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

RE: GREGORY AND MARION SULLIVAN - AAD 93-005/GWE
NOTICE OF VIOLATION UST 1358

ORDER

This matter is before the hearing officer on a Motion to Respond late to Request for Admissions ("Motion to Respond Late") filed by Respondent Gregory Sullivan on December 21, 1993. The Motion to Respond Late was filed with the hearing officer at oral argument on the Division's Motion for Summary Judgment. Division counsel, Brian A. Wagner, orally objected to the motion and subsequently filed an objection to Respondent's Motion and requested oral argument. Respondent did not initially request oral argument but later filed a lengthy motion requesting a hearing on the Motion to Respond Late. The Rules of Practice and Procedure of the Administrative Adjudication Division for Environmental Matters ("AAD Rules") Rule 8.00 (a)(3) provides in pertinent part:

> 3. Action on Motion.
>
> The administrative hearing officer may rule on a motion without holding a hearing if delay would seriously injure a party, or if the motion involves a matters as to which presentation of testimony or oral argument would not advance the administrative hearing officer's understanding of the issues involved,...

My review of the Motion to Respond Late and requests for oral argument by Respondent and the Objection filed by the Division indicates that oral argument is not warranted in this instance. Oral argument would not advance my understanding of

the issues raised by Respondent's Motion to Respond Late or Division's objection thereto. Neither party indicated in their request for oral argument an intent to present testimony and each argued their position at length in their written submissions. Accordingly, the parties' request for argument on the Motion to Respond Late is denied.

I turn now to the substance of Respondent's motion and governing rules. Rule 36 of the Superior Court Rules of Civil Procedure governs requests for admissions and states in pertinent part:

> **36. Admission of facts and genuineness of documents -** (a) Request for Admission. After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. If a plaintiff desires to serve a request within twenty (20) days after service upon the defendant, leave of court, granted with or without notice, must be obtained. Copies of the documents shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than ten (10) days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he or she cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance

> of the requested admission, and when good faith requires that a party qualify his or her answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. If a request is refused because of lack of information or knowledge upon the part of the party to whom the request is directed, he or she shall also show in his or her sworn statement that the means of securing the information or knowledge are not reasonably within his power.

The Motion to Respond Late to Request for Admissions is, in essence, a request to withdraw admissions that resulted from Respondents' failure to respond to the Division's Request for Admissions. The standard established by the Rhode Island Supreme Court in evaluating such a motion was established in General Electric Co. v. Forsell and Son, Inc., 121 R.I. 19, 394 A.2d 1101 (1978). Reiterating the general rule that admissions under Rule 36 must be considered binding, the Court acknowledged that circumstances may arise which allow a party to withdraw an admission. The Court directed that "[A]n admission may be withdrawn (1) if the admitting litigant has acted diligently; (2) if adherence to the admission might cause a suppression of the truth; and (3) if the withdrawal can be made without prejudice to the party who made the request." General Electric Co., 121 R.I. 19 at 23 (emphasis added).

The first consideration which must be addressed is whether Respondents acted diligently.

In Cardi Corporation v. State of Rhode Island, 524 A.2d 1092 (R.I. 1987) our Supreme Court reviewed the trial court's denial of a Motion to withdraw "deemed" admissions. In Cardi, the Court reasserted the standard of review articulated in General Electric v. Forsell, supra. With regard to the requirement that the admitting party demonstrate that it has acted diligently the Court advised that "[I]n order to establish diligence, a party must, at minimum, make a showing of what would amount to 'excusable neglect.'" Cardi Corporation v. State, 524 A.2d at 1095. Excusable neglect has been defined by the Rhode Island Supreme Court to mean "...that course of conduct which a reasonably prudent person would take under similar circumstances." Pari v. Pari, 558 A.2d 632 (R.I. 1989) (citation omitted).

