Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island

RE: ARPAD MERVA

AAD No. 93-024/GWE
Notice of Violation No. GW 93-01

DECISION AND ORDER

This matter came before the Administrative Adjudication Division ("AAD") of the Department of Environmental Management ("Department" or "DEM") on a request for a hearing on a Notice of Violation and Order ("NOV") dated March 9, 10, 1996 issued by the Groundwater Section of DEM ("Division") to Arpad Merva ("Respondent").

This matter is properly before the Hearing Officer pursuant to R.I.G.L. Chapter 12 of Title 46 entitled "Water Pollution", Chapter 12.5 of Title 46 entitled "Oil Pollution Control", R.I.G.L. Chapter 17.1 of Title 42, statutes governing the AAD (R.I.G.L. Sec. 42-17.7-1 et seq.), the Administrative Procedures Act (R.I.G.L. Sec 42-35-1 et seq.), the Oil Pollution Control Rules and Regulations ("Oil Regulations"), the Rules and Regulations for Groundwater Quality ("Groundwater Regulations"), and the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for the Department of Environmental Matters ("AAD Rules"). The proceedings were conducted in accordance with the above-noted statutes and regulations.

The NOV alleges that the Respondent, as owner of that certain property located at Dexter Road, East Providence, Rhode Island, otherwise known as Assessor's Plat 204, Parcels 17, 17.1 and 18, and Plat 304, parcel 5, violated the following statues and/or regulations:

1. R.I.G.L. Section 46-12-5 which states:

   Prohibitions.

   (a) It shall be unlawful for any person to place any pollutant in a location where it is likely to enter waters or to place or cause to be placed any solid waste materials, junk, debris of any kind whatsoever, organic or non-organic in any waters.
   (b) It shall be unlawful for any person to discharge any pollutant into the water except as in compliance with the provisions of this Chapter and any rules and regulations promulgated hereunder and pursuant to the terms and conditions of a permit.

2. R.I.G.L. Section 46-12.5-3 which states:

   Prohibitions against oil pollution. -

   (a) No person shall discharge, cause to be discharged, or permit the discharge of oil into or upon the waters or land of the state except by regulation or by permit from the director.
   (b) Any person who violates any provision of this chapter or any rule or regulation or order of the director issued pursuant to this chapter shall be strictly liable to the state.

3. Section 6 of the Oil Regulations, which states:

   Prohibited Activities -

   (a) No person shall place oil or pollutants into the waters of the state or in a location where they are likely to enter the waters of the State except in compliance with the terms and conditions of a permit or order of approval issued by the Director.

4. Section 8 of Groundwater Regulations, which states:

Prohibitions. -

8.01 Groundwater shall be maintained at a quality consistent with its classification. No person shall take actions that violate the standards established in these regulations.

8.02 No person shall cause or allow a discharge of any pollutant to groundwater without the approval of the Director pursuant to these and other Department Regulations.

8.04 No person shall operate or maintain a facility in a manner that is likely to result in a discharge of any pollutant to groundwater without the approval of the Director.

Said NOV seeks to compel Respondent to prepare a plan for, and implement, the remediation and removal of all petroleum products from the waters and land of the State which may exist at the facility.

Respondent requested an adjudicatory hearing on the NOV on March 24, 1993.

The Prehearing Conference was held on December 6, 1995 and the Prehearing Conferene Record was entered by the Hearing Officer on December 8, 1995.

Counsel agreed to the following stipulations of fact:

1. The Respondent, Arpad J. Merva, is the owner of those certain parcels of real property located on or near Dexter Road and/or the Seekonk River in the City of East Providence, Rhode Island, otherwise identified as East Providence Assessor's:

   a. Map 204, Block 01, Parcel 003.00 (2.6 acres) ("Parcel 3");
   b. Map 204, Block 01, Parcel 017.00 (4.435 acres) ("Parcel 17");
   c. Map 204, Block 01, Parcel 017.10 (2.447 acres) ("Parcel 17.1");
   d. Map 204, Block 01, Parcel 018.00 (2.49 acres) ("Parcel 18"); and
   e. Map 304, Block 01, Parcel 005.00 (9.86 acres) ("Parcel 5").

   as depicted in "Exhibit A" attached hereto.[1]

2. The Respondent purchased the above-referenced properties from Northeast Petroleum Corporation on or about September 19, 1985, for the price of EIGHT HUNDRED THIRTY THOUSAND DOLLARS ($830,000.00).

