proceeding.

The evidence of record fails to support Respondent's arguments that the proposed penalty should be reduced because of Respondent's financial condition. What was presented to me was not a full and complete picture of the Respondent's financial inability to pay or his lack of assets. The Respondent failed to prove by a preponderance of the evidence that the penalty and/or the economic benefit portion of the penalty was not assessed in accordance with the Penalty Regulations or that it is excessive. The Respondent's cash flow problem could well make it difficult for him to pay the total penalty in one lump sum at the present time. I have weighed Respondent's circumstances and arguments carefully and find that they warrant a delayed payment date and/or a reasonable payment schedule, but not an elimination of any portion of the penalty.

**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. Respondent, James W. Furia, is the owner of that certain parcel of real property located at 2207 Hartford Avenue, Johnston, Rhode Island, which property is otherwise identified as Johnston Assessor's Plat 54, Lot 10 (the "Facility" or "Site").
2. Respondent operates a retail gasoline/service station business, known as Hopkins Service Station, at the Facility.

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3. The Respondent is an owner of at least six (6) underground storage tanks ("USTs" or "tanks") located at the Facility, which tanks are used for the storage of petroleum products.
4. The Facility was registered with the Department in 1988 and the Facility is identified as UST Facility ID No. 0545.
5. The following information regarding the UST systems at the Facility was registered with the Department as of the date of issuance of the NOV:

<u>UST #</u>	<u>DATE UST INSTALLED</u>	<u>CAPACITY</u>	<u>CONTENT</u>
001	unknown	5,000 gals.	Gasoline
002	unknown	5,000 gals.	Gasoline
003	unknown	5,000 gals.	Gasoline
004	unknown	8,000 gals.	Gasoline

<u>UST #</u>	<u>DATE UST INSTALLED</u>	<u>CAPACITY</u>	<u>CONTENT</u>
005	unknown	4,000 gals.	Diesel
006	unknown	4,000 gals.	Diesel

6. Respondent stipulated in the Pre-Hearing Conference Record that precision tests were not performed on any tank at the Facility during the years 1989 through 1993, inclusive.
7. At the hearing, Respondent presented evidence and testimony indicating that one tank, UST #004, had been installed in 1982. Based on this evidence, UST #004 was required to be tested in 1990 (8<sup>th</sup> year), 1993 (11<sup>th</sup> year) and 1995 (13<sup>th</sup> year) and annually thereafter. Therefore, UST #004 was not legally required to be tested during 1989, 1991, and 1992 as alleged in the NOV. Consequently, the number of alleged precision test violations should be reduced by three (since UST #004 was not legally required to be tested during 1989, 1991, and 1993).

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8. Precision tests were not performed on any tank at the Facility until 1995.
9. The Division has voluntarily withdrawn the precision testing violations and penalties for UST No. 004 for the years 1989, 1991, and 1993. The withdrawal of said previously cited violations leaves a total of twenty-seven (27) missed precision tests as the sole remaining precision testing violations.
10. The UST systems located at the Facility were not precision tested as required during the following years:
  - a. #001: 1989, 1990, 1991, 1992, and 1993;
  - b. #002: 1989, 1990, 1991, 1992, and 1993;
  - c. #003: 1989, 1990, 1991, 1992, and 1993;
  - d. #004: 1990 and 1993;
  - e. #005: 1989, 1990, 1991, 1992, and 1993;
  - f. #006: 1989, 1990, 1991, 1992, and 1993;
11. The Respondents failed to submit to the Department any precision test results or other evidence of precision tests conducted at the Facility for the tanks and years cited in Paragraph 10 above as required by the *UST REGULATIONS*.
12. Respondent's actual cost for precision testing his tanks is \$225.00 per tank, per year.
13. Respondent realized an economic benefit as a result of not paying for precision tests to be performed on the six (6) UST systems as described in Paragraph 10 above in the amount of \$225.00 per tank, per year, for a total of \$6,075.00.
14. Prior to the issuance of the NOV, the Department had information that indicated that UST Nos. 001, 002, 003, 004, 005 and 006 at the facility had not been fitted with a spill containment basin; however, the Department has since been provided with evidence that spill containment basins have been installed on UST Nos. 001, 002, 003, and 004.
15. Division has voluntarily withdrawn the associated penalties, relating to the alleged failure to install a spill containment basin on UST Nos. 001, 002, 003, and 004. The withdrawal of said previously cited violations leaves a total of two (2) spill containment basin violations.

