

III. ISSUE

Whether the Respondents violated R.I. Gen. Laws § 46-12-3(21) and/or § 8.04 of *Rules and Regulations For Underground Storage Facilities Used For Petroleum Products and Hazardous Materials* (“UST Regulation”).²

IV. MATERIAL FACTS AND TESTIMONY

The parties agreed to the following facts:

The Department issued a Notice of Violation (“NOV”) dated April 30, 2018 to the Respondents regarding their underground storage tanks (“UST”) alleging violations of R.I. Gen. Laws § 46-12-3(21) and/or § 8.04 of the UST Regulation. Department’s Exhibit One (1) (NOV).

The property (“Property”) at issue is located at 644 Putnam Pike, Assessor’s Plat 3, Lot 8 in Smithfield, R.I. The Property includes a motor fuel filling station. Fuel Depot is the owner of the Property. Sahyouni owns and operates the facility.

The facility is registered with the Department and is identified as UST Facility number 00879. At the time of the alleged violations, there were three (3) USTs. Each tank held 8,000 gallons of gasoline and were singled-walled with no secondary containment. The USTs were operated past December 22, 2017. The tanks ceased operating in 2018 and were removed in 2018.

The sole issue at hearing appeared to be what was the appropriate penalty for the alleged violations except that at hearing, Sahyouni disputed when the tanks were installed believing them to have been installed in 1985 rather than 1984 as believed by the Department. The parties agreed that the tanks had been removed and replaced in 2018.

Tracey Tyrrell (“Tyrell”), Supervising Environmental Scientist, testified on behalf of the Department. She testified that she has been employed at the Department since 1989 and has held

² This regulation was in effect from April 26, 2011 to November 20, 2018 and was applicable at the time of this incidence.

her current title since 2001. She testified that she supervises the UST compliance program and other programs. She testified that she prepared the NOV for this matter based on the Department's inspection of the Property conducted on February 9, 2018. Department's Exhibit Four (4) (inspection). She testified that the purpose of the inspection was to verify whether the facility was operating its USTs past the December 22, 2017 deadline. She testified that since the USTs were still in operation, the NOV was issued. She testified that the NOV cited the Respondents with two (2) violations: 1) R.I. Gen. Laws § 44-12-3(21) which requires single-walled USTs and product pipelines installed before May 8, 1985 to no longer remain in use after December 22, 2017; and 2) UST regulation § 8.04(A) requiring that owners and operators of single-walled underground storage tanks and product piping installed before May 8, 1985 be permanently closed by December 22, 2017.

Tyrell testified that the Department maintains a registry of USTs and that the certificate of registration for USTs shows when tanks were installed and were inspected. She testified that the Respondents' USTs' certificate of registration is dated April 15, 1985 with registration number 879 and it states that three (3) new 8,000 gallon tanks along with new piping were installed in September, 1984. Department's Exhibit Five (5) (certificate of registration). She testified that the 1984 date is significant since the UST Regulation requires that single-walled underground storage tanks installed prior to May 8, 1985 be removed by December 22, 2017.

Tyrrell testified that the Department seeks a penalty of \$37,955. She testified that the NOV includes a penalty matrix worksheet that explains how that penalty was calculated. She testified that she based her calculations on 250-RICR-130-00-1 *Rules and Regulations for Assessment of Administrative Penalties Compliance and Inspection* ("Penalty Regulation"). She testified that the Department assessed for a violation of Rhode law and for violation of the UST Regulation.