3. Exxon Company and Northeast Petroleum Corporation each operated an oil storage and distribution facility on the properties prior to the Respondent's purchase of the properties.

4. The following environmental reports prepared by GZA on behalf of Newbay Corporation and subsequently submitted to the Department substantially represent the existing subsurface conditions on the subject properties:
   a. Supplemental Studies, Environmental Site Assessment, Proposed Cogeneration Center, East Providence, RI - dated February 1989, prepared by Goldberg-Zoino & Associates, Inc. ("GZA").
   b. United Engineers Requests, Cogeneration Center, East Providence, RI, dated March 1989, prepared by GZA.
   c. Supplemental Evaluation, Proposed Cogeneration Facility, East Providence, RI - dated April, 1991, prepared by GZA, including 2 maps.

[1] A copy of Exhibit A is attached to this Decision.

d. Map - undated, prepared by GZA.

Copies of the above-referenced documents were submitted for inclusion in the administrative record.

5. The Division does not allege that Respondent ever stored or handled petroleum products on the subject properties.

6. The Division does not alleged that the contamination documented in the above-reference documents is the result of business operations conducted at the subject properties following Respondent's acquisition of the properties.

The parties agreed on the admission of the following as Joint Exhibits:

Jt. 1 Copy of Supplemental Studies, Environmental Site Assessment, Proposed Cogeneration Center, East Providence, RI - dated February, 1989, prepared by Goldberg-Zoino & Associates, Inc. ('GZA").

Jt. 2 Copy of United Engineers Requests, Cogeneration Center, East Providence, RI - dated March, 1989, prepared by GZA.

Jt. 3 Copy of Supplemental Evaluation, Proposed Cogeneration Facility, East Providence, RI - dated April, 1991, prepared by GZA, including 2 maps.

Jt. 4 Map - undated, prepared by GZA

The parties also agreed that no exhibits other than the joint exhibits enumerated herein are to be submitted.

Pursuant to the Prehearing Conference Record, the issue to be considered is as follows:

Under the stipulated facts presented by the parties, is the Respondent, Arpad Merva, liable to perform the work ordered in the subject Notice of Violation and Order?

A stipulation was filed by the parties on March 18, 1996 (pursuant to Rule 15(b) of the AAD Rules) wherein the parties agreed "to waive formal hearing procedures in the above-entitled matter and to submit the matter for review and decision on the record as established in the Prehearing Conference Record. Based upon the Stipulations of Fact, Joint Exhibits and Agreed Issues identified in the Prehearing Conference Record, the parties agree that there is no need for the presentation of additional evidence or witness testimony. The issue remaining to be decided in this matter is primarily an issue of law, which issue will be addressed by the parties through the memoranda to be submitted in accordance with the Prehearing Conference Record."

The parties each submitted a Memorandum of Law on February 16, 1996. Respondent submitted his Reply to Division's Post-Hearing Memorandum on March 1, 1996. No reply memorandum was filed by Division.

In accordance with the Stipulation of the parties, no formal hearing procedure was conducted (i.e. no additional evidence or witness testimony was presented), and this matter is decided on the record as submitted by the parties.

Respondent maintains that Division seeks to hold Respondent liable under a strict liability scheme based solely on Respondent's status as the current owner of allegedly contaminated property who has taken no steps to remediate the existing contamination. Respondent basically does not dispute the Division's allegations as to the existence of petroleum product contamination on his property; but he denies having placed, discharged or caused to be discharged any pollutants or oil onto the property or nearby waters.

It is essentially Respondent's position that the pertinent statutes and regulations do not impose strict liability on a property owner who did not engage in any affirmative action resulting in the discharge of petroleum products into the environment. It is argued by Respondent that the statutes and regulations do not, and were

not intended to, impose liability on Respondent solely on the basis of his status as a property owner who has not attempted to remediate contamination which he did not cause.

Division maintains that the contamination of the subject property and the threat to the soils, surface waters and groundwaters of the State is well documented by the third-party engineering studies conducted on the subject property (as demonstrated by the Joint Exhibits), and that the statutes and regulations cited in the NOV prohibit a landowner from maintaining his property in a condition that endangers the soils and waters of the state.

