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

IN RE: Foster-Glocester Regional School District
AAD No. 92-005/IE
UST File No. 1713

DECISION ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter came before Hearing Officer McMahon on December 18, 1992 pursuant to Plaintiff's Motion for Summary Judgment filed by the DEM Oil Pollution/Underground Storage Tank Program ("Division") on October 2, 1992, the duly filed Defendant's Objection to Plaintiff's Motion for Summary Judgment, and the additional filing of the Division's Response to Defendant's Objection to Plaintiff's Motion for Summary Judgment.

Respondent's sole objection is that the "motion is barred by paragraph number 6 of the prehearing order issued March 4, 1992."

DECISION AND ORDER

Section 8.00 of the Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters ("AAD Rules") provides that parties in contested matters before the AAD may make such motions "which are permissible under these Rules and the R. I. Superior Court Civil Rules of Procedure (sic)" ("Court Rules"). Court Rule 56, which governs motions for summary judgment, provides that "The judgment sought shall

be rendered forthwith if the pleadinngs, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

The Rhode Island Supreme Court has determined that once a motion for summary judgment has been filed, the non-moving party has an affirmative duty to set forth specific facts that show there is a genuine issue of material fact to be resolved at trial. Quimette v. Moran, 541 A.2d 855 (1988); Trend Precious Metals v. Sammartino, 577 A.2d 986 (RI 1990); Pacheco v. Massachusetts Cas. Ins. Co., 610 A.2d 111 (RI 1992). See also David and Judy Kaloyanides, AAD No. 91-008/IE, Decision on Motions Presented by Department of Environmental Management, dated 3/16/92. The Court has also held that it is

> "clearly the obligation of the party opposing the motion to direct the motion justice's attention to the specific portions of the discovery materials upon which such party relies and to supplement those materials, where needed, by an affidavit . . . (citations omitted). In the event that a party opposing such a motion is unable to present such essential facts to justify his opposition at the time when motion for summary judgment is filed, such party may . . . obtain a continuance to permit affidavits to be furnished or depositions to be taken or discovery to be had in order to meet his burden." Nedder v. Rhode Island Hosp. Trust Nat. Bank, 459 A.2d 960, 962 (RI 1983).

As in the Nedder case, counsel herein has neither provided affidavits nor sought a continuance to obtain same.

The Division's Motion for Summary Judgment contends that the record establishes that Respondent has admitted to all matters save the reasonableness of the penalty assessed by the Department. Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, p. 3. Further, pages 9 through 24 of said Memorandum argues that the penalty issue "is not a genuine issue of material fact, rather this is purely an issue of law to be decided by the Administrative Hearing" and proceeds to demonstrate that the penalty "reasonably meets the purposes, goals and policies of the appropriate statutes and regulations; and second, . . . [that] the penalty was properly calculated . . ." at 9.

Respondent's Objection does not dispute an absence of genuine issues of material fact, nor does it address the penalty matter in any form; neither whether it is indeed "purely an issue of law", nor whether it was properly calculated. Rather, it relies solely on the procedural argument that pursuant to paragraph six (6) of the Prehearing Order entered on March 4, 1992, said motion was untimely. Respondent has not reequested oral argument as allowed under section 8.00(a)(2) of the AAD Rules.

Accordingly, absent any procedural infirmity, Plaintiff's Motion for Summary Judgment should be granted.

Paragraph 6 of the aforementioined Prehearing Order states in pertinent part:

> "Petitions to intervene must be filed by March 27, 1992. All other preliminary motions must be in writing and received by the Hearing Officer by the date of the Prehearing Conference."

Though the Prehearing Conference was originally scheduled for April 3, 1992, it was not held until July 3, 1992 due to two continuances of the matter. The record further reflects that neither party complied with the prehearing order and that the requirements of paragraph 6 were extended to July 31, 1992. Order of Chief Hearing Officer Kathleen M. Lanphear dated 7/6/92.

