

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
Re: Mutual Properties 1245 Jefferson, LLC
AAD No. 07-003/WME
Notice of Violation OC&I/UST 06-03419
2008

DECISION AND ORDER

This matter came before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters (AAD) pursuant to the request for hearing filed by Respondent Mutual Properties 1245 Jefferson LLC (Respondent or Mutual Properties) on the Notice of Violation (NOV) issued by the Office of Compliance and Inspection (OCI) to Mutual Properties and SB Automotive Enterprises, LLC on January 18, 2007. SB Automotive Enterprises did not request a hearing.

The hearing was conducted on February 4, 2008. Gary Powers, Esq. appeared on behalf of the OCI. Respondent was represented by Joshua W. Glass, Esq..

The adjudicatory proceeding was conducted in accordance with the statutes governing the AAD (R.I. Gen. Laws § 42-17.7-1 et seq.); the *Administrative Procedures Act* (R.I. Gen. Laws § 42-35-1 et seq.); the *Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters (AAD Rules)*; statutes allowing the assessment of administrative penalties for environmental violations (R.I. Gen. Laws § 42-17.6-1 et seq.); and the *Rules and Regulations for Assessment of Administrative Penalties (Penalty Regulations)*.

PREHEARING CONFERENCE

A prehearing conference was conducted on June 21, 2007 and the Record and Order was issued on August 7, 2007. At the conference the parties agreed to the following stipulations of fact:

1. The subject property is located at 1245 Jefferson Boulevard in the City of Warwick, Rhode Island, otherwise identified as Warwick Tax Assessor's Plat 268, Lot 241 (Property or Facility).
2. Respondent Mutual Properties 1245 Jefferson LLC is the owner of the Property, which took title on December 28, 2005.
3. SB Automotive Enterprises, LLC (SB) was the owner of the Property from April 29, 2003 until December 28, 2005.
4. SB was the operator of the Facility from April 29, 2003 until December 28, 2005.
5. Mutual Properties and SB are/were the owners of one underground storage tank (UST or tank) that is located on the Property, which tank is/was used for storage of petroleum products and/or hazardous materials and which is subject to the Rhode Island *Rules and Regulations for Underground Storage Facilities Used for Petroleum Products and Hazardous Materials*, December 1993 (the *1993 UST Regulations*), October 2002 (the *2002 UST Regulations*) and June 2005 (the *2005 UST Regulations*).
6. The UST is registered with DEM for the Facility as follows:

UST ID No. Date Installed Capacity Substance Stored

001 January 1990 3,000 gallons Waste Oil

7. On December 28, 2005 DEM issued a NOV to SB for an alleged violation of Rule 8.03 of the *2005 UST Regulations*. SB failed to contest the NOV and failed to comply with the requirements of the December 28, 2005 NOV.

8. UST No. 001 remains out-of-operation and has been abandoned since at least April 29, 2003.

9. On or about October 10, 2002 the DEM Office of Waste Management issued an Underground Storage Tank Facility Certificate of Registration for UST Facility No. 3419 (the UST), located at 1245 Jefferson Boulevard, Warwick, Rhode Island, to Paul Bailey's Service Center (Paul Bailey's), the then-owner of the Property, which Certificate expired on June 30, 2003.
10. On or about July 29, 2005 the OCI sent a Notice of Intent to Enforce to Paul Bailey's, the former owner of the Property, for failure to comply with Rule 8.03 of the *2005 UST Regulations*.
11. On or about January 18, 2007 the OCI issued a NOV to Mutual Properties and SB for failure to comply with Rules 13.02(A) and 13.05 of the *2005 UST Regulations*, assessing a penalty jointly and severally against Mutual Properties and SB in the amount of \$4,000.00.
- The OCI identified the following as issues to be considered by the Hearing Officer at the hearing:
1. Whether or not Mutual Properties and SB are liable for the violation of Rule 13.02(A) of the *2005 UST Regulations* which prohibits the abandonment of USTs.
 2. Whether or not Mutual Properties and SB are liable for the violation of Rule 13.05 of the *2005 UST Regulations* which governs the permanent closure of USTs removed from service for more than 180 days.
- Respondent identified the following as an issue to be considered by the Hearing Officer at the hearing:
1. Whether the penalty was appropriately calculated and in accordance with the *Penalty Regulations* and in accordance with R.I. Gen. Laws § 42-17.6-6.
- A list of the exhibits, marked as they were admitted at the hearing, is attached to this Decision as Appendix A.

