

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

RE: RICHARD FICKETT
(NOV #UST 03204)

AAD No. 93-014/GWE

DECISION AND ORDER

This matter came before the hearing officer for an administrative hearing on September 26, 1994 at the offices of the Administrative Adjudication Division for Environmental Matters ("AAD"), 1 Capitol Hill, Providence, Rhode Island. Brian A. Wagner, Esq. represented the Division of Waste Management, Underground Storage Tank Program ("Division") and Leonard L. Bergersen, Esq. represented Richard Fickett ("Respondent").

A prehearing conference was held on June 17, 1994 and a prehearing conference record was entered by the hearing officer on June 30, 1994. Counsel agreed to the following stipulations of fact:

1. The Respondent, Richard Fickett, is the owner of a certain parcel(s) of real property located at 215 Alton Bradford Road, Hopkinton, Rhode Island otherwise known as Hopkinton Assessor's Plat 5, Lot 85A ("the Facility").
2. The Facility is registered with the Department as UST Facility ID #03204.
3. The Facility is comprised of a retail gasoline service station known as the Holmes Garage, which Facility has at least two (2) underground storage tank ("UST") systems located thereon.

4. 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	5/77	1,000	Gasoline	Yes	n/a
002	5/77	2,080	Gasoline	Yes	n/a

5. The above-referenced USTs were not precision tested during the following years:
- (a) 001: 1987, 1988, 1991, 1992
 - (b) 002: 1987, 1988, 1991, 1992
6. As of the date of the Notice of Violation and Order ("NOV"), the respondent had not submitted to the Department any precision test results for the tanks and years identified in Paragraph (5) above.
7. Precision tests were conducted and submitted to the Department on the above-referenced USTs for the years 1989 and 1990.
8. Precision testing results were received for 1993 in accordance with UST Regulations.
9. Precision test results submitted to date have indicated no tank failure or leaks from the USTs on site.

Prior to commencing the administrative hearing, the hearing officer met with counsel to discuss the stipulations and issues stated in the prehearing conference record. Counsel agreed, as reflected in the transcript, that only two issues remained at the time of hearing. The first issue was an agreed issue and the second issue was proposed by the Respondent. Counsel agreed on the record that the two issues were as follows:

1. Whether the penalties asserted comply with the regulations for said penalties and are not excessive in fact, and within the ability of the respondent to pay.
2. Is the Department estopped from asserting a penalty for failure to test pre-1989 having accepted test results without issuance of a Notice of Violation?

As the transcript indicates, prior to going on the record at the hearing, counsel agreed that in light of the stipulations entered by the parties, testimony at the hearing would address agreed issue number 1 stated above, and the additional issue raised by the Respondent. In enforcement proceedings initiated by the Department, the Division bears the burden of proving the allegations contained in the NOV by a preponderance of the evidence. The Division waived opening statement and based upon the stipulations and exhibits agreed to by the parties, rested without presenting testimony. The hearing officer then informed Respondent's counsel that pursuant to Rule 12.00 of the Rules and Regulations for the Assessment of Administrative Penalties, once the Division establishes a violation, the burden of proof shifts to the Respondent to demonstrate by a preponderance of the evidence that the penalty was not assessed and calculated in accordance with the penalty regulations.

Respondent's counsel waived opening argument and called his only witness, Richard J. Fickett to testify. Mr. Fickett was questioned concerning his financial condition. Copies of federal

income tax returns of Richard and Olga Fickett were marked as full exhibits. After detailing the progressive decrease in business income over the subject years ultimately resulting in a business loss, Mr. Fickett testified that he is unable to pay the proposed administrative penalty. He cited the income/loss line items of the tax returns and his tax liabilities to the Internal Revenue Service as the only articulated bases for his inability to pay the proposed administrative penalty. No testimony was elicited which provided a complete picture of the Respondent's assets, liabilities, or net worth. Respondent did not present any witnesses or testimony to address the calculation or assessment of the administrative penalty.

In the course of direct examination Mr. Fickett testified that in the years 1991 and 1992 he did not have any product in the tanks and accordingly he was not using them to pump gasoline. On cross-examination Mr. Fickett wavered slightly concerning the content (if any) of the tanks in the years 1991 and 1992. He reiterated that he was not selling product in those years but that there still may have been something in the tanks.

