

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

ADDENDUM

RE: DTP, INC.

NOV. NO. 726

Introduction

On 5/1/95, Ad Hoc Hearing Officer Patricia Byrnes submitted a Recommended Decision and Order to the Director. Upon receipt of that recommended decision the Director immediately implemented the Finding of Fact and Law made by the Hearing Officer that the NOVOA was to be remanded to the Division for recalculation of the penalty assessed for any founded violations which happened prior to the imposition of the 1992 Rules and Regulations for the Assessment of Administrative Penalties to comport with the penalty regulations and standards that existed at the time the violations occurred. (finding of fact 34, finding of law 22, DTP, Inc. Recommended Decision 5/1/95) (Order of Director 5/19/95) As a result of that Order, the Division of Waste Management recalculated the penalty and on June 5, 1995 supplied the Director with an Amended Administrative Penalty Worksheet that charged DTP with the following fines:

1. Violation of 1985 UST Reg. 9(c) at the Wakefield Facility	16,000.00
2. Violation of 1985 UST Reg. 9(c) at the Tower Hill Facility	13,000.00
3. Violation of 1985 UST Reg. 15 at the Wakefield Facility	30,000.00
4. Economic Benefit for non-compliance	
(Wakefield) Facility	4,550.00
(Tower Hill) Facility	5,600.00

The submission of the recalculated penalty enables the Hearing Officer to review the Administrative Penalty Worksheet in light of the 1985 Tank Regulations and 1987 Penalty Rules and issue a complete Recommended Decision and Order.

DECISION AND ORDER

I. Should the penalty assessed to DTP for violating 1985 UST regulation 9(c) relating to precision test requirements, set forth in Section B of the June 5, 1995 Administrative Penalty Worksheet be affirmed?

A. The State has assessed DTP an administrative fine of \$16,000.00 as a penalty for violating 1985 UST Regulation 9(c) at the Wakefield Facility (Facility 02779). This fine results from a penalty calculation of \$1,000.00 per test for 16 missed tests at a Type II/minor level.

The 1987 Penalty Rules and R.I.G.L. 42-17-6.4 squarely place the burden on DEM to justify any administrative fine. As previously stated in the body of this decision (Recommended Decision and Order May 1, 1995 P.29-30) the State presented no direct evidence to explain how this fine was derived. In particular, there is no explanation as to why the Respondent was charged the maximum penalty for each violation, why the fine assessed was so much more than the penalty originally proposed in the 1988 NOVOA (DEM 14) or what impact, if any the company's financial condition played in the Department's determination of the pecuniary amount charged. In addition, the June 5, 1995 Administrative Penalty Worksheet contains a striking anomaly. Section B of the Administrative Penalty Worksheet provided by the State categorizes the violations of 1985 UST Reg. 9(c) by "type" and "deviation". Section 11 of the 1985 Penalty Rules provides the criteria for the assessment of an administrative penalty. In this regulation the applicable penalty range is determined by "type of violations" and "potential for harm". It was not until the promulgation of the 92 Penalty Rules did the Department calculate a penalty by "type and deviation". A comparison of the penalty sections in both sets of regulations shows that the factors enumerated for the assessment of a fine are similar but have some important distinctions.

Despite these omissions and discrepancies, after assessing all witnesses testimony, especially the examination of Susan Cabeceiras, viewing the documented evidence supplied by each party and applying the specific statutes and regulations the Hearing Official finds that the State has met the criteria for assessing an administration penalty outlined in 1985 UST Reg. 11(1)(B) and the accompanying Water Pollution Control Penalty Matrix by preponderance of the evidence. Therefore, the Hearing Officer recommends the fine of \$16,000.00 at a Type II minor level assessed to DTP for violation 1985 UST Reg. 9(c) at the Wakefield Facility should be affirmed.

B. For violations relating to precision testing at the Tower Hill Facility (facility #02779) DTP was assessed a penalty of \$13,000. The State arrived at this fine by calculating 13 missed tests at \$1,000 per test at a Type I minor level. For the reasons stated above, the Hearing Officer finds the fine of \$13,000 for violating UST Regulation 9(c) is within the parameters of the penalty matrix and showed the affirmed.

