

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

IN RE: Robert DeLisle and Joyce DeLisle AAD No. 93-026/GWE
East Greenwich Oil Company, Inc.
UST # 93-00357

DECISION AND ORDER

This matter is before the hearing officer on a Notice of Violation and Order ("NOVAO") issued by the Division of Waste Management, Underground Storage Tank Program ("Division") to Robert DeLisle, Joyce DeLisle and East Greenwich Oil Company, collectively referred to as "Respondents". The administrative hearing was held on March 27, 1995 at the offices of the Administrative Adjudication Division for Environmental Matters ("AAD") at One Capitol Hill, Providence, RI. Brian A. Wagner, Esq. represented the Division and Fred E. Joslyn, Jr., Esq. represented the Respondents.

A prehearing conference was held on July 13, 1994 at the Offices of the AAD. At that time counsel agreed to the following stipulations of fact:

1. The Respondents Robert DeLisle and East Greenwich Oil Company are owners and/or operators of the Facility.
2. The Facility is comprised of a commercial oil business known as East Greenwich Oil Co., which has at least four (4) underground storage tank ("UST") systems located thereon.
3. The Facility is registered with the Department and is identified as UST Facility ID No. 0357.

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	1960	20,000	#2 Fuel Oil	Yes	n a
002	unknown	5,000	Kerosene	Yes	n a
003	unknown	5,000	Kerosene	Yes	n a
004	unknown	2,000	Gasoline	Yes	n a

A list of exhibits entered into evidence at the hearing is attached as Appendix "A".

Counsel agreed at the prehearing conference that the following issues were to be considered at the hearing:

1. Whether the Respondents failed to precision test the subject UST systems at the Facility in accordance with the UST Regulations.
2. Whether Respondents failed to submit the results of precision tests to the Department for the subject UST systems at the Facility in accordance with the UST Regulations.

Counsel for the Respondent raised two additional issues to which there was no agreement. They are as follows:

1. What is the measure of damages, if any, to the State of Rhode Island, including the DEM, directly and proximately resulting from the use of the four USTs (001;002;003;and 004) at 390 Main Street, East Greenwich, Rhode Island by the Respondents during the years 1986-1987-1988-1989-1990-1991 and 1992?
2. Does the assessment by RIDEM of an administrative penalty in the amount of \$37,800.00 upon the Respondents herein pursuant to R.I.G.L. §42-17.6 satisfy the "rough proportionality" test as recited in Dolan v. City of Tigard, U.S. Supreme Court No. 93-518, decided June 24, 1994?¹

¹ Respondents did not pursue this issue at hearing or address it in their post-hearing briefs.

At the commencement of the hearing counsel affirmed that the agreements and stipulations recited in the prehearing conference record were accurate. With regard to UST No. 001 the Division informed the hearing officer that it had erroneously cited Respondents with violations for failure to precision test and failure to submit test results to the Division for the years 1986, 1987, 1988, 1989, 1990, and 1991. Counsel for the Division indicated that the UST Regulations did not require that UST No. 001 be tested until 1992. Accordingly, the violations alleged for UST 001 for the years 1986-1991 inclusive were dismissed. The Division bears the burden of proving by a preponderance of the evidence that the Respondents failed to comply with the UST Regulations as alleged in the NOVAO.

The Division called Susan Cabecieras as its sole witness. Ms. Cabecieras is presently employed by the Department of Environmental Management, Underground Storage Tank Section as a Senior Environmental Scientist. She testified that she works with the UST Regulations on a regular basis and is familiar with past as well as current regulatory requirements for underground storage tanks regulated by the Division. Ms. Cabecieras testified that her familiarity with the Facility was based on her review of the facility file maintained by the Division. Ms. Cabecieras indicated that she drafted the NOVAO based on her review of the Facility file and

the UST Regulations. Specifically, she referred to the Application for Underground Storage Facilities - Certificate of Registration - signed by Robert DeLisle (and marked as Div. 1 Full) which indicated the presence of four (4) USTs at the Facility and provided information concerning the volume, content and age (if known) of the USTs. Upon receipt of the Application, the Division assigned the USTs identifying numbers. The UST numbers are 001, 002, 003, and 004. Based on her review of the UST Regulations and a review of the information provided by Respondent Robert DeLisle in the Certificate of Registration, Ms. Cabecieras testified that the USTs were required to be precision tested on the following schedule;

UST 001	Testing in 1992
UST 002	Annual testing commencing in 1986
UST 003	Annual testing commencing in 1986
UST 004	Annual testing commencing in 1986