She testified that the violations were directly related to health, safety, welfare of the environment so fell under type 1 for penalties. She testified that the Penalty Regulation provides that different factors be taken into consideration when assessing an administrative penalty based on the deviation from the standard. She testified that based on the Penalty Regulation, the following factors were taken into consideration: 1) the extent to which the Respondents were out of compliance [the three (3) single-walled USTs operated past the deadline posed a threat to environment]; 2) environmental conditions; 3) toxicity; 4) duration of violations [four (4) months past the deadline (operation and failure to remove)]; 5) failure to prevent or mitigate; and 6) negligence because had control over the Property and failed to act. She testified that the Penalty Regulation provides for a penalty of up to \$25,000 per tank. She testified that since there were three (3) tanks with a high potential risk it was categorized as a major violation. However, she testified that since there was no information about the actual impact to the environment, the assessment was made at the lower end at \$12,500 per tank. She testified she believes that the Penalty Regulation clearly sets out how penalties are calculated. Tyrrell testified that the penalty could be assessed per day but instead the penalty was assessed per tank. She testified that there was a penalty associated with the economic benefit to the Respondents from non-compliance based on the money that could have been made because the UST facility was out of compliance from December, 2017 to May, 2018 and based on the Department's model that came to \$455 so the total penalty is \$37,955.

Tyrrell testified the Respondents received written notices in September 2016, April 2017, and November 2017 informing them of the law and regulation about the December 22, 2017 deadline. She testified that the Department regulations allowed for the temporary closure of USTs for those not removed by the December 22, 2017 deadline so that they would not be considered abandoned. She testified that procedure was to notify the Department and take them out of service

and empty the tanks and one could have had up to six (6) months of temporary closure with a chance to renew for another six (6) months. She testified that the Respondents never requested to put the tanks in temporary closure of up to a year without being assessed an administrative penalty for not being removed after December 22, 2017.

On cross-examination, Tyrrell testified the maximum penalties are up to \$25,000 per day per violation. She testified that based on the deviation factors, the maximum penalty was not assessed. She testified that the UST Regulation required the closure of single-walled steel tanks by December 22, 2017; though, the original statute was enacted in 2005 with a ten (10) year deadline so initially the deadline was in 2015 but legislature extended it so it was a 12 year period for single-walled tanks to be closed and removed.

Sahyouni was called to testify by the Department. He testified that he received the NOV and operated the three (3) USTs after December 22, 2017 through June 9, 2018 when he ceased operating the tanks. He testified that he did not put the tanks into temporary closure prior to December 22, 2017.

Sahyouni testified on his behalf. He testified that when the Department inspected the Property in February, 2018, he was not told that he had to close. He testified that he and a Department approved technician kept monitoring the tanks and there were no leaks or spills. He testified that he kept operating to support his family. He testified that he tried to sell his house to replace the tanks but did not sell the house in time. He testified that he got brand new piping in 2001 but it was too expensive to change the tanks then. He testified that he is in debt and has a mortgage on his house and about \$235,000 in loans for his business. He testified he cannot afford the administrative penalty. He testified if he was told about the penalty up front, he would have closed permanently. He testified he has been trying to replace the tanks since 2016

On cross examination, Sahyouni testified that he took over the business in 2001 and has been operating it since then. He testified he received notices prior to the December 22, 2017 deadline advising that the deadline was coming up. He testified he put his house on the market in 2014, and he bought his house in 2015, so it is actually since 2014, he has been trying get the money. He testified he made money from the sale of gas after the December 22, 2017 deadline.

V. DISCUSSION

A. **Legislative Intent**

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047, 1049 (R.I. 1994). See *Parkway Towers Associates v. Godfrey*, 688 A.2d 1289 (R.I. 1997). If a statute is clear and unambiguous, “the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.” *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. Dept. of Environmental Management*, 553 A.2d 541 (R.I. 1989) (internal citation omitted). In cases where a statute may contain ambiguous language, the Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131 (R.I. 1998). The statutory provisions must be examined in their entirety and the meaning most consistent with the policies and purposes of the legislature must be effectuated. *Id.*

B. **Standard of Review for an Administrative Hearing**

It is well settled that in formal or informal adjudications modeled on the Federal Administrative Procedures Act, the initial burdens of production and persuasion rest with the

moving party. 2 Richard J. Pierce, *Administrative Law Treatise* § 10.7 (2002). Unless otherwise specified, a preponderance of the evidence is generally required in order to prevail. *Id.* See *Lyons v. Rhode Island Pub. Employees Council 94*, 559 A.2d 130, 134 (R.I. 1989) (preponderance standard is the “normal” standard in civil cases). This means that for each element to be proven, the fact-finder must believe that the facts asserted by the proponent are more probably true than false. *Id.* When there is no direct evidence on a particular issue, a fair preponderance of the evidence may be supported by circumstantial evidence. *Narragansett Electric Co. v. Carbone*, 898 A.2d 87 (R.I. 2006).