The Hearing Officer does not find the designation of Type I minor is the appropriate designation. Having specifically found the Recommended Decision and Order that DEM failed to establish a basis for upgrading the penalty at Tower Hill to a Type I violation (see Recommended Decision and Order, May 1, 1995, p.21 finding of fact 42-43.) The Hearing Officer extends that finding to include violations for precision testing which are subject to the 1985 Penalty Rules, and finds the appropriate penalty designation is a Type II minor offense.

Note: It should be noted that the Hearing Officer found the Respondent violated Section 9 (e) of the 1985 penalty rules for failure to submit verification of compliance with precision testing at both facilities as alleged in the Penalty Rules (Recommended

Decision and Order, May 1, 1995, p.27 finding of fact 4, finding of law 11). The Department, however, did not allege a fine for these offenses in the June 5 1995 Administrative Penalty Assessment Worksheet.

II. Should the penalty assessed to DTP for violating 1985 UST Regulation 15 relating to closure at the Tower Hill facility, set forth in Section B of the June 5, 1985 Administrative Penalty Worksheet be affirmed?

The recalculated the penalty for violating 1985 UST Regulation 15 is characterized as a Type III minor offense and assessed a \$500 per day penalty, the maximum penalty allowed. (See 1985 UST Reg. 11 (1) (c) (1) (2), also 1987 Penalty Rules Water Pollution Control Penalty Matrix). The Department applied the \$500 per day penalty for 60 days of non-compliance and arrived at a total pecuniary assessment of \$30,000.

The Hearing Officer finds this penalty to be egregious. There is no dispute that DTP failed to comply with the Department's closure notification requirements (Recommended Decision and Order, May 1, 1995, p. 24 finding of law 13). However, the State clearly did not consider Respondent's lack of compliance to be a serious offense. Susan Cabericas, the principal witness for DEM stated that failure by Respondent to inform was merely a technical omission. (T1 p.50) Similarly, the State concedes that had the company applied for closure, it would have been granted. (T1 p.50 DEM memo p. 29) Further, the Department admits that Respondent complied with the State's closure requirements for emptying and securing the tanks (*id.*). Testimony also revealed that even though DTP had not formally notified DEM, the Department was aware from its own investigation that the tanks were closed (T1 p. 37-40, p. 138-140). Also, according to the testimony of Susan Cabeceiras, it is the general procedure of the Department to make insignificant findings when tanks have not been closed and to give a company time to comply. In this case, the Department has classified this offense at the Type III violation and categorized the violation at a minor level. Section 11 (c) of the 1987 Penalty Rules classify Type III violations as infractions which are "important but incidental to the protection of public health, safety, welfare or environment".

As stated previously for violations of 1985 UST Regulation 15, the State has assessed DTP the maximum per day penalty for 60 days of non-compliance. The penalty matrix for violations of R.I.G.L. §45-12 *et seq.* and R.I.G.L. §42-7-6.7 requires that "each and every occurrence on/or day which the violation or failure to comply is repeated shall constitute a separate and distinct violation". However Section 10 (d) of the 1987 Penalty Rules states "this section does not and shall not be construed to require the Director the maximum administrative penalty permissible under State law". The record is devoid of any references which could justify the State assessing DTP the maximum per day penalty, nor is any explanation given as to why the recalculated penalty for this violation is exactly the same fine as proposed in the NOVOA, even though if calculated correctly, different criteria would have been applied. Concomitantly, the Hearing Officer is mystified as to why the recalculated penalty worksheet applies a "deviation standard" to

assess the appropriate penalty range when this procedure did not exist until the promulgation of the 1992 Penalty Rules.

Applying the correct criteria to determine the appropriate administrative penalty listed in Section 9 of the 87 Penalty Rules and R.I.G.L. §42-17-6.6, following the assessment of penalty listed in the 1987 Penalty Rules Water Pollution Control Matrix and accepting the testimony of the State's witnesses as credible, the Hearing Officer recommends the Director assess the Respondent an administrative fine for violating 1985 UST Regulation 15 at the rate of \$100 per day for 60 days of non-compliance at the Type III minor level, resulting in a \$6,000 penalty for this violation.

III. Should the penalty assessed to the Respondent for the economic benefit of non-compliance, set forth in Section B of the June 5, 1995 Administrative Penalty Worksheet be affirmed?