It is the Division's position that the statutes and regulations (for which Respondent was cited in the NOV) not only prohibit the initial discharge of contaminants to the environment, but also prohibit landowners from failing to act and thereby allowing contaminants to remain on their property in such a fashion that the property itself becomes a source of contamination to adjoining land and waters.

Division argues that the statutes and regulations at issue in this matter should be interpreted in harmony with the common law from which they originated, and that said statutes and regulations should be construed in harmony with the common law doctrine of public nuisance when it comes to the question of abating conditions that harm or threaten to harm resources that the state is obligated to protect and preserve for public good. It is also argued by Division that the NOV does not "penalize" Respondent in any way, but merely requires the Respondent to remediate his property to a point that the present threat to the soils, surface waters and groundwaters of the state is abated.[2]

The Respondent's Memorandum of Law makes reference to the third-party action which he commenced at the AAD against Exxon Company, USA, alias Fuel Storage Corporation, and Northeast Petroleum[3]; and Division's Post-Hearing Memorandum makes reference to the role that the contamination played in negotiating the sale of the property. The prior use of the premises as an oil storage and distribution facility may well have affected the purchase price for said property, but the evidence introduced does not establish that Respondent must have known of the existing contamination on said property prior to his purchase of same. However, any possible third-party liability or Respondent's prior knowledge of the contamination is irrelevant to the issue to be decided in this matter. In any event, any reference to facts or events not included in the stipulated facts nor included in the evidence introduced have been ignored by the Hearing Officer.

The Division acknowledges that Respondent is not responsible for the initial placing of oil/petroleum on the subject property; however, Division contends that Respondent is responsible for permitting said contamination to leak, emit, discharge, escape and/or leach from his property into the surface and groundwaters of the State.

The parties stipulated that the environmental reports prepared by Goldberg-Zoino & Associates, Inc. (the joint exhibits) substantially represent the existing subsurface conditions on the subject properties; however, it was necessary for the Hearing Officer to examine said reports in order to make the requisite findings of fact concerning said contamination.

Joint Exhibit 1 is a copy of the supplemental report (dated February 1989) summarizing the results of the environmental site assessment conducted by GZA to evaluate whether hazardous material or oil is present in the soil or groundwater at the site. Said report summarizes the studies reported initially in their November 1988 report, and details the results of additional work completed in early 1989.

This February 1989 report contains a description of the site, a history of the subject property, the geohydrologic observations, and the explorations and testing conducted. The results of soil and groundwater surveys, sampling procedures and various other tests are detailed in said report as well as the conclusions

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[2] The NOV did not provide for the assessment of an administrative penalty against Respondent, and none is sought by Division.

[3] The third-party action was dismissed by the AAD since such third-party practice is beyond the scope of AAD jurisdiction.

and recommendations of GZA. This report states that the subject property is located at the intersection of Dexter and King Philip Roads near the waterfront in East Providence, Rhode Island. Omega Pond is located approximately 1000 feet to the north, and the Seekonk River is approximately 500 feet to the west. The subject property once contained large above-ground storage tanks which were part of an oil storage facility formerly owned by Exxon Corporation and Northeast Petroleum. These tanks, which are last known to have stored predominately No. 2 and No. 4 fuel oils, were dismantled during the years 1983 and 1984 and removed from the site. At present, the property is essentially bare except for traces of piping, manifolds and footings.

The site is located in an area of East Providence that is described on United States Geological Survey ("USGS") maps as glacial outwash deposits. Natural soil conditions are described as medium to coarse sand and gravel in the upper strata with fine sand, silt, and clay at depth. USGS prepared groundwater contours generally slope across the site from southeast to northwest, suggesting that regional groundwater flow is to the northwest toward the Seekonk River.

A subsurface exploration program was conducted by GZA to gather information on the presence of hazardous materials and oil in the soil and groundwater beneath the site and to characterize site geology. Approximately 27 test boring procedures were performed on the site. Observation wells were installed in twelve of the borings, and a survey was performed to determine relative groundwater elevations. These suggest a flow to the northwest and north toward the Seekonk River and Omega Pond. This agrees with the surficial drainage pattern observed in aerial photographs and is consistent with the flow pattern implied by the USGS topographic contours.

Subsurface and groundwater samples were collected in conjunction with the boring explorations. They were screened in GZA's Water Quality Laboratory for volatile organic compounds ("VOC"). The studies conducted indicated the presence of BTEX Compounds (i.e. benzene, toluene, ethyle benzene and the xylenes) and methyl-t-butyl ether. These compounds, when found together, are suggestive of the presence of gasoline.