Ms. Cabecieras explained that she reviewed the facility file for precision testing results and found that it contained no precision testing results for the years referenced above. There was also a lack of information regarding the installation of spill containment devices. After her review of the file Ms. Cabecieras authored Div. Exhibit 2 (Full) which is a letter to Robert DeLisle dated March 26, 1993 summarizing the missing information which the Division was

seeking. Ms. Cabecieras testified that she received a response from Mr. DeLisle including pictures of the Facility which demonstrated to her satisfaction that the respondents were not in violation of the spill containment requirements of the Regulations. Ms. Cabecieras testified that since March 26, 1993 she has never received any documentation from Respondent to indicate that the USTs were precision tested as required by the Regulations.

Ms. Cabecieras was questioned concerning the Certificate of Registration For Underground Storage Facilities marked as Respondents' 4 Full. She explained that the Certificate of Registration is issued by the Division when an application is filed and the correct fee is paid by the applicant and does not indicate anything with regard to a facility's compliance with UST Regulations.

On cross examination Ms. Cabecieras reiterated the fact that she was familiar with the Facility only through her review of the file but that the file indicated that no precision testing results had been submitted to the Division. She testified that a field visit to the site was not necessary since the pending matter was a "records case" which related only to the filing of documents as required by regulation. Upon questioning from Respondents' counsel concerning environmental impact, Ms. Cabecieras stated that she did not know if there was any environmental impact from the failure to

precision test the four USTs but explained that the penalty was assessed for the potential impact on the environment which results from the failure to precision test. Ms. Cabecieras testified that the penalty amount is correct even if there is no environmental impact from the failure to precision test. Respondents' counsel then elicited information concerning the publication of "fact sheets" by the Division to inform facilities of requirements of the Regulations and changes in testing or reporting requirements. Ms. Cabecieras acknowledged a need to make the Regulations easier to understand and that the fact sheets were published to assist facility owners and operators to more easily understand the Regulations.

On redirect Ms. Cabecieras explained the assessment of the administrative penalty. She stated that each failure to precision test was determined by her to be a Type II/Moderate violation under the Water Pollution Control Matrix contained in the Rules and Regulations for the Assessment of Administrative Penalties, May 1992 filing ("Penalty Regulations"). She indicated that she used the 1992 Penalty Matrix for all violations including those that occurred prior to the 1992 Penalty Regulations. She explained that she applied the later penalty matrix as a matter of convenience and that since the penalty amounts under the 1987 matrix were higher, there was no adverse impact upon the Respondents. By

way of example, Ms. Cabecieras explained that the 1987 penalty matrix for a Type II/Moderate violation ranged from \$1,500. - \$2,500. while the 1992 penalty matrix began with the lower amount of \$1,000. and ranged to \$5,000. The Division assessed the lower amount of \$1,000. for each violation.

In response to questions on cross examination concerning environmental impact and the calculation of the administrative penalty, Counsel for the Division questioned Ms. Cabecieras further on redirect concerning her calculation of the penalty assessment. Ms. Cabecieras indicated that her duties require her to review facility files for regulatory compliance only and that it is the Division of Site Remediation that would issue a Notice of Violation and Penalty in the event there was a release from a UST causing environmental impact. She testified that her duties and responsibilities in the Underground Storage Tank Program do not include a determination of whether a facility was impacted or contaminated as a result of a failure to precision test under the Regulations.

Subsequent to her testimony on redirect, Respondents' counsel conducted a vigorous recross concerning the basis on which the penalty was calculated and what factors Ms. Cabecieras considered in computing the amount of the penalty assessment. Specifically, counsel inquired how the failure to precision test constituted a Type II violation as set forth in

the Regulations. Ms. Cabecieras testified that the Regulations provide that Type II violations include acts which pose an indirect actual or potential for harm. She testified that each failure to precision test the USTs constituted a potential for harm to the environment. Counsel further inquired why the failures to precision test were characterized by Ms. Cabecieras as a moderate under the Regulations. Ms. Cabecieras explained that moderate was the extent to which she determined that the Respondents were out of compliance with the precision testing requirements. Based on her information that the subject USTs had not been precision tested at all, she determined that they were 100% out of compliance with the precision testing requirements of the Regulations. Respondents' counsel showed the witness Respondents' 2 (Full) and Respondents' 7 (Full) which are precision test results performed on the subject USTs after issuance of the NOVAO (the exhibits indicate that the USTs passed the precision tests performed in 1993 and 1994). He asked if the information contained in the exhibits would change her determination of the type or extent of the violation. Ms. Cabecieras remained firm that the violation was properly characterized as Type II due to the potential for harm and was properly calculated as moderate. Respondents' counsel persisted in attempting to impeach Ms. Cabecieras' penalty calculation and inquired what would then constitute a "Minor" violation. Ms. Cabecieras