HEARING SUMMARY

The NOV issued to Mutual Properties and SB on January 18, 2007 concerns property located at 1245 Jefferson Boulevard, Warwick, Rhode Island. The property was owned by SB and the facility was operated by SB from April 29, 2003 until December 28, 2005 when Mutual Properties acquired the title. Mutual Properties is the current owner of the property. *Prehearing Conference Record and Order*, stipulations 1-4. The NOV cites Mutual Properties and SB for violating Rule 13.02(A) of the *2005 UST Regulations* prohibiting the abandonment of USTs, and for violating Rule 13.05 of the *2005 UST Regulations* pertaining to permanent closure of USTs removed from service for more than 180 days. An administrative penalty in the amount of \$4,000.00 was assessed, jointly and severally, against each of the entities. Div 1. Mutual Properties filed a request for hearing at the AAD. SB did not file an appeal.

At the prehearing conference conducted on June 21, 2007 the parties stipulated: "UST No. 001 remains out-of-operation and has been abandoned since at least 29 April 2003." *Prehearing Conference Record and Order*, stipulation 8.

As the first matter addressed at the hearing, Respondent's counsel moved to supplement the *Prehearing Conference Record* to add four (4) exhibits. The OCI objected to Respondent's attempt to supplement the *Prehearing Conference Record* on the day of the hearing and also objected to the documents as irrelevant. For the reasons stated on the record, Respondent's motion was granted as to exhibits marked 15, 16 and 17, and denied as to exhibit 18. Exhibits 15, 16 and 17 were marked for identification only.

In the OCI's opening statement counsel asserted that the only matter remaining for hearing was the assessment of the administrative penalty.

The OCI called one witness: Tracey Tyrrell, a Supervising Environmental Scientist in the OCI who, by agreement, was qualified as an expert in the interpretation and application of the *UST Regulations*, specifically applicable UST regulatory requirements; UST enforcement practices and procedures; and how the violations/penalties alleged in the NOV were ascertained. Ms. Tyrrell testified that she has reviewed or drafted over a hundred NOVs. When drafting a NOV, she reviews the files and facts and determines if a violation has occurred; she determines the Type

of Violation, the Deviation from the Standard, and finally the amount of the administrative penalty. She stated that she did the same in this case.

According to the witness, two *UST Regulations* were violated: Rule 13.02(A) prohibiting abandonment of a UST and Rule 13.05 which requires permanent closure of a tank when it is not in use for 180 days. She stated that Respondent had owned the property since December 2005, and the tank had not been in use for over a year when the NOV was issued.

Ms. Tyrrell declared that there was no indication in the records maintained by the Office of Waste Management that a closure application had been submitted during that time. She testified that the tank has since been properly closed and that the only outstanding relief requested in the NOV was the matter of the administrative penalty.

Ms. Tyrrell discussed the calculation of the administrative penalty. She considered the violation to be directly related to protecting the public health, safety and environment, therefore a Type I Violation. She had considered the factors listed on page 7 of the NOV (Div 1) and concluded that the violation was a Minor Deviation from the Standard. She then determined the penalty of \$4,000.00 and it was approved. The NOV imposed the penalty of \$4,000.00. Div 1 at 3. She testified that no modification of the penalty was warranted.

Under cross-examination the witness reiterated that she had reviewed the file and the draft NOV in this matter. Ms. Tyrrell was questioned about the NOV issued to SB on December 28, 2005. *See Resp. 9.* She had been involved in the preparation of that NOV and acknowledged that it had not been recorded in the Land Evidence Records of the City of Warwick.