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16. No spill containment basins were installed at the Facility until on or about May 1, 1995.
17. In or about May 1, 1995, spill containment basins were installed on the four (4) gasoline USTs (Nos. 001, 002, 003, and 004).
18. As of the date of the hearing, spill containment basins had not been installed on the two (2) diesel USTs, viz. Nos. 005 and 006.
19. Although Respondent installed spill containment basins at this Facility in 1995, Respondent's actual cost to install those basins is unknown.
20. As of the date of the issuance of the NOV, the average cost for the installation of a spill containment basin was \$650.00.
21. The Respondent realized an economic benefit as a result of not paying for the installation of spill containment basins on the two (2) diesel systems as described in Paragraph 18 above in the amount of \$650.00 each for the UST Nos. 005 and 006, for a total of \$1,300.00.
22. The Respondent owes outstanding, past-due, UST Registration fees for the Facility for the years 1990, 1991, 1992 and 1993; and late fee for the year 1993.
23. Division, prior to issuance of the NOV, notified Respondent of his noncompliance with the regulatory requirements relating to the payment of annual UST registration fees, the performance of regular leak detection testing and the installation of spill containment basins; however, the Respondent either ignored same and/or refused to accept delivery of Division's communications.
24. The Respondent has cash flow problems which warrant an expanded time frame for payment of the penalty, but not an elimination of any portion of the penalty.
25. Division, in its Post-Hearing Memorandum submitted an Amended Administrative Penalty Assessment Worksheet Summary which represents a true and accurate description of the USTs at the Facility. A copy of said Amended Worksheet Summary is attached hereto as Appendix A.

**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. James W. Furia, as the owner and operator of the Facility and the USTs located thereon, is responsible for compliance with the *UST REGULATIONS* at the subject Facility.
2. DEM has jurisdiction in this matter.
3. The Division has satisfied its burden of proving the alleged violations (as amended herein) by a preponderance of the evidence.
4. Pursuant to *UST REGULATIONS*, §10.06(B)(1),<sup>2</sup> all USTs greater than thirteen (13) years of age must be precision tested annually.
5. Because UST nos. 001, 002, 003, 005, and 006 were installed before or during 1972, these USTs were required to undergo annual precision testing beginning in 1986 in accordance with *UST REGULATIONS*, §10.06(B)(1).
6. Respondent's failure to precision test UST nos. 001, 002, 003, 005 and 006 during 1989, 1990, 1991, 1992 and 1993 constitute violations of *UST REGULATIONS*, §10.06(B)(1).
7. Pursuant to *UST REGULATIONS*, §10.06(B)(1), all USTs that are less than fourteen (14) years of age must be precision tested during the 5<sup>th</sup>, 8<sup>th</sup>, 11<sup>th</sup>, and 13<sup>th</sup> years following the year the tank was installed and then annually thereafter.<sup>3</sup>

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<sup>2</sup> Note: Although this citation references the December 1993 *UST REGULATIONS*, similar provisions may be found in the following sections of preceding versions of those regulations:

August, 1993 *UST REGULATIONS* §10.06(B)(1)  
June, 1992 *UST REGULATIONS* §10.05(B)(1)  
May, 1985 *UST REGULATIONS* §9 (C)