The State has assessed DTP a separate penalty entitled "Economic Benefit from Non-Compliance" and has charged a \$5,600 fine to the Wakefield facility and \$4,550 to the Tower Hill facility for a total administrative fine of \$10,150. The recalculated administrative penalty worksheet shows the Department arrived at the economic advantage penalty by multiplying the number of precision tests not conducted before the promulgation of the 1992 Penalty Rules by \$350. Sixteen tests were not done at the Wakefield facility and 13 tests at the Tower Hill facility over the years 1987-1991.

As with any other fine assessed pursuant to the 1987 penalty regulations, DEM has the burden to show the penalty is within the State's purview and not excessive. In this instance, the Department is unable to justify the economic penalty assessment, at the Wakefield or Tower Hill facilities for the following reasons:

During direct examination, Susan Cabecieras explained that to eliminate any unwarranted economic benefit, the Department called several testing companies to determine the cost of precision testing and assessed that cost as a penalty (T1, p. 51). Inexplicably, the State retroactively applied the current rate to precision test of \$350 per test to all violations, even those which happened before the imposition of the 1992 Penalty Rules. Certainly, the cost to precision test in today's dollars is significantly different than the cost was between 1987 and 1991 when these precision test violations occurred.

In addition, comparison of the recalculated penalty to the NOVOA (DEM 45) shows that the Department used exactly the same numbers and formula in the recalculation as appeared on the NOVOA. Apparently, the State did nothing more than transfer the economic benefit penalty it was seeking on the NOVOA to a new sheet of paper.

Further, the inherent reason for levying an economic benefit penalty is to eliviate any advantage for not following the rules and to deter future non-compliance. Yet

without explanation, the Department has limited this fine to violations of precision testing.

Most importantly, a review of the penalty rules and the applicable statutes show that the regulations did not provide for a separate penalty to off-set economic advantage until the imposition of the 92 penalty rules (see 1992 Penalty Rules Section 10(c)). Section 9 of the 1987 Penalty Rules and R.I.G.L. §42-17.6-6 provides a list of factors to assist the Director in selecting an appropriate administrative fine. These criteria specifically allow the Director to consider economic benefit for non-compliance as one of the several factors to be considered before choosing a particular penalty from the appropriate matrix. (1987 Penalty Rules, Section 9(c)(d)(e), R.I.G.L. §42-17.6-6 (c)(f)(g)(h)) These are the only subsections of the regulation and statute which allow DEM to include economic advantage for non-compliance as part of the administrative fine. Nowhere in the 1987 Penalty Rules or applicable statute is the State granted the authority to charge a subsequent fine for that non-compliance.

In the instant case, the Hearing Officer has already found that the administrative fine assessed to DTP for failure to precision test was within the State's discretion and acceptable under the regulations (see p. 2 of this addendum). Implicit in the finding is a determination that DEM accurately applied the criteria for setting a fine outlined in Section 9 of the regulations and R.I.G.L. §42-17.6-6. Included in the State's determination was a consideration and application of the economic advantage to the Respondent for not precision testing particularly Section 9(d) which provides for a consideration of "the amount necessary to eliminate the economic advantage of non-compliance including but not limited to the financial advantage acquired over competitors from said non-compliance".

Without specific legislative or regulatory authority, the Department is precluded from again considering economic advantage and creating a separate fine on that basis. Therefore, the Hearing Officer finds the State has not met its burden on this issue and recommends the fine not be applied.

CONCLUSION

In conclusion, with respect to founded violations occurring under the auspices of the 1987 Penalty Rules, the Hearing Officer recommends the following penalties:

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

The recommended administrative fine for these violations is \$35,000.

Regarding the founded violations proven using the 1992 Penalty Rules, the Hearing Officer has previously made the following penalty recommendations: (See Recommended Decision and Order, May 1, 1995, p. 33-36)

Violation of 1992 UST Regulation 10.05(B) (Wakefield)	\$4,000
Violation of 1992 UST Regulation 10.05(B) (Tower Hill)	\$3,000
Violation of 1992 UST Regulation 10.08 (H) (Tower Hill)	\$ 300
1992 UST Economic Benefit Penalty (Reg. 10c) (Wakefield)	\$1,400
1992 UST Economic Benefit Penalty (Reg. 10c) (Tower Hill)	\$1,050

The total administrative penalty for these violations is \$9,750.00.