A soil gas survey was conducted on September 23, 1988 to preliminarily identify possible source areas of VOC contamination and delineate the extent of any VOC contamination in the soil at shallow depths in certain portions of the site. Based on the findings compiled during the first phase of this study, supplemental explorations, sampling, screening and analyses were performed in order to further evaluate the presence of oil or hazardous materials in the soil and groundwater at the site.

Groundwater sampling procedures were conducted at each of the monitoring wells to evaluate the presence of free-floating product layer. Recoverable petroleum product was observed in two of the fifteen observation wells. On January 16, 1989, these wells recorded a floating product thickness of 0.3 feet (4 inches) in one well and 0.6 feet (7 inches) in the other well.

Gas chromatograph screening indicated fuel oil and gasoline contamination. Oil "fingerprint" analysis was performed on groundwater samples from certain locations. Qualitative identification of the contamination at one location on the site indicates a mixture of gasoline and kerosene; another location is indicative of No. 2 fuel oil; and low levels of No. 2 fuel oil contamination and trace levels of petroleum contamination were detected at other locations. GZA's assessment identified the presence of VOCs indicative of gasoline and other petroleum products in soil and groundwater at the site. It is GZA's opinion that the localized areas of contamination resulted from past site activities.

Joint Exhibit 2 is a copy of the report dated March 1989, which was prepared by GZA to address certain issues raised by United Engineers & Constructors, Inc. It includes certain supplemental information and documents, as well as the complete laboratory analysis package performed by an independent laboratory (Enseco Incorporated).

Joint Exhibit 3 is a copy of the supplemental evaluation report dated April 1991 (including 2 maps), which details the work completed at the site by GZA. The objective of this work was to collect and analyze additional geohydrologic and chemical data from recently completed studies at the site. Said information was to be used

to decide if floating petroleum product recovery systems should be installed in the affected area on-site.

The April 1991 report states that GZA conducted an environmental assessment at the site in November of 1988; and that the February 1989 and March 1989 studies identified the presence of floating petroleum product in certain monitoring wells located in the central and western portion of the site. According to this report, a meeting took place on August 10, 1990 between DEM, GZA and Newbay Corporation to discuss the findings of these reports. Additional work tasks were agreed upon to provide sufficient data to initiate a discussion on a preliminary design of a floating product recovery system, if necessary.

On September 12, 1990, GZA submitted a Work Plan to DEM which provided the scope of work necessary and the tasks to be performed to provide the requisite data to resolve the technical issues raised at the August 10, 1990 meeting. This plan was approved by DEM on October 29, 1990. The objective of this work was to collect and analyze data from the recently completed studies. This report summarized the results of the completed tasks as follows: (1) Twelve additional borings were conducted and eight monitoring wells were installed to evaluate the extent of the free floating product; (2) Total VOC concentrations ranging from 8.3 to 100.4 ppm were detected in five of the eight samples analyzed. The chromatograph indicated the presence of No. 2 fuel oil in these samples; (3) Total VOC concentrations, ranging from 1.09 to 100.4 pm, were detected in seven of the ten groundwater samples. The chromatograph indicated the presence of No. 2 fuel in all samples, with a mix of gasoline in certain samples; (4) The depth of groundwater across the affected area ranged from approximately 8 feet to 37 feet. The maximum product thickness reading in the five wells with product ranged from a skim of oil (0.01 feet) to approximately 2.38 feet, and an average of 0.4 feet across the area. Five of the ten wells did not have floating product; (5) Rising head permeability tests were conducted on four wells. Based on these tests, and boring log data, the material has relatively low to moderate hydraulic conductivity, approximately 0.5 to 5 feet per day; (6) The direction of groundwater flow across the affected area is from east to west toward the Seekonk River. Hydraulic gradients observed on the dates of groundwater measurement average approximately 0.03 feet per foot; (7) Based upon the estimated hydraulic conductivity (0.5 feet/day), hydraulic gradient (0.03 feet/foot), and assuming an effective porosity for the unconsolidated sands of 0.3, yields a seepage velocity of approximately 18 feet per year using a higher conductivity value (5 feet/day), the flow velocity for groundwater would be 180 feet/year. By applying the retardation factor, the rate would be between 9 to 90 feet/year or an average of approximately 50 feet/year; and (8) Field measurements indicate that recoverable product volumes ranging from 2,000 to 15,000 gallons. The estimates of recoverable product using the computer program are within the 2,000 to 15,000 gallon range.