The OCI then rested its case.

Respondent did not present any witnesses to testify at the hearing. In Respondent's opening/closing argument, counsel contended that the abandonment of the UST was attributable to the predecessor in interest, Paul Bailey's. He stated that Mutual Properties did not "vacate or dispose" of the tanks as contemplated by the abandonment prohibition of the *UST Regulations*, that was done by a predecessor. The tank was never "in operation" by Mutual Properties, so it was not taken "out of operation" for a period of greater than 180 consecutive days to constitute an abandonment. As for the second violation, counsel made a similar argument: "closure" means removal from service and Mutual Properties never had the tank in service, so the tank could not be "removed" from service.

Respondent also argued that since the NOV issued to SB on December 28, 2005 (Resp. 9) was never recorded, Mutual Properties acquired the property without notice of the NOV. Upon Respondent's receipt of the NOV dated January 18, 2007, Mutual Properties proceeded to close the UST. Respondent had received no prior correspondence from DEM, and upon receiving the NOV, was the only party to act responsibly. Counsel maintained that the administrative penalty was unfair and unjust.

The OCI in its closing statement contended that the abandonment of the tank occurred by Respondent's failure to act. If Respondent had not taken the action to close the tank, then there would have been a further penalty. Counsel claimed that Respondent had not carried its burden of proof on the penalty issue.

Analysis and Conclusion

Respondent, in its identification of the issues to be considered by the Hearing Officer at the hearing, did not question whether the company was liable for violations of the *UST Regulations*. The only issue Respondent identified concerned whether the penalty was appropriately calculated. Respondent and the OCI, through agreed stipulations as discussed below, addressed the necessary evidentiary elements to establish the violations. Based upon the stipulations of the parties and Ms. Tyrrell's testimony that the tank has now been properly closed, the OCI contended that only the penalty issue remained outstanding -- and that was initially assessed at \$4,000.00. Notwithstanding that Respondent's counsel took a position at the hearing that was at

odds with its identification of the issue and at odds with the stipulations set forth in the *Prehearing Conference Record*, the only genuine issue for this adjudication is whether the \$4,000 penalty was appropriately calculated and in accordance with the *Penalty Regulations*.

Respondent has been cited with violations concerning the abandonment of a UST and the failure to permanently close the tank after it has been removed from operation for more than 180 days.

Rule 13.02(A) of the *2005 UST Regulations* provides as follows:

Prohibitions:

(a) The abandonment of any UST or UST system is prohibited.

Rule 5.01 defines "Abandonment" to mean:

[T]he relinquishment or termination of possession, ownership or control of underground storage tanks, by vacating or by disposition, without meeting the closure requirements listed in Rule 13 of these regulations; or the action of taking a UST or UST system out of operation for a period of greater than 180 consecutive days without the prior permission of the Director pursuant to Rule 13 Closure.

Although Respondent's counsel argued that his client's actions did not meet the definition of abandonment under the *UST Regulations*, Respondent is bound by the stipulations agreed to at the prehearing conference and which are now part of the record. See *Cookson America, Inc. v. Clark*, 610 A.2d 1095, 1097 (R.I. 1992). Stipulation 8 contained the admission that the tank remained out-of-operation and had "been abandoned since at least 29 April 2003." Stipulation 2 acknowledged that Respondent owned the property since December 28, 2005. The NOV was issued on January 18, 2007. The period from December 28, 2005 to January 18, 2007 is in excess of 365 days. By the terms of the above stipulations, the abandonment continued during Respondent's ownership of the property for more than one year. The OCI has therefore proved by a preponderance of the evidence that Respondent abandoned the tank in violation of Rule 13.02(A) of the *2005 UST Regulations*.

