

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

RE: ARPAD MERVA

AAD NO. 93-024/GWE

DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS

This matter is before the Hearing Officer on the Respondent's Motion to Dismiss ("Motion") whereby Respondent requests dismissal of the Notice of Violation ("NOV") issued by the Department of Environmental Management in the instant matter on the ground that it fails to state a claim upon which relief can be granted. Respondent filed this Motion pursuant to Rule 8 of the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters ("AAD Rules") and Rule 12 (b) (6) of the Superior Court Rules of Civil Procedure ("Superior Court Rules"). The Motion was accompanied by a written Memorandum of Law specifying the legal basis and support of the Respondent's position.

A written objection to said Motion, which incorporated a Memorandum specifying the legal basis and support of its position, was filed on behalf of the Division of Groundwater and ISDS ("Division").

A hearing on Respondent's Motion to Dismiss was held on May 25, 1995 at which all parties were given an opportunity to be heard.

Respondent bases his Motion on his assertions that the statutes and regulations (for which Respondent was cited in the NOV) do not impose strict liability on the owner of

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property who does not engage in any affirmative action resulting in oil pollution or contamination. It is Respondent's position that some affirmative act resulting in contamination or pollution is required in order for a property owner to be liable to the State. Respondent contends that since the NOV does not allege that Respondent engaged in any affirmative conduct that would constitute a violation of the statutes and regulations in question, it is clear beyond a reasonable doubt that Division cannot prove liability under these statutes and regulations.

Division argues that Respondent has mistakenly characterized this Motion as a Motion to Dismiss, and suggests that Respondent is deemed to have waived this Rule 12(b)(6) defense since it was not timely filed either in or prior to the filing of Respondent's hearing request. It is also argued by Division that the statutes and regulations involved in the instant matter are not as limited as Respondent contends, and that they do not require "affirmative conduct" for a violation to occur. Division contends that said statutes and regulations prohibit the release of contaminants, and that the Respondent's "negative" conduct in refusing to clean-up known contamination that is having continuous on and off-site impacts also constitute a violation of the statutes and regulations for which Respondent was cited in the NOV. It is Division's position that this matter should proceed to hearing

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at which Division will establish that the Respondent is allowing contaminants to remain in his property in such a fashion that the property itself becomes a source of contamination by continually releasing contaminants that migrate and have ongoing impacts on adjacent properties, the surface waters and groundwaters of the state in violation of statutes and regulations as cited in the NOV.

AAD Rule 8.00(a) provides that a party may request action on the part of the hearing officer by way of motions. The types of motions made shall be those which are permissible under these Rules and the R. I. Superior Court Civil Rules of Procedure.

Rule 12(b)(6) of the Superior Court Rules provides that a party may make a motion to dismiss for failure to state a claim upon which relief can be granted.

Superior Court Rule 12(c) provides that after pleadings are closed, a party may move for judgment on the pleadings.

Under the Superior Court rules, a Rule 12(b)(6) motion brought after the joinder of issue may be treated as a Rule 12(c) motion for judgment on the pleadings. Collins v. Fairways Condominiums Assoc. 592 A.2d 147 (R.I. 1991).

A Superior Court Rule 12(c) motion is tantamount to a Rule 12(b)(6) motion, and the same test is applicable to both, that is, it is clearly apparent that the plaintiff can prove no set of facts to support the complaint. Haley v. Town of

Lincoln, 611 A.2d 845 (R.I. 1992).

The sole function of a Superior Court Rule 12(b)(6) motion to dismiss is to test the sufficiency of a complaint. Romanella v. Maguire, 40 A.2d 833 (R.I. 1979). Dismissal of a cause of action under this rule is a harsh remedy; and is proper only where plaintiff is not entitled to relief under any conceivable set of facts that might be proved in support of plaintiff's claim. In testing the sufficiency of a cause of action, all allegations are taken as true and all doubts are resolved in plaintiff's favor. Only where it appears beyond a reasonable doubt that the plaintiff is not entitled to relief should a Rule 12 (b)(6) motion be granted. Hornsby v. Southland Corp., 487 A.2d 1069 (R.I. 1985).

The pleadings and terminology at Superior Court differ somewhat from those at the AAD.¹ However, the defense raised by Respondent in the instant Motion (i.e. failure to state a claim upon which relief can be granted), however entitled, should be considered by this tribunal according to the proper test applicable to Rule 12(b)(6) motions at the Superior Court, viz, whether it is clear beyond a reasonable doubt that Division will not be entitled to relief under any set of facts that might be proved.

¹Civil actions at Superior Court are commenced by "complaint" and provisions are made for "Judgment"; whereas at the AAD, the terminology "Notice of Violation", "Appeal/Request for Hearing", and "Final Decision" are employed.

The NOV issued by Division cites Respondent for violations of R.I.G.L. §§46-12-5 and 46-12.5-3, the Oil Pollution Control Regulations, and the Rules and Regulations for Groundwater Quality.

The Respondent claims that he should not be responsible for the actions of his predecessors in title; however, it does not appear that such actions are included in the alleged violations for which Respondent was cited in the NOV. Issues such as whether Division is entitled to the relief sought in the NOV if Respondent did not initially cause the contamination on the subject property, or whether Respondent should be held liable for the alleged violations by allowing contaminants to remain on his property in such a fashion that this constitutes a violation of the Statutes and Regulations (for which Respondent was cited) should more appropriately be addressed at the adjudicatory hearing.

The issues and arguments advanced by Respondent in support of his Motion do not warrant dismissal of the NOV at this stage of the proceedings. Respondent has failed to demonstrate to a certainty that the Division will not be entitled to relief under any set of facts that might be proved at the adjudicatory hearing. Since it does not appear at this time that on the face of the NOV there is some insuperable bar to relief, the Motion cannot be granted.

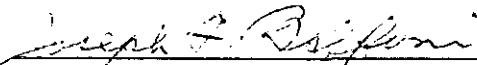
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It is therefore,

ORDERED

1. That Respondent's Motion to Dismiss is DENIED.

Entered as an Administrative Order this 28th day of September, 1995.



Joseph F. Baffoni
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, Third Floor
Providence, Rhode Island 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within order to be forwarded, via regular mail, postage prepaid to Guido R. Salvatore, Esq., 123 Dyer St., Providence, RI 02903; Ralph T. Lepore, III, Esq., Deborah E. Barnard, Esq., Warner & Stackpole, 75 State St., Boston, MA 02109; Gerald J. Petros, Esq., Hinckley Allen & Snyder, 1500 Fleet Center, Providence, RI 02903; Gregory L. Benik, Esq., McGovern, Noel & Benik, 321 South Main St., Providence, RI 02903 and via interoffice mail to Brian A. Wagner, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this 28th day of September, 1995.