C. Relevant Statute and Regulation

R.I. Gen. Laws § 46-12-3 provides in part as follows:

Powers and duties of the director. In addition to the other powers granted the director of the department of environmental management herein, the director shall have and may exercise the following powers and duties:

(21) To promulgate and enforce rules and regulations to govern the location, design, construction, maintenance, and operation of underground storage facilities used for storing petroleum products or hazardous materials to prevent, abate, and remedy the discharge of petroleum products and hazardous materials into the waters of the state; provided that all underground storage tanks and associated piping installed after September 1, 1991 shall provide for secondary containment in a manner approved by the director; and provided, that single-walled tanks and/or piping installed prior to May 8, 1985, shall be permitted to remain in use until December 22, 2017, and single-walled tanks and/or piping installed between May 8, 1985, and July 20, 1992, shall be permitted to remain in use for thirty-two (32) years from the date of installation if the owner/operator of the single-walled tank or piping performs an annual facility compliance inspection to ensure structural integrity. ***

The UST Regulation provides in part as follows:

8.04 Mandatory Deadline for Permanent Closure of Single-Walled UST Systems (Tanks and/or Piping): Except as provided in Rule 8.01, all existing tank and piping systems without secondary containment shall be permanently closed as follows:

(A) Single-walled tanks and/or piping installed prior to May 8, 1985 shall be permanently closed by December 22, 2017.

The Penalty Regulation provides in part as follows:

1.10 Assessment of Administrative Penalty - Calculation

A. The amount of the penalty will be calculated based on the factors enumerated below. The factors set forth in R.I. Gen. Laws § 42-17.6-6 shall be considered when calculating the Type of Violation and Deviation from the Standard as set forth below.

1. The penalty may be based on the gravity of the violation. That portion will be calculated according to the applicable "Penalty Matrix" in the Appendix § 1.14 of this Part. The applicable penalty range is reached by first determining the "Type of Violation" and the "Deviation from the Standard" of the alleged violation.

a. "Type of Violation" - refers to the nature of the legal requirement allegedly violated.

(1) Type I violations include violations of legal requirements identified by the Director as directly related to the protection of the public health, safety, welfare or environment. Such violations include, but are not necessarily limited to, acts which pose an actual or potential for harm to the public health, safety, welfare or the environment; acts or failures to act which are of major importance to the regulatory program; any failure to obtain a required permit, license or approval from the Director; any failure to report an unauthorized activity which actually or potentially threatens the public health, safety, welfare or the environment; any failure to take remedial action to mitigate a known or suspected harm; and/or any failure to comply with an order of the Director which is presently enforceable.

b. "Deviation from the Standard" - refers to the degree to which the violation is out of compliance with the legal requirement allegedly violated. The Deviation from the Standard may be determined without consideration of factor (I) enunciated below in cases of strict liability. In all other cases, the Department's assessment of whether a violation is a minor, moderate or major deviation from the standard is based upon an evaluation of one or more of the following factors except to the extent already considered: (1) The extent to which the act or failure to act was out of compliance; (2) Environmental conditions; (3) The amount of the pollutant; (4) The toxicity or nature of the pollutant (5) The duration of the violation; (6) The areal extent of the violation; (7) Whether the person took reasonable and appropriate steps to prevent and/or mitigate the non-compliance; (8) Whether the person has previously failed to comply with any regulations, order, statute, license, permit or approval issued or adopted by the Department, or any law which the Department has the authority or responsibility to enforce; (9) The degree of willfulness or negligence, including but not limited to, how much control the violator had over the occurrence of the violation and whether the violation was foreseeable; (10) Any other factor(s) that may be relevant in determining the amount of a penalty, provided that said other factor(s) shall be set forth in the Notice of Violation or other written notice of the assessment of a penalty.