Combining the penalty amounts for all violations, the Hearing Officer recommends that DTP, Inc. pay a total administrative fine of \$44,750.00.

FINDING OF FACTS AND CONCLUSIONS OF LAW

After carefully considering all the testimony, the credibility of the witnesses, reviewing the documentary evidence presented and for the reasons stated in the Recommended Decision and Order and Addendum, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

FACT

1. That the Department submitted a recalculation Administrative Penalty Worksheet to the Director on June 5, 1995;
2. That the recalculated penalty assessed fines for violations of the 1985 UST regulations as follows:

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

Wakefield	\$4,050.00
Tower Hill	\$5,600.00
4. That the recalculated penalty assessed no fine for violations of 1985 UST Regulation 9 (e);
5. That the fine for violating 1985 UST 9 (c) at the Wakefield facility was calculated at \$1,000 per test for 16 tests;
6. That the recommended penalty for violations of 1985 UST Regulation 9 (c) at the Wakefield site is \$16,000 at a Type II minor level;
7. That the fine for violating 1985 UST 9 (c) at the Tower Hill facility was calculated at \$1,000 per test for 13 tests;
8. That the recommended penalty for violating 1985 UST Regulation 9 (c) at Tower Hill facility is \$13,000 at a Type II minor level;
9. That although Respondent failed to inform DEM on a tank closure at the Tower Hill facility, the Department did not consider the omission to be a serious offense;

10. That the recalculated penalty for violations of 1985 UST Regulation 15 applied the term "deviation" to assess the violation although no such term existed until promulgation of the 1992 Penalty Rules
11. That the Department presented the same fine for violating 1985 UST Regulation 15 as was proposed in the NOVOA although the 1987 penalty regulations use different criteria to calculate the fine;
12. That the recommended penalty for violating 1985 UST Regulation 15 is \$6,000 at a Type III minor level;
13. That the State assessed DTP a separate fine for "Economic Benefit from Non-Compliance";
14. That the State arrived at the separate fine for economic benefit by multiplying each missed test by \$350.00;
15. That sixteen precision tests were not conducted at the Wakefield facility and 13 tests at the Tower Hill facility over the years 1987-1991;
16. That the current rate to precision test of \$350 was applied to all precision tests;
17. That the State provided the same fine in the recalculated penalty for economic advantage as appeared in the NOVOA;
18. That the inherent reason for levying an economic benefit penalty is to alleviate any advantage for not following rules and regulations to deter further non-compliance;
19. That the State has limited the economic benefit penalty to precision testing;
20. That the 1987 Penalty Rules do not provide for a separate penalty to offset economic advantage;
21. That the recommended administrative fine to be paid by DTP for violations of the 1985 Tank Regulations are as follows:

1985 UST Regulation 9 (c) (Wakefield)	\$16,000
1985 UST Regulation 9 (c) (Tower Hill)	\$13,000
1985 UST Regulation 9 (15) (Tower Hill)	\$ 6,000
22. The total recommended administrative fine to be paid by DTP for violations of 1985 tank regulations is \$35,000;

23. The total recommended administrative fine to be paid by DTP for all violations is \$44,750.00;
24. That the testimony of Susan Cabreicas was credible.

LAW

1. That in accordance with 1987 Penalty Rules Section 9 and 11 and R.I.G.L. §42-17.6-4, the State met its burden to show the penalty for violations of 1985 UST Regulation 9 (c) at the Wakefield facility is within the parameter of the regulations and not excessive;
2. That in accordance with 1985 Penalty rules Section 9 and 11 and R.I.G.L. §42-17.6-4, the State has met its burden to show the monetary penalty for violations of 1985 UST Regulation 9 (c) at the Tower Hill facility is within the parameters of the regulations and not excessive;
3. That the assessment of violations for infractions of 1985 UST Regulation 9 (c) at Tower Hill facility does not meet the criteria for a Type I designation, but does meet the criteria for a Type II assessment;
4. That in the recalculated Penalty Worksheet, the Department levied no fine to the company for violations of 1985 UST Regulation 9 (e);
5. That the fine levied to the Respondent for violations of 1985 UST Regulation 15 is egregious;
6. That the 1987 Penalty Water Pollution Control Matrix requires that each day of the violation be considered a separate occurrence;
7. That the 1987 Penalty Rules Section 10 (d) does not require the Director to issue the maximum administrative penalty allowed under the law;
8. That the record is devoid of any references that could justify DEM issuing the maximum per day penalty;
9. That DEM calculated the penalty for violations of 1985 UST Regulation 15 by using a "deviation standard" which did not exist until the imposition of the 1982 Penalty Rules;
10. That in accordance with 1987 Penalty Rules Section 9 and 11, the Water Pollution Control Matrix and R.I.G.L. §42-17-6.6, the appropriate penalty for violations of Regulation 15 is \$100 per day for 60 days of non-compliance for a maximum penalty of \$6,000;