Although the facts in Cardi differ, a common thread exists with respect to the lack of diligence exercised by the party seeking to withdraw admissions. In the present matter, on September 3, 1994 the Division forwarded a Request for Admissions ("Request") to the Respondents. The Request indicated that the requests would be deemed admitted as true and accurate unless within ten days a sworn statement is served upon the Division denying or objecting to the request. On September 10, 1993 the prehearing conference was convened

and continued and an appropriate order was issued on September 13, 1994. The Order reflects that Respondent represented that he planned to have the tanks removed and the Division's counsel indicated that he would discuss the penalty assessment with his client. The Order required that the parties advise the hearing officer of the status of the matter on or before October 8, 1993.

In response to the hearing officer's order, the Division, on September 15, 1993, forwarded a proposed consent agreement to Respondents. There is no indication in the administrative record that Respondents ever complied with the September 13, 1994 Order requiring a status report to the hearing officer.

No response to the Request for Admissions was filed by Respondents and on November 16, 1993 the Division moved for summary judgment pursuant to Rule 56 of the Superior Court Rules of Civil Procedure. The motion clearly indicated that it was based upon facts deemed admitted by Respondents' failure to respond to the Request for Admissions. No objection to the motion was filed although an objection to such a motion is required by AAD Rules and is to be filed with the Clerk within seven (7) days (AAD Rule 8.00(a)2). Because it was a dispositive motion, the hearing officer set the matter down sua sponte for hearing for December 7, 1993.

By way of conference call, Respondent Gregory Sullivan's father, George Sullivan, Esq.,(an attorney licensed to

practice in Massachusetts) requested a continuance of the oral argument indicating that Respondents received the notice of oral argument on December 3, 1993 and needed additional time to prepare. Although notice to Respondents was in accord with the requirements of the AAD Rules of Practice, and over the objection of Division counsel, the hearing officer issued an order on December 7, 1993 continuing the matter one week to December 14, 1993. Because of a conflict in the hearing officer's schedule the oral argument was again continued, by conference call with Gregory Sullivan, to December 21, 1993. Still, no objection to the summary judgment motion was filed nor did Respondents file any response to the Request.

At oral argument on December 21, 1994 Respondent Gregory Sullivan submitted to the hearing officer and Division counsel the following: (1) Respondent's Response to Request for Admissions; (2) Respondent's Motion to Respond Late to Request for Admissions; and (3) Respondent's Memorandum in Opposition to Department's Motion for Summary Judgment. The Division objected orally at the argument to each submission proffered by Mr. Sullivan.

As Division counsel correctly points out in his memorandum, Respondents had numerous opportunities to file responses to the Request and the summary judgment motion. The Respondents were made fully aware by the Division's summary judgment motion that they failed to respond to the Request for

Admissions as required by Rule 36 and moreover that their failure to respond was now the basis for summary judgment. At that juncture, diligence required Respondents to take some action to comply with the Rules. Attempting to file answers to the Request over three months late and five weeks after Respondents became aware that the failure to respond is the basis for a summary judgment motion does not, in my opinion, constitute an exercise of diligence. Such failure to act is not the course of conduct which a reasonably prudent person would take under similar circumstances.

Even if I were to accept Respondent Gregory Sullivan's explanation for the failure to respond to the Request, (his purported belief that he had somehow orally answered the Request at the prehearing conference[1]), Respondents did not thereafter act diligently to cure the error or to even respond in any manner, prior to argument, to the Motion for Summary Judgment. The arguments that Respondents assert, that they did not retain an attorney because they could not afford one and that they did not properly answer the Request because Respondent Gregory Sullivan thought he had complied, are not persuasive. See Pari v. Pari, 558 A.2d 632 (1989). Respondents' conduct is characterized by a lack of diligence

[1]Such a response, assuming arguendo that it did occur, is wholly inadequate pursuant to Rule 36 of the Superior Court Rules of Civil Procedure and the proper procedure for responding to the Request for Admissions was clearly set forth in the body of the document.

and does not constitute excusable neglect.

The second factor that must be weighed is whether adherence to the admission might cause a suppression of the truth. After a lengthy review of the record and applicable case law and much deliberation, I conclude that adherence to the admissions are not likely to cause a suppression of the truth in this matter.