<sup>3</sup> See fn.2, above

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8. Respondent's failure to precision test UST no. 004 during 1990 and 1993 constitute violations of *UST REGULATIONS*, §10.06(B)(1).
9. As of the date of the issuance of the NOV, September 20, 1994, Respondent had failed to perform a total of twenty-seven (27) required precision tests on the USTs at the Facility since the Facility's registration in 1988. Each missed test constitutes a separate and distinct violation of *UST REGULATIONS*, §10.06(B)(1).
10. The Division has met its burden of establishing in evidence the penalty amount and the calculation thereof.
11. Respondent has failed to prove by a preponderance of the evidence that the penalties and economic benefit assessed as a result of the violations were not properly assessed in accordance with the Rules and Regulations for Assessment of Administrative Penalties.
12. Respondent has failed to prove by a preponderance of the evidence that the penalties and economic benefit assessed as a result of the violations are excessive.
13. Based upon the date of the issuance of the NOV, September 20, 1994, the 1992 *PENALTY REGULATIONS* govern DEM's calculation and assessment of penalties in this matter.
14. The Respondent's violations for failing to perform precision tests are properly classified as Type II/Moderate violations in accordance with §10(a)(1 & 2) of the *PENALTY REGULATIONS* and the Water Pollution Control Matrix.
15. In accordance with §10(c)(1) of the *PENALTY REGULATIONS*, Respondent incurred an economic benefit of \$225.00 per test for each test that he did not perform as required by *UST REGULATIONS*, §10.06(B)(1).

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16. Pursuant to *UST REGULATIONS*, §10.10(A),<sup>4</sup> all non-fuel oil USTs at existing facilities were required to be fitted with spill containment basins on or before May 8, 1987.
17. Respondent's failure to timely install spill containment basins on the USTs at the Facility constitute violations of *UST Regulation*, § 10.10(A).
18. Following the issuance of the NOV, on or about May 1, 1995, Respondent partially satisfied his legal obligation to install spill containment basins under *UST REGULATIONS*, §10.10(A) by installing spill containment basins on the Facility's four (4) gasoline USTs (nos. 001-004).
19. The Respondent's violations for failing to (timely) install spill containment basins are properly classified as Type II/Moderate violations in accordance with §10(a)(1 & 2) of the *PENALTY REGULATIONS* and the Water Pollution Control Matrix.
20. In accordance with §10(c)(1) of the *PENALTY REGULATIONS*, Respondent incurred an economic benefit of \$650.00 per test for each spill containment basin that he has not installed as required by *UST REGULATIONS*, §10.10(A).
21. Pursuant to §7.5(d) of the September 1989 Amendments to the 1985 *UST REGULATIONS*, Respondent was required to pay a registration fee of \$25.00 for each of his six (6) tanks in 1990.
22. Pursuant to §7.5(d)(i) of the September 1991 Amendments to the 1985 *UST REGULATIONS*, Respondent was required to pay a registration fee of \$35.00 for each of his six (6) tanks in 1991.

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<sup>4</sup> **NOTE:** Although this citation references the December 1993 *UST REGULATIONS*, similar provisions may be found in the following sections of preceding versions of those regulations:

August, 1993 *UST REGULATIONS* §10.10(A)  
June, 1992 *UST REGULATIONS* §10.09(A)  
May, 1985 *UST REGULATIONS* §9(b)

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23. Pursuant to §7.5(d)(i) of the September 1991 Amendments to the 1985 UST Regulations. Respondent was required to pay a registration fee of \$35.00 for each of his six (6) tanks in 1992.
24. Pursuant to §8.10 of the August, 1993 *UST REGULATIONS*, Respondent was required to pay a registration fee of \$50.00 for each of his six (6) tanks in 1993.
25. Pursuant to §8.14 of the August, 1993 *UST REGULATIONS*, Respondent is subject to a late fee of \$25.00 for each of his six (6) tanks for failing to timely pay his 1993 registration fee.
26. The Respondent's violations for failing to pay annual registration fees for the four (4) years 1990-1993, inclusive, are properly classified as Type III/Minor violations in accordance with §10(a)(1 & 2) of the *RULES AND REGULATIONS FOR ASSESSMENT OF ADMINISTRATIVE PENALTIES* and the Water Pollution Control Matrix.
27. The penalties in the within matter do not exceed the maximum penalties allowed by statute or regulation.
28. The penalty assessment (as specified in the amended Administrative Penalty Assessment Worksheet Summary) is not excessive and is reasonable and warranted.