3. The Economic Benefit from Non-Compliance. The penalty shall include an amount intended to offset the economic benefit of non-compliance.
a. Such an amount may include, but not be limited to: (1) The cost of complying; (2) The cost of equipment needed to comply; (3) Any associated operation and maintenance costs; (4) The costs of studies needed to achieve compliance; (5) Any other delayed or avoided costs including, interest, market or competitive advantage over other regulated entities which are in compliance.

D. Arguments

The Department argued that Sahyouni operated the three (3) USTs installed in 1984 past the deadline of December 22, 2017 and failed to permanently close the tanks so that he violated said statute and regulation. The Department argued that the penalty requested is consistent and reasonable under the Penalty Regulation.

While Sahyouni did not file a brief, at hearing he requested that the penalty be lower and fairer since he believed it was too high.

E. Whether Sahyouni Violated R.I. Gen. Laws § 46-12-3(21) and/or § 8.04 of UST Regulation

At hearing, Sahyouni did not agree that the three (3) tanks had been installed prior to May 8, 1985. The Department produced evidence showing the registration of these three (3) USTs and that they had been installed in 1984 prior to May 8, 1985. It was undisputed that the three (3) tanks were single-walled. It was undisputed that the three (3) tanks were not closed and removed prior to December 22, 2017. Therefore, Sahyouni violated R.I. Gen. Laws § 46-12-3(21) and § 8.04 of the UST Regulation by failing to stop operating the three (3) tanks and failing to remove them by December 22, 2017. The three (3) tanks were not permanently closed prior to December 22, 2017.

F. Default

At hearing, a default was entered against Fuel Depot for failing to comply with this office's order that it obtain an attorney to represent it at hearing. A default is proper for failing to comply with court orders. *Mumford v. Lewiss*, 681 A.2d 914 (R.I. 1996). Therefore, Fuel Depot violated R.I. Gen. Laws § 46-12-3(21) and § 8.04 of the UST Regulation by failing to stop operating the three (3) tanks and failing to remove them by December 22, 2017. The three (3) tanks were not permanently closed prior to December 22, 2017.

G. What is the Appropriate Penalty

In 2005, a law was enacted to allow ten (10) years for single-walled no secondary containment USTs installed prior to May 8, 1985 to be closed and removed by 2015. The deadline was extended by statute to December 22, 2017. The Respondents received notices regarding the deadline in September 2016, April 2017, and November 2017. Indeed, Sahyouni testified that he was aware of the requirement as he was trying to sell his house in 2014 to meet the requirement.

Sahyouni testified that he was not told at the February, 2018 inspection that he should close and if he had been told, he would have closed. There was no requirement that the Department tell Sahyouni in February, 2018 that he should close the USTs. Indeed, the purpose of inspection was to verify if the tanks were closed so the fact the Department was checking on whether the USTs were closed or not, indicates that such tanks should have already been closed (as required by law). In addition to the statutory deadline, the Department had already sent written notices three (3) times to all those with such USTs reminding them of the impending deadline (extended by law) and Sahyouni received those notices. There was a regulatory procedure available to close the tanks without removing them by the December 22, 2017 deadline without incurring a penalty but the Respondents did not avail themselves of this opportunity.

Sahyouni testified and argued that the penalty was too high and it would be hard for him to afford the penalty. However, he never provided any factual basis for the Department not to apply the deviation from standard in the Penalty Regulation that the Department applied. The Department's witness testified as to the factors for calculating administrative penalties contained in the Penalty Regulation and how they were applied to this matter. Based on the factors, the Department applied the low end of the administrative penalty per tank rather than per day. The Department also applied the penalty to both violations rather than per violation. There is no reason to vary from the Department's application of the Penalty Regulation for each tank.