I turn next to the final factor articulated in General Electric. In determining whether the untimely answers should be allowed, I must consider whether the withdrawal can be made without prejudice to the party who sought the request. General Electric Co. v. Forsell, 121 R.I. at 23. The Court in General Electric found that the particular facts and posture of the case prejudiced the requesting party to the extent that the withdrawal of the admission was denied. The present matter is distinguishable. In that case the admission was made two years before the withdrawal request. More importantly, the request was made at trial and after evidence that would alternatively prove the facts admitted was no longer available. The Court in General Electric did not establish a specific definition of prejudice. The United States Court of Appeals for the Eleventh Circuit did define such prejudice in the case of Smith v. First National Bank of Atlanta, 837 F 2d 1575 (11th Cir. 1988). Therein, the Court of Appeals adopted the reasoning of our First Circuit Court of

Appeals and stated with approval:

> The prejudice contemplated by the Rule is not simply that the party who initially obtained the admission will now have to convince the fact finder of its truth. Rather, it relates to the difficulty a party may face in proving its case, e.g., caused by the unavailability of key witnesses, because of the sudden need to obtain evidence with respect to the questions previously answered by the admissions.
> Brook Village North Assoc. v.General Electric Co., 686 F.2d 66, 70 (1st Cir. 1982).

In the instant case, there is no indication that withdrawal will prejudice the Division to any great extent from maintaining its action on the merits.

A decision with regard to this Motion is discretionary in nature. I have carefully considered all the arguments presented by the parties and weighed the factors as guided by General Electric v. Forsell, supra. I conclude that in order to prevail in his motion, Respondents must demonstrate that they acted diligently and that denial of their Motion will cause a suppression of the truth. I conclude that Respondents have failed to persuade me in either of the above considerations. The remaining conclusion that there is no prejudice to the Division is not sufficient under the General Electric tripartite test to compel me to allow the answers out of time. Accordingly, Respondents Motion to Respond Late is denied.

Furthermore, Division Counsel has challenged the proffered response on the additional basis that it does not

conform to the requirements of Rule 36. As the Division notes, Rule 36 requires that responses be sworn. The attestation handwritten by Respondent Gregory Sullivan does not meet the requirement of Rule 36.

As to Marion Sullivan, the Request for Admissions indicates on its face that they are "...to be answered separately and individually by the Respondents, Gregory and Marion Sullivan..." The Respondents' Response to Request for Admissions is signed only by Gregory Sullivan but purports to be the response of Respondents.[2] Marion Sullivan never responded to the Request for Admissions, timely or untimely, in conformance with the substantive requirements of Rule 36. Marion Sullivan is a party upon whom a request for admissions was served and is required by the Rule to serve a sworn answer upon the requesting party within a ten-day period. Marion Sullivan never signed the Respondent's Response to Request for Admissions. A sworn statement is required by the Rule and necessary so the person filing the response is mindful that he or she must set forth any denial or inability to answer fully based upon facts within his or her personal knowledge. Demers v. Demers, 557 A.2d 1187 (R.I. 1989). In Demers the court held that if a response does not meet the requirements of the rule all of the requests must be deemed to be admitted. Id.

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[2]The proffered response states "Respondents submit their responses to the Department's Request for Admissions, as follows..."

1191. Accordingly, even if I were to allow the response to be filed out of time, the Request for Admissions would be deemed admitted as to both Respondents for the failure of the response to conform to the requirements of Rule 36.

Based on the foregoing, it is hereby

ORDERED

That the Motion to Respond Late to Request for Admissions is **DENIED** and the statements set forth in the Request for Admissions are deemed **ADMITTED**.

Entered as an Administrative Order this 22nd day of April, 1994.

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

CERTIFICATION

I hereby certify that I caused a true copy of the within order to be forwarded, via regular mail, postage prepaid to Gregory Sullivan and Marion Sullivan, 21 Florence Avenue, Norwood, MA 02062 and via interoffice mail to Brian A. Wagner, Esq., Office Legal Services, 9 Hayes Street, Providence, RI 02908 on this 22nd day of April, 1994.

Brian L Stewart