Based on the foregoing, it is hereby

**ORDERED**

1. Division's Motion to Amend the Administrative Penalty Assessment Worksheet Summary (as embodied in Appendix A) is GRANTED.
2. Division's objection to the consideration of the "evidence/exhibits" presented in Respondent's Post-Hearing Memorandum is SUSTAINED.

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3. That the Notice of Violation and Order No. UST 94-002904 issued to the Respondent dated September 20, 1994 as recalculated herein is **SUSTAINED**.

4. Respondent, James W. Furia, shall comply with the following:

- (a) Immediately bring the subject Facility into compliance with the current requirement of the UST Regulation.
- (b) Immediately submit a new UST Registration Application which includes the new facility information presented at hearing while also conforming with the other information contained in the original registration.

5. The Respondent shall pay to the Department the total sum of **Forty-Two Thousand Three Hundred Ninety-Five Dollars (\$42,395.00)** in administrative and economic benefit penalties as hereinafter set forth:

(a) §10.06(A & B) UST REGULATIONS – Precision Testing  
 Water Pollution Control Matrix, Type II/Moderate  
 27 violations \* \$1,000.00 = ..... \$27,000.00

Economic Benefit (Cost for testing)  
 27 tests \* \$225.00 per test = .....\$6,075.00

(b) §10.10(A) UST REGULATIONS – Spill Containment  
 Water Pollution Control Matrix, Type II/Moderate  
 6 violations \* \$1,000.00 = .....\$6,000.00

Economic Benefit (Cost to install basins)  
 2 USTs \* \$650.00 per basin = .....\$1,300.00

(c) §8.09 UST REGULATIONS – Annual Registration Fees  
 Water Pollution Control Matrix, Type III/Minor  
 4 years \* \$250.00 = .....\$1,000.00

Economic Benefit (unpaid Fees)

- 1990: 6 USTs * \$25.00 per tank	= .....\$	150.00
- 1991: 6 USTs * \$35.00 per tank	= .....\$	210.00
- 1992: 6 USTs * \$35.00 per tank	= .....\$	210.00
- 1993: 6 USTs * \$50.00 per tank	= .....\$	300.00
- 1993: 6 USTs * \$25.00 per tank (Late Fees)	= .....\$	150.00

**TOTAL = \$42,395.00**

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6. Respondent's penalty shall be paid in the following manner:
- (a) Respondent shall pay an initial payment in the sum of Seven Thousand Eight Hundred Ninety-Five Dollars (\$7,895.00) within thirty (30) days of the entry of the Final Agency Order in this matter.
  - (b) Respondent shall pay the remainder of the penalty, \$34,500.00 in twenty-three (23) equal and consecutive monthly installments of One Thousand Five Hundred Dollars (\$1,500.00). The first monthly installment shall be due and payable on the first day of the month following sixty (60) days of the entry of the Final Agency Order in this matter. The subsequent payments shall be due and payable on the first day of each and every month thereafter until such time as the full amount has been paid.
  - (c) In the event that the real estate or the Facility is sold or otherwise transferred to or otherwise acquired by new owners, all outstanding penalties shall immediately become due and payable.