responded that there would be a basis to determine that such a violation was minor if the Facility could demonstrate that the precision tests had indeed been performed but that the Facility had failed to submit them to the Division as required by the Regulations. The Division rested at the conclusion of Ms. Cabecieras' testimony.

Respondents presented one witness, Mr. Robert DeLisle. Mr. DeLisle testified that he is the President and owner of East Greenwich Oil Company and has served in that capacity for forty one (41) years. According to Mr. DeLisle's testimony East Greenwich Oil is a family-run business which began in 1898. Mr. DeLisle testified that he personally filled out the 1985 Certificate of Registration form (Div. 1 Full) and has renewed the registration annually. Mr. DeLisle stated that he received the renewal forms annually but that he never received a notification that he was in violation of the UST Regulations. He testified that the first time he became aware of the precision testing requirements was when he received correspondence from the Underground Storage Tank Section (Ms. Cabecieras' correspondence marked as Div. 2 Full). Mr. DeLisle stated that each time he renewed his annual certificate of registration, he relied on the registration certificate as an indication that he was in compliance with the UST Program Regulations. Mr. DeLisle explained how he has complied with EPA requirements on unrelated matters and his

sincere efforts to comply with environmental requirements generally. Under questioning from his own counsel, Mr. DeLisle testified that he did not intend to willfully violate sections 10.05(B) and 10.08(H) of the Regulations.

Division's counsel conducted a brief cross examination of Mr. DeLisle. Counsel separately referenced each year cited in the NOVAO² and inquired whether any precision tests on any USTs were performed in those years. Mr. DeLisle responded in the negative to each question. Mr. DeLisle candidly admitted that he did not precision test any of the subject USTs until 1993. No other witnesses testified on behalf of Respondent.

Counsel indicated that they preferred to file briefs in lieu of closing arguments and a briefing schedule was set by the hearing officer. After some amendment to the original briefing schedule, the hearing was deemed closed on July 6, 1995 after the time for objection to Respondents' Motion to File a Supplemental Reply Memorandum passed.

Respondents raised the defense of equitable estoppel at hearing and elicited testimony from witnesses 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

² The Division voluntarily dismissed the violations alleged in the NOVAO concerning UST 001 for the years 1986, 1987, 1988, 1989, 1990, and 1991.

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. Quoting J. Pomeroy, Equity Jurisprudence, §805, Respondents state in their initial post-hearing memorandum that the requirements of an equitable estoppel defense are as follows:

1. There must be conduct-acts, language, or silence amounting to a representation of concealment of material facts.
2. These facts must be known to the party estopped at the time of his said conduct, or at least circumstances must be such that knowledge of them is necessarily imputed to him.
3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done and at the time when it was acted upon by him.
4. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, and, thus relying, he must be led to act upon it.
5. He must in fact act upon it in such a manner as

to change his position for the worse...."

Respondents' Posthearing Brief at page 7.

The issuance of a Certificate of Registration annually by the Division is relied upon by Respondents as a representation that the Respondents were in compliance with all UST Regulations. Such reliance is unreasonable in light of the fact that the Certificate of Registration includes no such representation and merely addresses one requirement of the UST Regulations (Facility Registration). Respondents highlight the Division's actions in subsequent years to clarify the requirements of the UST Regulations and the Division's admission that the Regulations were "confusing" as evidence that the Division misrepresented the UST requirements or knowingly misled the Respondents not to precision test their USTs. The Division's acknowledgement that the UST Regulations may be confusing and its efforts in recent years to relieve that confusion through the issuance of guidance documents and user-guides hardly amount to misrepresentation of material facts. Similarly, Respondents' Exhibit 5 relates solely to the abandonment and/or non-use of UST's and does not establish that the Division made a representation to Respondents concerning the precision testing requirements of the USTs.

Moreover, as Respondents acknowledge in their recitation of the requirements of estoppel, the conduct done by the Division must be done with the intention, or at least the

expectation that it will be acted upon by the Respondent. The record is bereft of evidence, direct or circumstantial, that the Division either intended or expected that issuance of a Certificate of Registration would cause a facility not to precision test its USTs or comply with UST Regulations. Such an intention or expectation by the Division would be in direct contravention of the goals and policies underlying the UST Regulations.