As a result of the abandonment, Respondent also violated the related requirement to permanently close a tank when it has been removed from operation for more than 180 days. Rule 13.05 provides as follows:

Permanent Closure: All owners/operators that have removed any underground storage tank from operation for more than 180 days and have not been granted an extension of temporary closure by the Director or who have abandoned any UST or who desire to permanently close a UST shall comply with the procedures for closing underground storage tank(s) in accordance with the provisions of this Rule and appropriate national codes of practice. The Director may require permanent closure of UST systems for which there is confirmation of a leak or release.

The OCI has therefore proved by a preponderance of the evidence that Respondent failed to permanently close the tank in violation of Rule 13.05 of the *2005 UST Regulations*.

The OCI has proven the violations and has established in evidence the calculation (Type I Minor) and the amount of the penalty (\$4,000). Section 12 (c) of the *Penalty Regulations* provides as follows:

In an enforcement hearing the Director must prove the alleged violation by a preponderance of the evidence. Once a violation is established, the violator bears the burden of proving by a preponderance of the evidence that the Director failed to assess the penalty and/or the economic benefit portion of the penalty in accordance with these regulations.

Pursuant to the above regulation, the burden to prove that the penalty was not properly assessed shifts to the Respondent once the violation has been proven by the OCI. Respondent's counsel has argued that the abandonment was the result of inaction by Respondent's predecessor. Counsel asserts that his client was unaware of the prior NOV issued to SB on December 28, 2005.¹

Counsel's statements cannot be construed as evidence. *In Re: Landry & Martin Oil Co., Inc.*, AAD No. 00-031/WME, Final Agency Order entered on January 28, 2003 at 14-15; *In Re:*

Gerald L. & Antoinette Bucci, AAD No. 92-022/IE, Final Agency Order entered on March 31, 1995 at 7-8, quoting *Wood v. Ford*, 525 A.2d 901, 903 (R.I. 1987).

Although counsel's arguments are not themselves evidence, they do assail OCI's determination that the administrative penalty be assessed "jointly and severally" against this Respondent and SB. As discussed in *In Re: Medea, LLC.*, AAD No. 00-006/SRE, Partial Decision and Order entered on July 25, 2003 at 16:

The general principle of joint and several liability is that where parties act in concert or share in the advantages, or if there is a right to relief arising out of the same transaction, occurrence, or series of transactions, then liability may also be shared. See R.I. Gen. Laws § 10-6-2; Restatement (Second) of Torts § 876 (1979); Rule 20 of the *Rhode Island Superior Court Rules of Civil Procedure*; *Cole v. Lippitt*, 22 R.I. 31, 46 A. 43 (1900); *Cady v. IMCi iMortg. Co., Inc.*, 2002 WL 220899 (R.I. Super.) Jan. 31, 2002.

In that AAD preceding the Respondent was the successor owner/operator of a facility where a NOV had been issued to Medea and to the prior owner/operator D.T.P., Inc.. The OCI had calculated the penalty based upon both parties' actions and imposed a penalty jointly and severally. It later settled with D.T.P. on certain violations but proceeded against Medea on the remaining violations and the remaining penalty amount. In the *Medea* Decision it was determined that the OCI had not established that the two entities acted in concert or shared in the advantages, or that there was a right to relief for a violation that occurred during D.T.P.'s ownership and continued through Medea's ownership of the facility. at 17. Yet the penalty calculations for four of the five violation counts against Medea had employed D.T.P.'s history of noncompliance when joint and several liability had not been established. The matter was remanded to the OCI for recalculation of the Deviation from the Standard on the four counts. The matter was subsequently settled by the parties.

In this matter there was no evidence that Mutual Properties was acting in concert or shared in the advantages with SB. The OCI has not shown that it has a right to relief against Mutual Properties that includes SB's own liability for the previous abandonment of the UST. The OCI has therefore not established that imposition of joint and several liability, and factors pertinent to SB that increased the minimum penalty for the violation, should be applied to Mutual Properties.

