

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE POLLUTION CONTROL AGENCY

In the Matter of the Administrative Penalty Order Issued to Big O Partnership, Walker, Minnesota

FINDINGS OF FACT,
CONCLUSIONS, RECOMMENDATION AND MEMORANDUM

The above-entitled matter came on for hearing before Phyllis A. Reha, Administrative Law Judge, on November 18, 1994, at the Minnesota Pollution Control Agency (MPCA), 520 Lafayette Road, St. Paul, Minnesota. The hearing took most of the day on November 18th. The record closed upon the submission of the last reply brief on December 30, 1994.

Appearing on behalf of the Minnesota Pollution Control Agency was Ann E. Cohen, Assistant Attorney General, 900 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101. Appearing on behalf of Big O Partnership was Jonathan C. Lewis, Strusinski & Lewis, Western Bank Building, 1740 Rice Street, Suite 280, St. Paul, Minnesota 55113.

This Report is a recommendation, not a final decision. The Commissioner will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 116.072, subd. 6(e), the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least five days. Within those five days, parties may comment to the Commissioner on the recommendations, and the Commissioner must consider the comment's in making his final decision. Parties should contact Charles W. Williams, Commissioner, Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

1. Whether Big O Partnership committed the violations alleged in the Administrative Penalty Order issued in the matter.
2. Whether the \$3,476.00 nonforgivable penalty assessed against Big O Partnership is reasonable under all of the circumstances.

FINDINGS OF FACT

1. Big O Partnership (Big O) is one of many business entities owned by Tim Orton and others (Orton).
2. Orton is both owner and operator of 19 underground storage tank facilities (UST) in Minnesota.
3. Orton is owner but not operator of one UST facility in Minnesota: Stan's Standard, in Motley. Orton owns the property and USTs at Stan's Standard. Orton had registered the tanks with the MPCA. PCA Exhibit 1.
4. Stanley Winters is the operator of Stan's Standard. He occupies the property under the terms of a lease agreement which expired in 1985, as modified orally with Big O from time to time. Jurisdictional Exhibit A.
5. The lease agreement does not address compliance with the requirements of Minn. Rules 7150, and Big O had not discussed with Mr. Winters who was to be responsible for environmental compliance.
6. Owners generally control UST systems. As is the case with Orton's other 19 sites, it is not uncommon for UST owners to perform the role of operator as well. Because a single owner often has control over tanks at several sites, there are far fewer UST owners in the state than UST operators. These facts, coupled with resource limitations which make it inefficient for the MPCA to divide its regulatory efforts between owners and operators, have led the MPCA to focus its compliance efforts on owners rather than operators. Only owners are tracked in the MPCA database. Only owners receive MPCA and EPA educational UST mailings.
7. The MPCA selected Big O from its database of UST owners for an underground storage tank inspection.
8. Roger Fisher, an inspector with the MPCA's underground storage tank program, selected Stan's Standard for the location of the test because the tanks at that location were the oldest among those owned by Big O.
9. By letter dated June 6, 1993, the MPCA notified Big O that it would be inspecting its facilities. The letter noted that the inspection would include a review of leak detection practices. Included with the letter was a form and instructions that might be used to ensure the performance of proper inventory control.
10. Following receipt of this letter, Pete Pederson, Controller of Orton Oil, a company which forms part of the Big O Partnership, contacted the MPCA and confirmed what would be required to demonstrate compliance with applicable UST rules.
11. Approximately one week before the UST inspection, Roger Fisher notified Big O of the impending inspection at Stan's Standard.
12. After receiving notice of the impending inspection from Mr. Fisher, and before the inspection took place, Big O took the USTs at Stan's Standard out of service and removed the fuel dispensers.
13. By letter dated August 17, 1993, Big O requested that the MPCA not perform its planned UST inspection at Stan's Standard. The letter indicated that the tanks were not in

compliance with tightness testing requirements, but would be taken out of service shortly due to a decision by Amoco not to allow the station to continue to use the Amoco brand and identifying signs. The letter stated Big O's position that UST compliance tests were not necessary under these circumstances. PCA Exhibit 9.

14. On August 22, 1993, Mr. Fisher proceeded with an inspection of the USTs at Stan's Standard. He was accompanied by two MPCA regional staff members: Stan Kalinoski and Doug Bellefeuille. The MPCA representatives were met at the site by Mr. Winters, Mr. Orton, and Mr. Pederson.

