

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

RE: GREGORY AND MARION SULLIVAN  
NOTICE OF VIOLATION UST 1358

AAD NO. 93-005/GWE

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

This matter is before the Administrative Adjudication Division for Environmental Matters on the Motion for Summary Judgment filed by the Division of Waste Management, Underground Storage Tank Program (the "Division") on November 16, 1993. No objection to the Motion was filed. Due to the dispositive nature of the motion, this hearing officer set the matter down for hearing sua sponte for December 7, 1993.

By way of conference call, Respondent Gregory Sullivan's father, George Sullivan, Esq, (an attorney licensed to practice in Massachusetts) requested a continuance of the oral argument indicating that Respondents received the notice of oral argument on December 3, 1993 and needed additional time to prepare. Although notice to Respondents was in accord with the requirements of the AAD Rules of Practice, and over the objection of Division counsel, the hearing officer issued an order on December 7, 1993 continuing the matter one week to December 14, 1993. Because of a conflict in the hearing officer's schedule the oral argument was again continued, by conference call with Gregory Sullivan, to December 21, 1993. Still, no objection to the summary judgment motion was filed nor did Respondents file any response to the Request.

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Oral argument was held on December 21, 1993. At oral argument, Respondent Gregory Sullivan submitted to the hearing officer and Division counsel the following: (1) Respondent's Memorandum in Opposition to Department's Motion for Summary Judgment; (2) Respondent's Motion to Respond Late to Request for Admissions; and (3) Respondent's Response to Request for Admissions. The Division objected orally at the argument to each submission proffered by Mr. Sullivan. As the transcript indicates, the Division was afforded an opportunity to file written objections to the submissions and subsequently did so.

The Division has moved for summary judgment asserting that there are no genuine issues of material fact and that the Division is entitled to entry of summary judgment as a matter of law concerning the Notice of Violation and Order "NOVAO" issued to Respondents. In support of its Motion, the Division relies upon the admissions of Respondents, Gregory Sullivan and Marion Sullivan and its Memorandum of Law filed on November 16, 1993.

By way of an Order issued on April 22, 1994, Respondent's Motion to Respond late to the Request for Admissions was denied and the admissions were conclusively established in accord with Rule 36 of the Superior Court Rules of Civil Procedure. As the moving party, the Division must demonstrate to this administrative tribunal that it is entitled to judgment as a matter of law and that there exist

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no genuine issues of material fact. Palmisciano v. Burrillville Racing Assn., 603 A.2d 317 (R.I. 1992).

Upon deciding this motion for summary judgment, it is incumbent upon me to conduct an examination of the pleadings, affidavits, admissions and other appropriate evidence, if any, in the light most favorable to Respondent. Commercial Union Companies v. Graham, 945 A.2d 243, (R.I. 1985). Thereafter, summary judgment may only be granted if such review determines that no issue of material fact exists and the moving party is entitled to judgment as a matter of law. Blanchard v. Blanchard, 484 A.2d 904 (R.I. 1984).

The primary basis of Respondents' opposition lies in the Respondent's proffered Response to Requests for Admissions filed at the summary judgment argument. As indicated previously, the Respondent's Motion to Respond Late to Request for Admissions was denied by separate order. Accordingly, the only remaining basis for opposition cited in Respondent's Memorandum is the handwritten statement alleging, in total, that "there are facts in dispute." I have considered the written submissions to the extent indicated, considered the pleadings, and considered the arguments of the parties in the light most favorable to the Respondents.

Based on the admissions of Respondents, I find as fact the following:

1. The respondents, Gregory and Marion Sullivan, are the owners of a certain parcel(s) of real property located at 23-27 Carver Street, Pawtucket, Rhode Island, otherwise known as Pawtucket Assessor's Plat 63, Lots 278 and 671 (the "Facility").
2. The respondents purchased the Facility on April 26, 1986.
3. The Facility is comprised of two adjacent properties containing two apartment buildings, each of which has four or more residential units.
4. At the time that the respondents purchased the Facility, one or more USTs were located thereon, which USTs were previously used for the storage of petroleum products.
5. The USTs located at the Facility were used to store No. 2 heating oil for the purpose of heating the apartment buildings located thereon.
6. Operation of the USTs located at the Facility was discontinued by a prior owner when the buildings' heating systems were converted from oil to natural gas.
7. During a Status Conference conducted in the above-referenced matter before Hearing Officer Patricia Byrnes on April 2, 1993, respondent Gregory Sullivan stated that:
  - (a) The Facility contained two, six-unit apartment buildings; and that
  - (b) Operation of the USTs had been discontinued approximately two owners prior to the respondents purchase of the Facility.
8. The respondents have not operated the USTs since their purchase of the Facility.
9. The Facility continues to use natural gas to heat the buildings located thereon.
10. The USTs located at the Facility have never been registered with the Department or closed in accordance with the Regulations for Underground Storage Facilities Used for Petroleum Products and Hazardous Materials (the "UST Regulations").

11. The respondents have had actual knowledge of their regulatory obligation to close any abandoned tanks on the Facility since at least October, 1991.
12. On September 18, 1992, the Department issued a Notice of Violation and Order (the "NOV") to the respondents.
13. The NOV was served on the respondents by certified mail, return receipt requested on February 8, 1993.

Based on the foregoing admissions and arguments of the parties, I conclude the following as a matter of law:

(1) There is no dispute as to any material fact and the Division is entitled to judgment as a matter of law concerning liability for violations of Section 8 of the UST Regulations as alleged in the NOVAO.

(2) There is no dispute as to any material fact and the Division is entitled to judgment as a matter of law concerning liability for violations of Section 15 of the UST Regulations as alleged in the NOVAO.

The Rules and Regulations for the Assessment of Administrative Penalties provides in Section 12 that once the Division establishes a violation, as it has done here, the burden shifts to the Respondents to prove by a preponderance of the evidence that the penalty assessment and/or economic benefit portion of the penalty was not in accordance with the Penalty Regulations. The Respondents asserted in their hearing request, filed on February 16, 1993, that the penalty assessment was excessive and sought a hearing on said assessment citing R.I.G.L. §42-17.6-4. Respondents should be

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afforded an opportunity to come forward with evidence supporting their assertions. Accordingly, it is hereby

ORDERED

1. The Division's Motion for Summary Judgment is GRANTED as to the liability of Marion and Gregory Sullivan for violations of Section 8 and Section 15 of the UST Regulations as alleged in the NOVAO.
2. The Division's Motion for Summary Judgment as to the penalty assessment is DENIED.
3. The Clerk shall forthwith schedule this matter for a Prehearing Conference on the sole issue of the penalty assessment. As required by Section 12 of the Penalty Regulations, the Respondents bear the burden of proving by a preponderance of the evidence that the penalty assessment and/or economic benefit portion of the penalty was not assessed in accordance with the Penalty Regulations.

Entered as an Administrative Order this 26<sup>th</sup> day of April, 1994.

Kathleen M. Lanphear  
Kathleen M. Lanphear  
Chief 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 certified mail, postage prepaid to Gregory Sullivan, 21 Florence Avenue, Norwood, MA 02062; and certified mail to Marion C. Sullivan, 21 Florence Avenue, Norwood, MA 02062 and via interoffice mail to Brian A. Wagner, Esq., Office Legal Services, 9 Hayes Street, Providence, RI 02908 on this 26<sup>th</sup> day of April, 1994.

[Signature]