The Division's Request for Admissions was filed with the Clerk of the DEM Administrative Adjudication Divison ("AAD") on September 8, 1992[1] after the parties were unable to agree to a proposed Stipulation of Facts. Pursuant to Court Rule 36 (as allowed by section 8.00 of the AAD Rules), "Each of the matters of which an admission is requested shall be deemed admitted," unless within ten (10) days of service Respondent has provided a sworn statement denying the requested admissions or detailing

[1] Respondent has not argued that discovery was closed, nor has he sought to remove the admissions from the record.

the reasons why the requested admissions could not be admitted or denied, or has filed a written objection pursuant to Court Rule 36(a)(2). Respondent filed neither a sworn statement nor an objection within the specified period (and has not to date), and thus the requested matters were deemed admitted.

The Division contends that its Motion for Summary Judgment, filed on October 2, 1992, could not have established an absence of genuine issue of material fact until it had obtained the admissions. Further, it argues that summary judgment motions, being dispositive in nature, are not the contemplated "preliminary motions" referenced in paragraph 6 of the Prehearing Order. Response to Defendant's Objection to Plaintiff's Motion for Summary Judgment, p.2.

I concur. Court Rule 56 requires judgment only when the pleadings, depositions, answers to interrogatories, and admissions demonstrate there is no genuine issue as to any material fact. If the Divison had filed its motion according to paragraph 6, it would have been denied as premature because the record would not have contained admissions establishing the absence of issues of material fact necessary for obtaining judgment. Further, even if such a premature motion had been made and denied, the Rhode Island Supreme Court has held that "prior denial of a motion for summary judgment does not preclude the later granting of summary judgment on an expanded record."

Mulholland Const. v. Lee Pare & Assoc., 576 A.2d 1236, 1239 (RI 1990). The admissions herein would clearly have constituted "an expanded record" which would have allowed for the renewal of the motion for summary judgment.

Therefore, based on my review of the record and viewed in the light most favorable to the Respondent, I make the following

FINDINGS OF FACT

1. The respondent, Foster-Glocester Regional School District (the "School District") is the owner of that certain parcel of real property located at 91 Anna Wade Road, Glocester, Rhode Island 02857, otherwise known as the Ponagansett Middle School.

2. Sometime during 1960, a 550 gallon underground storage tank ("UST") was installed on the grounds of the Ponagansett Middle School.

3. On August 25, 1986, a precision or tank-tightness test (the "precision test") was performed on the UST for the School District by the Sure-Test Corporation of Manville, Rhode Island ("Sure-Test").

4. The UST failed the precision test conducted on August 25, 1986. The results of the precision test indicated the the UST was not tight.

5. The UST was never retested subsequent to the precision test of August 25, 1986.

6. The results for the August, 1986 precision test were filed with the Department on July 20, 1987.

7. The results for the August, 1986 precision test were the only precision test results every submitted to the Department by the School District for the UST located at the Ponagansett Middle School.

8. On February 9, 1991, a gasoline spill of undetermined quantity occurred at the Ponagansett Middle School.

9. School District employees responded to the spill of February 9, 1991, by spreading sand over the affected area to absorb and contain the gasoline, by notifying the local fire department and by collecting and placing the sand/gasoline mixture into 55 gallon drums.

10. Thereafter, the School District contracted with Clean Harbors, Inc., which collected the 55 gallon drums and disposed of the contaminated soil.

11. On March 26, 1991, the 550 gallon UST was excavated and removed in the presence of personnel from the Department.

12. At the time of the removal of the 550 gallon UST the following conditions were observed:

    (a) The UST exhibited numerous holes from corrosion and pitting on the bottom and sides of the steel UST;

    (b) The soils surrounding the tank "grave" were visibly saturated with, and had a strong odor of gasoline; and

    (c) A light sheen of gasoline was observed floating on the water table, which was exposed at the bottom of the excavation.

13. On April 16, 1991, the Department issued a Notice of Violation and Order ("NOV") to the School District, care of Raymond Reilly, Superintendent.

14. Mr. Reilly timely filed a request for hearing with the Administrative Adjudication Division ("AAD").

15. On May 9, 1991, the School District engaged Triangle Engineering ("Triangle") of Providence, Rhode Island, to provide remediation for the contaminated UST site.

16. ON May 16, 1991, Clean Harbors Analytical Services of Braintree, Massachusetts, tested a soil sample from the tank grave of the UST in question. Results indicated 67 mg/kg of petroleum hydrocarbon oil and grease.

17. Between May 17, 1991 and May 21, 1991, Triangle drilled six (6) monitoring wells ("MW") in the area surrounding the UST site.