15. Minn. Rules 7150.0240B(5) requires owners and operators to maintain documentation of compliance with leak detection requirements under Minn. Rules 7150.0350.

16. Minn. Rules 7150.0350 requires owners and operators to "maintain records according to part 7150.0240 demonstrating compliance with the applicable requirements of parts 7150.0300 to 7150.0350." Part B of this rule requires that the results of any sampling, testing or monitoring be maintained for at least 10 years.

17. Minn. Rules 7150.0330A(2), in conjunction with the documentation requirements noted in Findings 15 and 16, requires the recording of inventory recordkeeping to the nearest 1/8 inch. Mr. Fisher found no evidence during the inspection to indicate that stick readings were being made to the nearest 1/8 inch. Mr. Winters told Mr. Fisher during the inspection that he measured to the nearest 1/4 inch. Mr. Winters translated his stick readings into gallonage and relayed the readings by phone to Big O three times a week.

18. According to Minn. Rules 7150.0330A(1) and (3), stick readings are required to be taken daily and before and after petroleum deliveries. Mr. Fisher reviewed Mr. Winter's tank stick reading records for three months. Mr. Fisher identified no records on site to indicate that the owner or operator had measured petroleum levels at the site before and after deliveries.

19. Following the inspection, Orton provided the MPCA with bills of lading indicating that the level of petroleum had been measured before and after product delivery. The measurements had been made by the delivery driver.

20. Minn. Rules 7150.0330A(6), in conjunction with the documentation requirements noted in Findings 15 and 16, requires monthly product inventory control documentation on tank water levels to the nearest 1/8 inch. Mr. Winters told Mr. Fisher that he checked the tanks for water, but no records were kept to record the results of such tests.

21. Minn. Rules 7150.0330 requires monthly testing and reconciliations sufficient to detect a release of at least 1 percent flow-through plus 130 gallons. Mr. Fisher reviewed Big O inventory control data while at Stan's Standard. He determined that the site inventory data was not being reconciled in a manner sufficient to comply with this Rule.

22. Big O did not use stick readings to perform its monthly reconciliations, but instead used readings on terminal manifests. At the hearing, Mr. Orton stated that he reconciled the data in his head. Even if true, such mental reconciliation does not comply with the recording requirements of the Rule noted in Findings 15 and 16.

23. Minn. Rules 7150.0310A(2) requires annual tank tightness tests. Big O conceded that no tank tightness tests had been performed for the three tanks at Stan's Standard for the two years preceding the inspection.

24. Following the inspection, Mr. Fisher mailed a copy of a Warning Citation and his inspection checklist to Big O. The purpose of a Warning Citation is to give the regulated party notice of violations so that the regulated party can come into compliance. The warning citation noted the following violations of Minn. Rules Ch. 7150:

- .0300, subp. 1c: failure to conduct precision tests on tanks 45, 46, 47 by 12/22/91 and again by 12/22/92
- .0330A(6): failure to document on inventory control sheets that water was tested for at least one month.
- .0330A(2): end of gauge stick is worn and incapable of measuring product level to within 1/8".
- .0330A(2): failure to record product levels to nearest 1/8".

25. Minn. Stat. §116.072, subd. 2, gives the Commissioner authority to authorize penalties up to \$10,000 for all violations identified during an inspection or compliance review. In determining the amount of a penalty the Commissioner may consider:

- (1) the willfulness of the violation;
- (2) the gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state;
- (3) the history of past violations;
- (4) the number of violations;
- (5) the economic benefit gained by the person by allowing or committing the violation; and
- (6) other factors as justice may require, if the commissioner specifically identifies the additional factors in the commissioner's order.

26. The MPCA has developed a thorough evaluation process for determining the amount of a fine to be assessed in administrative penalty situations. The application of this process to the Big O violations is described in Penalty Calculation Worksheet, PCA Exhibit 4. The process is based upon the statutory factors noted in Finding 25.

27. On January 27, 1994, the MPCA convened an "enforcement forum" to discuss the violations noted during the August inspection and subsequent record review. An enforcement forum is a meeting attended by the unit supervisor, the inspector, a co-inspector, an attorney for the MPCA, and other MPCA staff people as available. The purpose of the enforcement forum is to review noted violations for accuracy and to determine an appropriate penalty for the violations.