Examination of the entire hearing record coupled with consideration of the factors enumerated above compels me to conclude that there is not competent evidence sufficient to warrant the application of the doctrine of equitable estoppel.³

The standard of actual damages espoused by Respondents in their proposed issues and brief is not the standard established in the UST Regulations or Penalty Regulations for assessment of an administrative penalty in these circumstances. Actual environmental damage is not a prerequisite to assessment of an administrative penalty for UST precision testing violations.

³ Unlike the circumstances cited by the court in Ferrelli v. Employment Security Department, 106 R.I. 588, 261 A.2d 906, (1970) the Respondents in the case at bar were afforded an opportunity to present and cross-examine witnesses and to develop a full evidentiary record in support of their estoppel defense.

FINDINGS OF FACT

After review of all the documentary and testimonial evidence of record I find as fact the following.

1. The Respondents Robert DeLisle and East Greenwich Oil Company are owners and/or operators of the Facility.
2. The Facility is comprised of a commercial oil business known as East Greenwich Oil Co., which has at least four (4) underground storage tank ("UST") systems located thereon.
3. The Facility is registered with the Department and is identified as UST Facility ID No. 0357.
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	1960	20,000	#2 Fuel Oil	Yes	n a
002	unknown	5,000	Kerosene	Yes	n/a
003	unknown	5,000	Kerosene	Yes	n a
004	unknown	2,000	Gasoline	Yes	n a

5. UST 001 was required by the UST Regulations to be precision tested in 1992.
6. UST 001 was not precision tested in 1992.
7. UST 002, 003, and 004 were required by the UST Regulations to be precision tested annually commencing in 1986.
8. UST 002, UST 003 and UST 004 were not precision tested for the years 1986, 1987, 1988, 1989, 1990, 1991, and 1992.
9. The Respondents failed to submit written verification to the Division that precision testing was performed on USTs 002, 003, and 004 for the years 1986, 1987, 1988, 1989, 1990, 1991, and 1992.
10. The Respondents failed to submit written verification to the Division that precision testing was performed on UST 001 for the year 1992.

11. At hearing, the Division voluntarily dismissed the violations alleged in the Notice of Violation and Order concerning UST 001 for the years 1986, 1987, 1988, 1989, 1990, and 1991.

12. Testimony by the division established that each failure to precision test constituted a Type II/Moderate Violation under the Water Pollution Control Matrix contained in the Rules and Regulations for the Assessment of Administrative Penalties.

13. The violations were characterized as "Moderate" based upon the fact that Respondents were 100% out of compliance with the precision testing requirements of the Regulations.

14. Each failure to precision test was assessed a penalty of \$1,000. which is the lowest penalty amount referenced in the penalty matrix for a Type II/Moderate violation.

15. Each failure to precision test the USTs as required by Regulation constituted a potential for harm to the environment.

16. The penalty was assessed for the potential impact to the environment based on a failure to precision test USTs as required by the UST Regulations.

17. The amount of economic benefit accruing to Respondent was determined by the Division to be \$350.00 for each failure to precision test.

18. Robert DeLisle relied on the Division's issuance/renewal of an annual Certificate of Registration as a determination by the agency that the facility was in compliance with all applicable UST Regulations.

CONCLUSIONS OF LAW

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

1. Robert DeLisle and East Greenwich Oil Company, Inc. are the owners/operators of the Facility as defined by the Regulations.

2. The Division failed to prove by a preponderance of the evidence that Joyce DeLisle is an owner of the Facility as defined by the Regulations.

3. The Division has jurisdiction over Robert DeLisle and East Greenwich Oil Company, Inc.

4. A mathematical recomputation of the administrative penalty is warranted based upon the voluntary dismissal of alleged precision testing violations for UST 001 for the years 1986, 1987, 1988, 1989, 1990, and 1991.

5. The Division proved by a preponderance of the evidence that Robert DeLisle and East Greenwich Oil Company, Inc. violated UST Regulation 10.05 (B), 10 08 (H) and 10.13 for each of the following USTs/years:

UST 001: 1992

UST 002: 1986, 1987, 1988, 1989, 1990, 1991, and 1992

UST 003: 1986, 1987, 1988, 1989, 1990, 1991, and 1992

UST 004: 1986, 1987, 1988, 1989, 1990, 1991, and 1992

6. The assessment of the administrative penalty for each of the violations established in Conclusion of Law No. 5 above was properly calculated in accordance with the Rules and Regulations for the Assessment of Administrative Penalties and totals \$29,700.00.⁴

7. The performance of required precision tests by Respondents in accordance with regulatory requirements four months after receipt of the NOVAP does not mitigate Respondents' previous violations of the precision testing requirements set forth in the NOVAP.