11. That Section 10(c) of the 1992 Penalty Rules provide for a separate and additional penalty for economic benefit.
12. That the 1987 Penalty Rules and the applicable statutes do not provide for a separate penalty to off-set economic advantage;
13. That economic benefit for non-compliance is one of the several factors provided in Section 9 of the regulations to be considered in assessing the administrative fine.
14. That the State has considered and applied the economic advantage to Respondent for failure to precision test set forth in the 1987 Penalty Rules Section 9 and R.I.G.L. § 42-17.6-6 as one of the factors to justify the penalty assessment;
15. That without specific statutory or regulatory authority granting DEM the power to levy a separate fine for economic advantage for infractions occurring under the auspices of the 1987 Penalty Regulations, the State cannot meet its burden on this issue.

ORDERED

1. That Respondent is ordered to pay the following administrative fines:

- | | | |
|-----|---------------------------------------------------------------------------------|----------|
| (a) | For violations of 1985 Regulation 9 (c) (Wakefield) | \$16,000 |
| (b) | For violations of 1985 Regulation 9 (c) (Tower Hill) | \$13,000 |
| (c) | For violations of 1985 Regulation of 15 (Tower Hill) | \$ 6,000 |
| (d) | For violations of 1992 Regulation 10.05 (b) (Wakefield) | \$ 4,000 |
| (e) | For violations of 1992 Regulation 10.05 (b) (Tower Hill) | \$ 3,000 |
| (f) | For violations of 1992 Regulation 10.08 (h) (Tower Hill) | \$ 300 |
| (g) | For violations economic benefit penalty (1992 Penalty
Reg. 10c) (Wakefield) | \$ 1,400 |
| (h) | For violations economic benefit penalty (1992 Penalty
Reg. 10c) (Tower Hill) | \$ 1,050 |

The total penalty for all founded violations is \$44,750.00

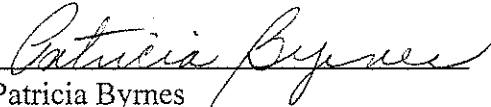
2. That payment of the administrative fine is to be made within 30 days of the agency's final decision and order.

3. That payment of the administrative penalty is to be made to:

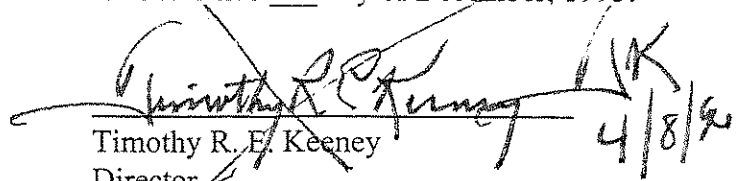
State of Rhode Island, General Treasurer, and mailed to:

Rhode Island Department of Environmental Management
Business Affairs
Attn: Robert Silvia
22 Hayes Street
Providence, Rhode Island 02908

Entered as a Recommended decision and order the 5 day of December, 1995.


Patricia Byrnes
Ad-Hoc Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, Third Floor
Providence, Rhode Island 02908

Entered as a Final Agency Decision and Order this ___ day of December, 1995.



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 order to be forwarded, via regular mail, postage prepaid to George and Dorothy Potter, DTP, Inc., 83 Merry Mount Drive, Warwick, Rhode Island 02886; Peter McGinn, Esq., Tillinghast Collins & Graham, 10 Weybosset Street, Providence, Rhode Island 02903 and to Brian A. Wagner, Esq., Office of Legal Services, 9 Hayes Street, Providence, Rhode Island 02908 on this _____ day of December, 1995.

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