At the conclusion of testimony the Division moved to amend the Notice of Violation and Order to conform to the evidence. Respondent's counsel objected and the hearing officer required the Division to submit a written motion. A Motion to Amend and supporting memorandum were filed by the Division on October 27, 1994. The Respondent did not submit either a written objection

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or a supporting memorandum. Thereafter an order was entered on December 23, 1994 allowing the Division to amend the Notice of Violation and Order by adding an alleged violation of UST Regulation §15.02 prohibiting the abandonment of any UST or UST system. The order granting the Motion to Amend afforded the parties an opportunity to present additional evidence and /or witnesses in light of the amended pleadings. Neither party responded in the affirmative and the hearing was deemed closed. The list of exhibits introduced into evidence at the hearing is set forth in Appendix "A" attached hereto and incorporated herein by reference. A briefing schedule was set by the hearing officer and amended at the request of counsel due to ongoing settlement negotiations. Negotiations appeared to be exhausted after May 25, 1995 when Respondent's extension of time to file a posthearing brief expired. To date the Respondent has not filed a posthearing brief.

Respondent argues that the Division should be estopped from asserting precision testing violations against the Respondent for the "pre-1989" failures to conduct precision tests on the USTs located at the subject Facility. Respondent has the burden of establishing that the defense of estoppel should be invoked against the Division. Respondent did not brief this issue and accordingly I must rely upon the evidence adduced at hearing and the argument of counsel made at the conclusion of testimony. Counsel for Respondent elicited testimony from Respondent in an

attempt to establish an adequate basis upon which to invoke the doctrine against the Division. Our Rhode Island Supreme Court has held that the doctrine of equitable estoppel may be applied to a governmental authority when appropriate circumstances and principles of equity so require. Greenwich Bay Yacht Basin Association v. Brown, 537 A. 2d 988 (R.I. 1988). The Court also cautioned that such relief is "...extraordinary and will not be applied unless the equities clearly must be balanced in favor of the parties seeking relief under this doctrine". Id., at 991.

The Division's acceptance of precision test results for the years 1990 and 1991 is identified by Respondents as a basis for the application of estoppel for violations alleged prior to 1989. Such argument is without merit. The Division did not even know that the Facility existed until the Respondent filed the Certificate of Registration in 1990 (albeit several years after the regulatory requirement for facility registration took effect). Examination of the hearing record and consideration of the factors necessary to invoke the doctrine of estoppel manifest a lack of competent evidence to warrant the application of the doctrine of estoppel.

In reviewing the evidence of record in this proceeding I note that no documentary or testimonial evidence was presented to establish the penalty amount and penalty calculation which the

Division seeks to assess against Richard Fickett.¹

Section 12 of the Rules and Regulations for the Assessment of Administrative Penalties provides in pertinent part:

SECTION 12

Assessment of Administrative Penalty - Hearing and Burden of Proof

(a) * * *

(b) * * *

(c) 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.

(d) * * *

At the commencement of the hearing the hearing officer informed counsel of their respective burdens of proof as delineated in Section 12(c). Section 12(c) however does not speak to the Division's burden of going forward with documentary or testimonial evidence of the penalty assessment and penalty calculation. The party asserting imposition of the penalty has the obligation to produce evidence of the penalty it seeks to impose and the calculation thereof. Specifically, once the

¹ The Division presented no testimonial evidence at the hearing and chose to rest its case solely upon the stipulations and exhibits of record and the provisions of Section 12 C of the Penalty Regulations. (Transcript pp. 9-10)

Division discharges its initial duty to establish in evidence the penalty amount and its calculation, Section 12 (c) shifts the burden of proof to the Respondent 1) to produce evidence of record and 2) to bear the burden of persuasion that the Director failed to assess the penalty or economic benefit portion of the penalty in accordance with the Penalty Regulations.

The Administrative Procedures Act ("APA"), R.I. Gen. Laws §42-35-9(g) mandates that findings of fact be based exclusively on the evidence and matters officially noticed. Although the pleadings are part of the administrative record, the APA distinguishes pleadings and other portions of the administrative record from evidence received or considered at the hearing and upon which the hearing officer may base his or her findings of fact. See § 42-35-9(e). In the present matter the hearing record is bereft of evidence of an administrative penalty. Since the APA provides that findings of fact must be based exclusively on the evidence and matters officially noticed, the absence of evidence concerning the administrative penalty precludes the necessary factual findings to uphold the assessment of an administrative penalty. Accordingly, I need not reach the remaining agreed issue of whether the penalties asserted comply with the Regulations, are not excessive in fact, and within the ability of Respondent to pay.

FINDINGS OF FACT

After consideration of the documentary and testimonial evidence of record I find as fact the following:

1. The Respondent, Richard Fickett, is the owner of a certain parcel(s) of real property located at 215 Alton Bradford Road, Hopkinton, Rhode Island otherwise known as Hopkinton Assessor's Plat 5, Lot 85A ("the Facility").
2. The Facility is registered with the Department as UST Facility ID #03204.
3. The Facility is comprised of a retail gasoline service station known as the Holmes Garage, which Facility has at least two (2) underground storage tank ("UST") systems located thereon.
4. 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	5/77	1,000	Gasoline	Yes	n/a
002	5/77	2,080	Gasoline	Yes	n/a

5. The above-referenced USTs were not precision tested during the following years:
 - (a) 001: 1987, 1988, 1991, 1992
 - (b) 002: 1987, 1988, 1991, 1992
6. As of the date of the Notice of Violation and Order ("NOV"), the Respondent had not submitted to the Department any precision test results for the tanks and years identified in Paragraph (5), above.
7. Precision tests were conducted and submitted to the Department on the above-referenced USTs for the years 1989 and 1990.