8. The precision tests performed by Respondents in

⁴ The original assessment of administrative penalty contained in the NOVAP totaled \$37,800.00. The Division dismissed six instances of failure to precision test. Accordingly, based on a purely mechanical computation, the penalty amount is reduced by \$8,100.00 (5 missed tests X \$1,000.00 = \$6,000.00 & 6 economic advantage calculations X \$350.00 = \$2,100.00 for a total of \$8,100.00).

accordance with regulatory requirements following receipt of the NOVAP (indicating that there were no leaks from the subject UST(s)) do not mitigate the portion of the administrative penalty assessed for potential impacts to public health and/or the environment attributable to the prior violations of the precision testing requirements of the UST Regulations (for which the Respondents were cited in the NOVAP).

9. Robert DeLisle's reliance on the Division's issuance/renewal of a Certificate of Registration as a determination by the agency that the facility was in compliance with all applicable UST Regulations was not reasonable.

10. Respondents failed to prove by a preponderance of the evidence the elements necessary to invoke the doctrine of estoppel against the Division.

11. Respondents failed to prove by a preponderance of the evidence that the administrative penalty is excessive.

12. The penalty assessment is reasonable and warranted.

Based on the foregoing it is hereby

ORDERED

1. The Notice of Violation and Order and Penalty Assessment as to Respondent Joyce DeLisle are DISMISSED.

2. The Notice of Violation and Order and Penalty Assessment as to Respondents East Greenwich Oil Company and Robert DeLisle are SUSTAINED but for the reduction in penalty assessment indicated in paragraph three below.

3. Pursuant to R.I. Gen. Laws § 42-17.6, the following administrative penalty is assessed, jointly and severally, against Respondents East Greenwich Oil Company and Robert DeLisle:

\$29,700.00

4. Payment of the Administrative Penalty shall be made directly to :

R. I. Department of Environmental Management
Office of Business Affairs
22 Hayes Street
Providence, R.I. 02908

Entered as a Recommended Decision and Order this 27th day of September, 1995.

Kathleen M. Lanphear
Kathleen M. Lanphear
Chief Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, Third Floor
Providence, Rhode Island 02908

Entered as a Final Agency Order this _____ day of September, 1995.

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

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CERTIFICATION

I hereby certify that I caused a true copy of the within order to be forwarded, via regular mail, postage prepaid to Fred E. Joslyn, Jr., Esq., Box 8888, Garden City, Cranston, RI 02920 and via interoffice mail to Brian A. Wagner, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this _____ day of September, 1995.

EXHIBIT A

EXHIBIT LIST

- Resp. 1 Full Copy of memorandum dated August 25, 1993 from Tom Epstein to Registered Underground Storage Tanks (USTs) Facility Owners (2 pp.).
- Resp. 2 Full Copy of November 22, 1993 C/P Utility Services Company, Inc. test results (10 pp.).
- Resp. 3 Full The curriculum vitae of Rory R. Collins.
- Resp. 4 Full Copy of Certificate of Registration for UST Facilities, Certificate No. 357 (1 p.).
- Resp. 5 Full Copy of letter of Saverio Mancieri to East Greenwich Oil dated February 1, 1988 (1 p.).
- Resp. 6 Full Copy of Certificate of Registration dated February 8, 1995.
- Resp. 7 Full Copy of Tracer Research Corporation Report dated December 20, 1994.

The parties agreed upon the admission of the following documents submitted by the Division as Full Exhibits:

- Div. 1 Full Copy of Application for Underground Storage Facilities - dated April 1, 1985 (3 pp.).
- Div. 2 Full Copy of Certified Correspondence to Robert deLisle - dated March 26, 1993 (3 pp) (Original to be produced).
- Div. 3 Full Copy of Resume of Susan Cabeceiras.
- Div. 4 for Id Copy of Underground Storage Tank Update, July 11, 1990.
- Div. 5 for Id Fact Sheet for UST owners, August 27, 1991.
- Div. 6 for Id Fact Sheet - Recent Revisions to DEM Regulations for USTs.