18. Groundwater samples obtained by Triangle on May 29, 1991, from MW #2 were analyzed and found to contain benzene, toluene, ethylbenzene and xylene ("BTEX"), which is a known constituent of gasoline.

19. Except for ethylbenzene, each of the BTEX compounds were found to be present in amounts exceeding EPA health advisory levels.

20. Samples of MW #2 taken by Triangle on December 16, 1991 again showed the presence of benzene, toluene and xylene above EPA's health advisory levels.

21. Samples of MW #2 taken by Triangle on March 31, 1992, showed an increase in the levels of all of the BTEX compounds, includinng ethylbenzene, all well above EPA's health advisory levels.

22. As of July 31, 1992, Respondent was in compliance with Paragraphs one (1) through five (5) of the Order section of the NOV.

After review of the record and viewed in the light most favorable to the Respondent, I make the following

CONCLUSIONS OF LAW

1. This matter is properly before the Adminstrative Adjudication Division pursuant to R.I.G.L. § 42-17.1-2(u), Chapter 42-17.6 and § 42-17.7-1 et seq..

2. Respondent failed to submit to the Department the August 1986 precision test results within fifteen (15) days of the date of test completion in violation of section 9(e) of the Regulations for Underground Storage Facilities Used for Petroleum Products and Hazardous Materials ("UST Regulations").

3. Respondent failed to immediately report to the Department the failed August 1986 precision test, which was indicative of a suspected leak, in violation of Section 14 of the UST Regulations.

4. Respondent failed to conduct annual precision tests subsequent to the precision test of August 25, 1986 in Violation of Section 9 of the UST Regulations.

5. Respondent failed to submit annual precision test results between July 20, 1987 and March 26, 1991 in violation of Section 9 of the UST Regulations.

6. Respondent discharged oil or pollutants into the waters of the State in violation of Section 6 of the Oil Pollution Control Regulations.

7. The administrative penalty was assessed in accordance with R.I.G.L. § 42-17.1-2(v), § 42-17.6-1 et seq., and the Rules and Regulations for Assessment of Administrative Penalties.

Based on the foregoing findings of fact and conclusions of law, it is hereby

ORDERED

1. Division's Motion for Summary Judgment is herewith GRANTED.

2. Respondent shall continue compliance with paragraphs one (1) through five (5) of the Order section of the NOV, which is hereby incorporated by reference.

3. Respondent shall remit to the Rhode Island Department of Environmental Management, Office of Business Affairs, 22 Hayes Street, Providence, RI 02908 by February 15, 1993, an administrative penalty in the amount of twenty-eight thousand nine hundred dollars ($28,900.00) payable by certified check to the order of the General Treasurer, State of Rhode Island, to be deposited in the Environmental Response Fund pursuant to R.I.G.L. § 23-19.1-23.

I hereby recommend the foregoing Decision and Order to the Director for issuance as a final order.

010493

Entered as an Administrative Order this 4th day of January, 1993.

Mary F. McMahon
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, Third Floor
Providence, RI 02908

~~Entered as a Final Agency Order this~~ 15 ~~day of January, 1993.~~

~~Louise Durfee~~
~~Director~~
~~Department of Environmental Management~~
~~9 Hayes Street~~
~~Providence, RI 02908~~

I hereby adopt the findings of fact and conclusions of law in the foregoing proposed order. While I am reluctant to adopt conclusion of law number seven (7), I am left without a choice. In responding to the Division's Motion for Summary Judgment, the Respondent failed to object or even advise the hearing officer that a genuine issue of material fact exists concerning whether the administrative penalty was properly assessed. The lack of a substantive objection to the summary judgment motion compels that it be granted.

Unfortunately, the Respondent is left to whatever post-decision remedies that may be available.

Entered as a Final Agency Order this 18th day of January, 1993.

Louise Durfee
Director
Department of Environmental Management
9 Hayes Street
Providence, RI 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within Decision and Order on Plaintiff's Motion For Summary Judgment to be forwarded via regular mail, postage prepaid to Vincent J. Piccirilli, Esq., Piccirilli & Sciacca, 121 Phenix Avenue, Cranston RI 02920 and via interoffice mail to Brian A. Wagner, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this 19th day of January, 1993.

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