8. Precision testing results were received for 1993 in accordance with UST Regulations.
9. Precision test results submitted to date have indicated no tank failure or leaks from the USTs on site.
10. Respondent did not pump product from the subject USTs for a period of time in excess of 180 consecutive days.

CONCLUSIONS OF LAW

Based on the documentary and testimonial evidence of record I conclude the following as a matter of law:

1. Richard Fickett is the owner of the Facility.
2. The Division proved by a preponderance of the evidence that the Respondent violated UST Regulation §10.05 (B) and 10.08 (H) regarding precision testing requirements for UST 001 for the years 1987, 1988, 1991 and 1992.
3. The Division proved by a preponderance of the evidence that the Respondent violated UST Regulation §10.05 (B) and 10.08 (H) regarding precision testing requirements for UST 002 for the years 1987, 1988, 1991 and 1992.
4. The Division proved by a preponderance of the evidence that the Respondent violated UST Regulation §10.13 requiring the submission of written verification of the precision testing requirements of §10.05 for UST 001 for the years 1987, 1988, 1991, and 1992.
5. The Division proved by a preponderance of the evidence that the Respondent violated UST Regulation §10.13 requiring the submission of written verification of the precision testing requirements of §10.05 for UST 001 for the years 1987, 1988, 1991, and 1992.

6. The Division failed to prove by a preponderance of the evidence that the Respondent violated UST Regulation §15.02. Specifically, the Division failed to prove by a preponderance of the evidence that the Respondent abandoned the UST or UST system as defined in the Regulations.
7. There is no evidence in the record to establish the amount of the administrative penalty.
8. The Respondent failed to prove by a preponderance of the evidence the elements necessary to invoke the doctrine of estoppel against the Division.

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

ORDERED

1. Respondent Richard Fickett shall precision test UST 001 and 002 within 10 days of this Order and submit the results to the Division of Waste Management, Underground Storage Tank Program, Department of Environmental Management, 291 Promenade Street, Providence, Rhode Island 02908.
2. In lieu of precision testing UST 001 and/or UST 002 as required in paragraph 1 of this Order Respondent shall close UST 001 and UST 002 in accordance with the UST Regulations within thirty (30) days of the date of this Order.

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Entered as a Recommended Final Agency Order this 27th day
of October, 1995.

Kathleen M. Lanphear
Kathleen M. Lanphear
Chief Hearing Officer
Administrative Adjudication Division
Department of Environmental Management
One Capitol Hill, Third Floor
Providence, RI 02908
(401) 277-1357

I hereby adopt the foregoing as a Final Agency Order this
_____ day of _____, 1995.

Timothy R.E. Keeney, Director
Timothy R.E. Keeney, Director
Department of Environmental Management
9 Hayes Street
Providence, Rhode Island 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within
Final Agency Order to be forwarded, via regular mail, postage
prepaid to Leonard L. Bergersen, 1070 Kingstown Road, P.O. Box
218, Peacedale, Rhode Island 02883-0218 and via interoffice mail
to Brian A. Wagner, Esq., DEM/Office of Legal Services, 9 Hayes
Street, Providence, RI 02908 on this _____ day of _____,
1995.

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APPENDIX A

EXHIBITS:

For Division:

- Div. 1 Full Copy of Application for Underground Storage Facilities, 5/2/190, (6 pp.).
- Div. 2 Full Copy of telephone memo dated 12/16/92.
- Div. 3 Full Copy of certified correspondence from Susan Cabeceiras to Holmes Garage, dated 11/24/92, (3 pp.).
- Div. 4 Full Copy of resume of Susan Cabeceiras.
- Div. 5 Full Copy of letter from Saverio Mancieri to Holmes Garage dated May 4, 1990, and appended return receipt signed by Samuel Gill.

For Respondent:

- Resp. 1A Full Copy of 1989 Federal Income Tax Return of Richard and Olga Fickett.
- Resp. 1B Full Copy of 1990 Federal Income Tax Return of Richard and Olga Fickett.
- Resp. 1C Full Copy of 1991 Federal Income Tax Return of Richard and Olga Fickett.
- Resp. 1D Full Copy of 1992 Federal Income Tax Return of Richard and Olga Fickett.
- Resp. 1E Full Copy of 1993 Federal Income Tax Return of Richard and Olga Fickett.