The April 1991 report identifies two separate areas of relatively significant petroleum contamination on the site. Based on floater thickness readings and the levels of VOC and petroleum hydrocarbon contamination in soil and groundwater, the two areas are designated as: (1) the west/central portion of Parcel C-1, combined with the east/central portion of B-3; and (2) the western portion of B-3. The two areas are considered to be separate plumes by comparing floater thickness readings and the levels of contamination, if any, at these two locations to other surrounding locations. GZA estimated that the leading edge of the contaminant plume was located between the railroad tracks and the Seekonk River (which would be directly adjacent to the said river).

Free-floating product was observed in monitoring wells located within an area approximately 500 by 100 feet or 50,000 square feet. Product thickness in the wells located in this area ranged from 0.01 feet to 2.38 feet, and the product volume in the aquifer was estimated to be 3,800 cubic feet or 28,000 gallons. Based on the groundwater contours, the predominant direction of groundwater flow appears to be across the affected area from east to west toward the Seekonk River.

The laboratory results from 1988, 1989 and 1991 sampling rounds identified the type of petroleum contamination as fuel oil (No. 2 and kerosene) with lesser amounts of gasoline. The source(s) of the contamination appear to be from the above-ground storage tanks located at or upgradient of these two identified areas of contamination, which were taken out of service seven (7) years ago. Potential off-site sources are unlikely as a result of previous explorations and well installations along the border of both parcel C-1 and B-3.

Joint Exhibit 4 is an undated map prepared by GZA which essentially demonstrates: (1) the locations of borings performed by Guild Drilling, Inc. in 1988 and observed by GZA personnel; (2) the observation wells installed; (3) the borings performed by Guild Drilling, Inc. in 1987; (4) the shallow soil gas explorations performed by GZA in 1988; (5) the former above-ground storage tank locations; (6) the property lines; and (7) the inferred direction of groundwater flow.

The Joint Exhibits clearly establish that substantial petroleum contamination presently exists on the subject property, and that said contamination is moving toward the Seekonk River. This contamination obviously arose prior to Respondent's purchase of said property, and the only question for decision herein is whether the pertinent statutes and regulations impose liability on Respondent for the remediation and removal of said petroleum contamination.

The resolution of this matter turns on the issue of statutory interpretation. It is a primary canon of statutory construction that statutory intent is to be found in the words of a statute if they are free from ambiguity and express a reasonable meaning. The statutory terms must be given their plain and ordinary meaning unless a contrary intent is clearly shown on the face of the statute. Little v. Conflict of Interest Commission, 121 R.I. 232 (1979).

In construing a statute, it is necessary to establish and effectuate the intent of the Legislature. Such intent must be determined from an examination of the language, nature and object of the statute. Absent a contrary intent, the words in the statute must be given their plain and ordinary meaning. Furthermore in construing the statute, a construction should be adopted that does not effect an absurd result. Brouillette v. DET, 677 A,2d 1344 (R.I. 1996).

Applying the above principles of statutory interpretation to the instant matter, a ruling that Respondent is not required to maintain his property in a condition that does not endanger the soils and water of the state would be contrary to the intent of §46-12-5(a) and (b) and §46.12.5-3 (a) and (b), as well as the intent of both the Water Pollution Act and the Oil Pollution Control Act as a whole. The obvious purpose of the Water Pollution Act is to prohibit unauthorized discharges of pollutants into the waters of the state; and the stated purpose of the Oil Pollution Control Act is to prohibit unauthorized discharges of oil into, or upon the waters or land of the state, and to hold violators strictly liable to the state. See §46-12.5-6(a)(2) (the purpose of the Oil Pollution Control laws is "that the citizens of this state should not have to bear the burdens of the cleanup and the losses of economic livelihood that result from the discharge of oil in any degree"). See also §45-12.5-7(a) ("In addition to penalties established in this chapter, any person who violates or causes or permits to be violated a provision of this chapter or rule, regulation or order pursuant thereto, shall be strictly liable to the state for these costs and expenses").

The expressed intent of the legislature is that the discharge of oil in any quantity may have a substantial permanent or negative impact on the public health and environment and the economy of this state; and that the Rhode Island citizenry should not have to pay for cleanups resulting from the discharge of oil. Accordingly, Respondent's negative conduct in refusing to clean up known contamination that is having continuous on and off-site impacts constitutes a violation of the laws cited in the NOV. A holding to the contrary would create a result not intended by the Legislature.