All of said payments shall be in the form of a certified check, made payable to the General Treasurer, State of RI for deposit in the Water and Air Protection Program Account and shall be forwarded to:

Office of Management Services  
RI Department of Environment Management  
235 Promenade Street, Third Floor  
Providence, Rhode Island 02908  
Attention: Glen Miller

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Entered as a Recommended Decision and Order this 5<sup>th</sup> day of February, 1999.

Joseph F. Baffoni

Joseph F. Baffoni  
Hearing Officer  
Administrative Adjudication Division  
Department of Environmental Management  
235 Promenade Street, Third Floor  
Providence, Rhode Island 02908  
(401) 222-1357

Entered as a Final Agency Order this 19<sup>th</sup> day of February 1999.

George Welly

George Welly  
Interim Director  
Department of Environmental Management  
235 Promenade Street, 4<sup>th</sup> Floor  
Providence, Rhode Island 02908

**CERTIFICATION**

I hereby certify that I caused a true copy of the within Order to be forwarded by via regular mail, postage prepaid, to Richard P. Sullivan, Esquire, ~~425 Sandy Bottom Road, Coventry, Rhode Island 02816~~ and via interoffice mail to Brian A. Wagner, Esquire, Office of Legal Services, 235 Promenade St., Providence, Rhode Island 02908 on this 23<sup>rd</sup> day of February, 1999.

Brian A. Wagner

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**APPENDIX A**

**A. Amended UST Facility Data Chart**

TANK ID#	DATE OF INSTALLATION	GALLONS	CONTENT	SPILL CONT.	LEAK DET.	PRECISION TEST RESULTS NOT SUBMITTED
001	<del>UNKNOWN</del> 1972	5,000	Gasoline	No Yes-1995	N/A	1989, 1990, 1991, 1992, 1993
002	<del>UNKNOWN</del> 1972	5,000	Gasoline	No Yes-1995	N/A	1989, 1990, 1991, 1992, 1993
003	<del>UNKNOWN</del> 1972	5,000	Gasoline	No Yes-1995	N/A	1989, 1990, 1991, 1992, 1993
004	<del>UNKNOWN</del> 1982	8,000	Gasoline	No Yes-1995	N/A	<del>1989, 1990,</del> <del>1991, 1992,</del> 1993
005	<del>UNKNOWN</del> 1955	4,000	Diesel	No	N/A	1989, 1990, 1991, 1992, 1993
006	<del>UNKNOWN</del> 1955	4,000	Diesel	No	N/A	1989, 1990, 1991, 1992, 1993

**B. Amended Violation/ Penalty Data**

VIOLATION	MAX. ALLOWABLE PENALTY	PENALTY CALCULATION	TOTAL
\$10.06 (A) Precision Testing	\$5,000 per test	<del>30</del> 27 Missed Tests *\$1,000	<del>\$30,000.00</del> \$27,000.00
\$10.10 (A) Spill Containment	\$5,000 per tank	6 Tanks *\$1,000	\$6,000.00
\$8.09 Registration	\$500 per year	4 years *\$250	\$1,000

**AMENDED SUB-TOTAL = \$34,000.00**

**APPENDIX A (Continued)**

C. Amended Economic Advantage Calculation

NUMBER OF MISSED TESTS	AVERAGE COST PER TEST	TOTAL
30 27	<del>\$450.00</del> \$225.00	<del>\$13,500.00</del> \$6,075.00

NUMBER OF TANKS WITHOUT SPILL CONTAINMENT BASINS	AVERAGE COST FOR INSTALLATION	TOTAL
6 2	\$650.00	<del>\$3,900.00</del> \$1,300.00

INVOICE DATE	AMOUNT DUE	LATE FEE
7/12/90	\$150.00	N/A
11/18/91	\$210.00	N/A
9/9/92	\$210.00	N/A
8/25/93	\$300.00	\$150.00
<b>TOTAL</b>	<b>\$870.00</b>	<b>\$150.00</b>

**AMENDED SUB-TOTAL = \$8,395.00**

**TOTAL AMENDED PENALTY = \$42,395.00**