VI. FINDING OF FACTS

1. The Department issued a NOV dated April 30, 2018 to both Respondents regarding the three (3) USTs alleging a statutory and regulatory violation on the Property and requesting the imposition of an administrative penalty.
2. The Property is located at 644 Putnam Pike, Assessor's Plat 3, Lot 8 in Smithfield, R.I. The Property includes a motor fuel filling station.
3. Fuel Depot is the owner of the Property.
4. Sahyouni owns and operates the facility.
5. The Respondents are responsible for the three (3) USTs as they are on the Property and are part of the facility.
6. The facility is registered with the Department and is identified as UST Facility number 00879. At the time of the violations, there were three (3) USTs. Each tank held 8,000 gallons of gasoline and were singled-walled with no secondary containment.
7. These three (3) USTs were installed in 1984 prior to May 8, 1985.

8. The deadline for owner/operators of single-walled USTs to stop operating and to remove said single-walled USTs installed prior to May 8, 1985 was December 17, 2017

9. These three (3) USTs were operated past December 22, 2017.

10. These three (3) USTs ceased operating in 2018 and were removed in June, 2018.

11. Sahyouni operated these three (3) USTs beyond December 22, 2017 until June, 2018.

12. A Status Conference Order and Discovery Closure Order was issued to the Respondents by this office on May 21, 2018 in response to a request for hearing by the Respondents in response to the NOV.

13. A hearing was held on January 28, 2020.

14. Fuel Depot failed to appear at the hearing with an attorney as ordered by this office in an order dated October 30, 2019 and is defaulted.

15. The Department timely filed a brief by February 26, 2020. Sahyouni did not file a brief,

16. The facts contained in Section IV and VI are reincorporated by reference herein.

VIII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

1. The AAD has jurisdiction over this matter pursuant to R.I. Gen. Laws § 42-17.1-1 *et seq.*, R.I. Gen. Laws § 42-17.7-1 *et seq.*, R.I. Gen. Laws § 42-35-1 *et seq.*, and the Hearing Regulation.

2. Fuel Depot violated R.I. Gen. Laws § 46-12-3(21) and § 8.04 of the UST Regulation by failing to stop operating the three (3) tanks and failing to remove them by December 22, 2017 so that the three (3) tanks were not permanently closed prior to December 22, 2017.

3. Sahyouni violated R.I. Gen. Laws § 46-12-3(21) and § 8.04 of the UST Regulation by failing to stop operating the three (3) tanks and failing to remove them by December 17, 2017 so that the three (3) tanks were not permanently closed prior to December 22, 2017.

VIII. ORDER

Based on the foregoing, the Respondents violated R.I. Gen. Laws § 46-12-3(21) and § 8.04 of the UST Regulation and a penalty of \$37,955 shall be imposed. Said penalty shall be due on the 31st day after execution of this decision. The NOV is upheld and the Respondents' appeal is dismissed.

Dated: April 1, 2020

/s/ Catherine R. Warren

Catherine R. Warren, Esquire
Hearing Officer

NOTICE OF APPELLATE RIGHTS

THIS DECISION CONSTITUTES A FINAL DECISION OF THE DEPARTMENT OF ENVIRONMENTAL MANAGEMENT PURSUANT TO R.I. GEN. LAWS § 42-35-12. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS.

CERTIFICATION

I hereby certify that on this 2 day of April, 2020, that a copy of the within Decision and Notice of Appellate Rights was sent by first class mail and electronic delivery to Respondents, Abed M. Sahyouni, 644 Putnam Pike, Smithfield, R.I. 02828 and Fuel Depot, Inc. c/o Abed M. Sahyouni, Registered Agent, 644 Putnam Pike, Smithfield, R.I. 02828 and by electronic delivery to Tricia Quest, Esquire, and Ms. Sarah Gousie, Department of Environmental Management, 235 Promenade Street, Providence, R.I. 02908.