Although §46-12.5-6(d) provides a defense to administrative penalties in some instances (when the discharge occurred solely as a result of an act of a third person who is not made jointly and severally liable), this defense specifically applies to administrative penalties and not to remediation. Although the cost of clean-up may well be substantial, it cannot be equated with imposition of a penalty or fine.

The courts in other jurisdictions wherein somewhat similar legislation is involved, have relied heavily on their interpretation of the specific language of the statutes under consideration. The term "disposal" as used in the Comprehensive Environmental Response, Compensation and Liability Act, was held not to include "passive migration" in a landfill. U.S. v. CDMG Realty Co., CA 3, No. 95-5505, 9/27/96. However, the court pointed out that at issue in said case was the meaning of "disposal"; and also that other language in said

legislation was significant in the interpretation of the legislation under consideration in said matter.

The statutes and regulations at issue in the instant matter are somewhat similar in that they contain provisions relating to the dissemination of pollutants in the environment, and each contain prohibitions relating to oil or petroleum pollution. The term "discharge" is not specifically defined by the Oil Pollution Act; but it is included in the definition of the term "Release", which term by definition in §46-12.5-1(h) includes "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaking, dumping or disposing into the environment". By and through Respondent's willful refusal to remove or otherwise prevent the migration of known, substantial, petroleum contamination from his property, Respondent is permitting that contamination to leak, emit, discharge, escape and/or leach from his property into the surface and groundwaters of the state.

The Oil Pollution Regulations contain provisions similar to those contained in the Oil Pollution Act. Section 6 of the Oil Pollution Regulations provides that persons are prohibited from "placing oil or pollutants into the waters of the state or in a location where they are likely to enter the waters of the state... This prohibition shall include, but not be limited to, releases, discharges or placement of pollutants...". "Place or Release", is defined by § 5 of the Oil Pollution Regulations as "adding, spilling, releasing, leaking... emitting...discharging...escaping, leaching...or disposing into the environment of oil, such that oil is likely to enter the waters of the state."

The Water Pollution Act provides that "It shall be unlawful for any person to place any pollutant in a location where it is likely to enter waters..." and that "It shall be unlawful for any person to discharge any pollutant into the water...". This statute was obviously intended to empower the Director of DEM to prevent, control, and/or abate new or existing pollution of the waters of this state.

The Groundwater Regulations provide for the classification of the groundwater resources for the State of Rhode Island; and their declared purpose is to protect and restore the quality of the state's groundwater resources for use as drinking water and other beneficial uses, and to assure protection of the public health and welfare and the environment. Section 8.01 requires that groundwater shall be maintained at a quality consistent with its classification, and prohibits all actions that violate or cause to be violated the standards established in said regulations. Section 8.02 prohibits discharging or allowing the discharge of any pollutant to groundwater. Section 8.04 specifically prohibits the maintenance of a facility in a manner that is likely to result in a discharge of any pollutant to groundwater.

The Groundwater Regulations mirror the language of the Oil Pollution Act on the issue of when a release or discharge to groundwater occurs. "Discharge to groundwater" is defined by the Groundwater Regulations as "the intentional, negligent, accidental, or other release of any pollutant onto or beneath the land surface, in a location where it is likely to enter the groundwater of the state". "Release" is defined as "any spilling, leaking, pumping, pouring, emitting, emptying, injecting, escaping, leaching, dumping, or disposing of any pollutant onto or below the land surface. For purposes of these regulations, release also includes any storage, disposal, or abandonment of any substance or material in a manner which presents a substantial threat of release as herein defined." The definition of "Pollutant" in said regulations includes "petroleum or petroleum products, including but not limited to oil".

The pertinent statutes and regulations were enacted under the authority of the state's police power to protect the public health and environment. The statutes and regulations at issue emerge out of the common law doctrine of public nuisance, are similar to said doctrine when it comes to liability, and should be interpreted in harmony with the common law from which they originated. See Gillig, Common Law Public Nuisance in State Environmental Enforcement, NATIONAL ENVIRONMENTAL ENFORCEMENT JOURNAL, (October 1993).