The OCI had calculated the violation to be a Type I Minor Deviation from the Standard. Respondent has not proved that the violation was improperly calculated. The \$4,000.00 penalty amount, however, was selected from the mid-range for a Type IMinor Deviation from the Standard, which is listed at \$2,500.00 to \$6,250.00. Div 1 at 7. In selecting the penalty amount, the OCI clearly considered SB's abandonment of the tank as is indicated in the factors set forth on page 7 of the NOV (Div 1).

An adjustment of the penalty amount in this matter does not involve the more complex considerations of the *Medea* remand. Based upon my review of the factors considered by the OCI in assessing the \$4,000.00 administrative penalty, I have determined that the minimum penalty in the range is appropriate and warranted.

Wherefore, after considering the stipulations of the parties and the testimonial and documentary evidence of record, I make the following:

FINDINGS OF FACT

1. The subject property is located at 1245 Jefferson Boulevard in the City of Warwick, Rhode Island, otherwise identified as Warwick Tax Assessor's Plat 268, Lot 241 (Property or Facility).
2. SB Automotive Enterprises, LLC (SB) was the owner of the Property from April 29, 2003 until December 28, 2005.
3. SB was the operator of the Facility from April 29, 2003 until December 28, 2005.
4. Mutual Properties 1245 Jefferson LLC is the owner of the Property, which took title on December 28, 2005.

5. SB and Mutual Properties are/were the owners of one underground storage tank (UST or tank) that is located on the Property, which tank is/was used for storage of petroleum products and/or hazardous materials and which is subject to the Rhode Island *Rules and Regulations for Underground Storage Facilities Used for Petroleum Products and Hazardous Materials*, December 1993 (the *1993 UST Regulations*), October 2002 (the *2002 UST Regulations*) and June 2005 (the *2005 UST Regulations*).

6. The UST was registered with DEM for the Facility as follows:

UST ID No. Date Installed Capacity Substance Stored

001 January 1990 3,000 gallons Waste Oil

7. UST No. 001 was out-of-operation and had been abandoned since at least April 29, 2003.

8. On or about January 18, 2007 the OCI issued a NOV to Mutual Properties 1245 Jefferson LLC and SB Automotive Enterprises LLC and assessed a \$4,000.00 administrative penalty jointly and severally against Mutual Properties and SB.

9. UST No. 001 was properly closed after the issuance of the NOV.

10. The OCI established in evidence that the violation was calculated to be a Type I Minor Deviation from the Standard with a proposed administrative penalty of \$4,000.00.

11. The penalty range for a Type I Minor Deviation from the Standard is \$2,500.00 to \$6,250.00.

12. The OCI considered SB's actions when it weighed factors (a), (e), (g) and (i) of Section 10 (a) (2) of the *Penalty Regulations* and imposed the \$4,000.00 administrative penalty against Mutual Properties and SB.

CONCLUSIONS OF LAW

After due consideration of the documentary and testimonial evidence of record and based upon the above Findings of Fact, I conclude the following as a matter of law:

1. The OCI has proved by a preponderance of the evidence that Mutual Properties violated Rule 13.02 (A) of the *2005 UST Regulations* as set forth in Violation 1 of the NOV.

2. The OCI has proved by a preponderance of the evidence that Mutual Properties violated Rule 13.05 of the *2005 UST Regulations* as set forth in Violation 2 of the NOV.

3. Respondent's violations of Rule 13.02 (A) and Rule 13.05 of the *2005 UST Regulations* were properly calculated to be a Type I Minor Deviation from the Standard with a penalty range of \$2,500.00 to \$6,250.00.

4. The OCI has failed to prove that the evidence supports imposition of joint and several liability against Mutual Properties.

5. The assessment of an administrative penalty in the amount of \$4,000.00 against Respondent is excessive.

6. The assessment of an administrative penalty in the amount of \$2,500.00 against Respondent is not excessive and is in accordance with the *Penalty Regulations*.

Wherefore, based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED

1. An administrative penalty in the amount of Two Thousand Five Hundred (\$2,500.00) Dollars is hereby ASSESSED against Respondent.