The AAD obviously has no authority to entertain common law causes of action, but the statutes and regulations at issue should be construed in harmony with the common law doctrine of public nuisance when it comes to the question of abating conditions that harm or threaten to harm resources that the state is obligated to protect and preserve for the public good. As with the enforcement of the pertinent statutes and regulations, a sovereign's actions to abate a public nuisance is an exercise of its police power governed by

strict liability. Liability to abate a public nuisance is strict in the sense that once the existence of the nuisance is established, the nuisance must be stopped. Liability is based on the existence of the nuisance and is not a question of fault for causing the nuisance. Successors in interest who did not cause a nuisance can be held equally liable for the cessation of that nuisance as can the predecessors who actually caused the nuisance. Friends of the Sakonnet v. Dutra, 749 F.Supp 381.

The Water Pollution Act and the Oil Pollution Control Act are similar statutes; and although not identical in their provisions, the two are designed to achieve similar goals. In construing the provisions of statutes that relate to the same or to similar subject matter, an attempt should be made to harmonize each statute with the other so as to be consistent with their general scope. This rule of construction applies even though the statutes in question (may) contain no reference to each other and (even though they) are passed at difference times. Kaya v. Partington, 681 A.2d 256 (R.I. 1996).

A review of the pertinent statutes and regulations in their entirety demonstrates that they are not as limited as Respondent contends. They do not require affirmative conduct in order to impose liability on Respondent for the remediation of the existing contamination. They should not be read so as to effectuate the absurd result that one who allows the continuing migration of pollutants from his property into the waters of this state can avoid responsibility therefore merely because he did not originally spill the pollutant.

The maintenance of property in such a condition that the property itself becomes a source of contamination that endangers the soils and waters of the state is prohibited by the statutes and regulations for which Respondent was cited, and Respondent should be held liable for said contamination despite the fact that Respondent did not place the contamination on said property initially.

FINDINGS OF FACT

After consideration of the stipulated facts and the documentary evidence of record, I find as fact the following:

The stipulated facts (1 through 6) as previously recited are incorporated herein as findings of fact; and after review and consideration of the documentary evidence of record, I find as additional facts the following:

7. The Seekonk River is located approximately 1000 feet west of the subject property.

8. The facility formerly located at the site had utilized large above-ground storage tanks for the storage of predominantly No. 2 and No. 4 fuel oils prior to Respondent's purchase of the subject property.

9. The storage tanks were dismantled and removed from the site during 1983 and 1984.

10. The subject property is essentially bare at the present time, except for traces of piping, manifolds and footings.

11. Environmental site assessments were conducted at the subject property.

12. A subsurface exploration program was conducted by GZA to determine the presence of hazardous materials and oil in the soil and groundwater beneath the site.

13. Test boring procedures were performed at the site and observation wells were installed in some of said borings.

14. The soil at the site consists of medium to course sand and gravel in the upper strata, and fine sand, silt, and clay at depth.

15. The groundwater contours generally slope across the site from southeast to northwest, and the regional groundwater flows northwesterly toward the Seekonk River.

16. Soil samples were collected on May 14, 1990, and analyzed for total petroleum hydrocarbons ("TPH"), polychlorinated biphenyls ("PCB"), and volatile organic compounds ("VOC").

17. The results of the soil samples showed TPH concentrations of 16,500 and 40,900 parts per million ("ppm"), VOC concentrations including benzene, at 1.7 ppm. toluene at 8 .. 7 and 8 ppm, ethylbenzene at 14 and 9.5 ppm, and xylene at 69 ppm and 61 ppm.

18. The results of bi-monthly well-monitoring show the presence of free phase floating product in five monitoring wells covering an area of approximately 50,000 square feet.

19. On September 12, 1990 GZA submitted a workplan "designed to collect and analyze additional data that will lead to the implementation of a product recovery system within the two affected areas, if necessary".

20. The results of the additional investigations conducted pursuant to the aforesaid workplan confirmed the presence of approximately 28,000 gallons of free phase product.

21. There are two areas of substantial oil/petroleum contamination, as well as other less significant areas of oil/petroleum contamination, present in the soils and groundwater of the subject property.

22. The oil/petroleum contamination on the subject property resulted from past site activities.

23. There are no potential sources of off-site contaminants.

24. There are two localized areas of relatively significant petroleum contamination on the subject property. The two areas are considered to be separate plumes, and the leading edge of the contaminant plume is located between the railroad tracks and the Seekonk River (directly adjacent to said river).

25. The depth of the groundwater across the affected area ranges from approximately 8 feet to 37 feet.

26. The maximum product thickness in the five wells with product ranged from 0.01 feet to approximately 2.38 feet, and an average of 0.4 feet across the area.

27. The groundwater in the central and western portion of the subject property contains a significant layer of recoverable floating petroleum product.

28. The product has a relatively low to moderate hydraulic conductivity, approximately 0.5 to 5 feet per day.

29. The direction of the groundwater flow across the affected area is from east to west toward the Seekonk River.

30. The rate of flow velocity for the groundwater at the site is calculated at up to 180 feet per year.

31. The amount of recoverable petroleum product on the subject property is between 2,000 to 15,000 gallons.

32. The petroleum contamination on Respondent's property is migrating into the groundwater and waters of the state.

33. The Respondent is permitting the petroleum contamination present on his property to leak, emit, discharge, escape and/or leach from his property into the surface and groundwaters of the state.

34. The Respondent is maintaining the subject property in such a manner that the property itself has become a source of petroleum contamination to adjoining land and waters.

35. The substantial petroleum contamination existing on the subject property is moving towards the Seekonk River.

36. The ongoing migration of petroleum contaminants from Respondent's property is impacting or threatening to impact the surface and groundwaters of the state.

37. Free-phase, floating product recovery systems should be installed on the subject property.

38. The Order requested by Division in the NOV that Respondent prepare a plan for, and implement, the remediation and removal of all petroleum products from the subject property is necessary to assure compliance with the Statutes and Regulations.

CONCLUSIONS OF LAW

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

1. Arpad Merva is the owner of the subject properties.

2. DEM has jurisdiction in this matter.

3. The Groundwater Section has proved by a preponderance of the evidence that The Respondent, Arpad Merva, is discharging and permitting the discharge of a pollutant/oil into and upon the waters and land of the state in violation of the statutes and regulations.

4. The Groundwater Section has proved by a preponderance of the evidence that the contamination on Respondent's property is discharging into the soils and groundwaters of the state, and that said contamination is moving toward the Seekonk River and is impacting or threatening to impact the surface and groundwaters of the state.

5. The Division, has proved by a preponderance of the evidence that the Respondent, at its subject property, is liable for the violations of R.I.G.L. 46-12-5(a) and (b), 46-12.5-3(a) and (b), Section 6(a) of the Oil Regulations, and Sections 8.01, 8.02 and 8.04 of the Groundwater Regulations, as alleged in the NOV.

6. The statutes and regulations, for which Respondent was cited in the NOV, impose liability on Respondent for the remediation and removal of the petroleum contamination on Respondent's property.

7. DEM is entitled to the relief requested in the NOV.

8. The NOV should be affirmed in its entirety (except as modified herein as to dates and times).

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

ORDERED

1. That the Notice of Violation and Order No. GW 93-01 issued to Respondent dated March 9, 10, 1996 be and is hereby sustained.

2. That within ten (10) days of this Order, Respondent, Arpad Merva, shall submit to the Groundwater Section of DEM documentation that he has retained the services of a qualified environmental consultant to conduct a detailed field investigation and prepare a plan for the remediation and removal of all petroleum products from the waters and land of the State which may exist at the facility.

3. That within thirty (30) days of this Order, Respondent shall submit to the Groundwater Section of DEM a DETAILED time schedule prepared by the environmental consultant for completion of the following tasks:

    a. Installation of additional monitor wells to determine and delineate the full extent of oil contamination both on and emanating from the facility;

    b. A proposed sampling schedule and chemical parameter sampling methodology for new and existing monitor wells;

    c. Submittal of a Corrective Action Plan that details and specifies a groundwater treatment system capable of recovery of free phase product and the removal of dissolved phase petroleum products from waters of the State;

    d. Schedule for installation and implementation of the proposed groundwater treatment system; and

    e. Such other documentation, data or information as the Director may require.

4. That Respondent shall notify the Groundwater Section of DEM at least 48 hours prior to commencing any excavation, well installation, or replacement or repair of any facility component so that a DEM representative may be present at the site.

Entered as a Recommended Final Agency Order this 12th day of November, 1996.

Joseph F. Baffoni
Hearing Officer

I hereby adopt the foregoing as a Final Agency Order this 11 day of December, 1996.

Timothy R. E. Keeney
Commissioner