2. Respondent shall make payment of the administrative penalty within thirty (30) days from the date of entry of the Final Agency Order in this matter. Payment shall be in the form of a certified check or money order made payable to the "General Treasury - Water & Air Protection Program Account" and include the following notation: AAD No. 07-003/WME. The payment shall be forwarded to:

R.I. Department of Environmental Management

Office of Management Services
235 Promenade Street, Room 340
Providence, Rhode Island 02908

Attn: Terrence Maguire

Entered as an Administrative Order this _____ day of _____, 2008 and herewith recommended to the Director for issuance as a Final Agency Order.

Mary F. McMahon
Hearing Officer

Entered as a Final Agency Order this _____ day of _____, 2008.
W. Michael Sullivan, Ph.D.,
Director

NOTICE OF APPELLATE RIGHTS

This Final Order constitutes a final order of the Department of Environmental Management pursuant to R.I. Gen. Laws § 42-35-12. Pursuant to R.I. Gen. Laws § 42-35-15, a final 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.

APPENDIX A

LIST OF EXHIBITS

OCI'S EXHIBITS

DIVISION Notice of Violation dated January 18, 2007 including Penalty Summary &
1 Worksheets 7 pages (Copy).

FULL

DIVISION State of Rhode Island Underground Storage Tank Facility Certificate of Registration
2 effective 1 July 2002 1 page (Copy).

FULL

DIVISION City of Warwick Assessor's Office concerning 1245 Jefferson Blvd. Dated
3 6/29/2005 1 page (Copy).

FULL

DIVISION City of Warwick Assessor's Office concerning 1245 Jefferson Blvd. Dated
4 6/30/2006 1 page (Copy).

FULL

DIVISION Rhode Island Corporate Search Re: Mutual Properties 1245 Jefferson, LLC. 2 Pages
5 (Copy).

FULL

DIVISION Curriculum vita of Dean Albro. 5 Pages (Copy).
6

FULL

DIVISION Curriculum vita of Tracey D'Amadio Tyrrell. 2 Pages (Copy).

FULL

RESPONDENT'S EXHIBITS

Resp 1 UST Closure Application dated February 27, 2007.

for ID

Resp 2 Title Insurance policy dated December 28, 2005.

FULL

Resp 3 Certificate of Tank Tightness Test dated November 23, 2005.

FULL

Resp 4 UST Closure Application Approval Letter dated March 12, 2007.

for ID

Resp 5 Office of Compliance and Inspection Notes to File dated June 18, 2003.

FULL

Resp 6 June 11, 2003 Compliance Inspection Letter from DEM to Paul Bailey's.

FULL

Resp 7 UST Certificate of Registration October 10, 2002.

FULL

Resp 8 Notice of Violation dated January 18, 2007.

FULL

Resp 9 Notice of Violation dated December 28, 2005.

FULL

Resp 10 DEM April 9, 2007 Corporations search concerning Mutual Properties.

for ID

Resp 11 June 26, 2003 Electronic Mail from Richard LeFabvre to Kevin Gillen.

for ID

Resp 12 November 23, 2005 Complaint Form.

FULL

Resp 13 DEM August 25, 2006 Tax Assessor's Search concerning the property.

FULL

Resp 14 DEM August 25, 2006 Corporations search concerning Mutual Properties.

FULL

Resp 15 DEM Certification of List of underground storage tank facilities that were issued Notices of Intent to Enforce for failure to comply with Rule 8.03 of the 2005 UST Regulations.

for ID

Resp 16 Letter from Kevin Gillen, DEM Office of Waste Management to Stephen Soscia, Mutual Properties dated July 9, 2007.

for ID

Resp 17 Closure Certificate for UST Facility #3419 dated July 9, 2007.

for ID

Footnotes

1

The December 28, 2005 NOV issued to SB concerned SB's failure to submit a complete Compliance Certification Form for the Facility as required by Rule 8.03 of the *2005 UST Regulations*. It did not concern the abandonment of the tank. Resp. 9