28. The forum concluded that forgivable penalties were appropriate for the violations relating to inventory control. Each of these violations was deemed to represent either "minor" or "moderate" deviations from compliance, representing "minor" or "moderate" potential for harm. The forum participants took into account the fact that some inventory control was being performed.

29. The forum concluded that a nonforgivable base penalty of \$5,000 was appropriate for the violations relating to the lack of annual tank tightness testing. The forum deemed that

violation a “serious” deviation from compliance, representing a “serious potential for harm in that the tanks are steel, 19 years old, and the monthly inventory control data for these tanks were not reconciled on a monthly basis. The potential for harm is enhanced by the fact that the site has shallow ground water (8’) and the tanks are partially submerged in water. Groundwater contamination exacerbates the harmful effects of leaking tanks.” PCA Exhibit 4.

30. The forum determined that the nonforgivable base penalty should be enhanced by 25 percent—for a nonforgivable subtotal of \$6,250—due to “culpability” factors: Big O had received mailings concerning leak detection and had attended UST workshops presented by the MPCA, and therefore should have had an enhanced awareness of the need to comply with tank leak detection regulations.

31. No increase in the penalty was warranted or applied on the basis of Big O’s compliance history. At the time the forum was convened, Big O had no past UST violations.

32. To encourage compliance, the forum concluded that 70 percent of the nonforgivable penalty should be changed to forgivable.

33. The forum then added \$2,100 to the nonforgivable penalty as an assessment of “economic benefit” gained by Big O for failing to conduct tank tightness tests annually. This amount was calculated from an assumed testing cost of \$350 per tank, for three tanks, for two years.

34. The \$350 per tank test amount was based on the average cost of tank tightness testing as shown on a 1992 survey in American Petroleum Marketers Magazine, and was confirmed by telephone contacts with tank tightness testers in Minnesota.

35. Big O submitted evidence during the hearing that tank tightness tests could be conducted currently for \$250 or \$275 per tank. Big O Exhibit 18. Although lower than the MPCA’s figure, these bids do not demonstrate that the figure used by the MPCA is unreasonable.

36. The total penalties calculated by the forum were \$3,975 nonforgivable and \$7,460 forgivable. To remain within the statutory penalty limit of \$10,000 for such actions, the forum adjusted each penalty downward proportionally, resulting in an Adjusted Nonforgivable Penalty of \$3,476 and an Adjusted Forgivable Penalty of \$6,524.

37. The MPCA Commissioner issued an Administrative Penalty Order (APO) to Big O on June 21, 1994. The APO first delineated the following violations of state UST rules:

1. 7150.0330A(2): Failure to record product levels on the inventory recordkeeping form to the nearest 1/8 inch.
2. 7150.0330A(3): Failure to gauge tanks before and after fuel deliveries to determine the amount of product delivered to the tanks.
3. 7150.0330A(6): Failure to document monthly on the inventory control recordkeeping form the quantity of water in each tank.
4. 7150.0330A: Failure to reconcile product inventory control data on a monthly basis.
5. 7150.0310A(2): Failure to conduct a tightness test on tanks 045, 046, and 047 by December 22, 1991 and December 22, 1992.

38. Following the delineation of violations, the APO contains a page with the heading "Corrective Action Required." It begins by stating that the recipient is required, per Minn.Stat. § 116.072, subd. 4, to correct all violations listed in the Order. It then gives the recipient a choice of two options: either perform the recording, gauging, documenting, reconciling, and tank testing processes cited as violative of the UST rules, or "permanently close tank systems 045, 046, and 047." Below these lines is the statement that "this requirement has been completed." The APO then describes the penalties assessed to Big O for the cited UST rule violations.

39. According to Minn.Stat. § 116.072, subd. 5, penalties shall be forgiven if the Commissioner determines that the violation has been corrected, unless it is a "repeated or serious violation." Because the tanks at Stan's Standard had been removed from service by the time the APO was issued, the APO reflected that the corrective action required had been completed. The effect of the acknowledgment was that the forgivable portion of the penalty was in fact forgiven.

40. The APO contains a provision regarding appeal, which Big O invoked by filing a timely request for a hearing.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of the Pollution Control Agency have jurisdiction in this case pursuant to Minn.Stat. §§ 14.57-14.62 and Minn.Stat. § 116.072.

2. All relevant substantive and procedural requirements of law or rule have been fulfilled. The matter is properly before the Administrative Law Judge.

3. Any Finding of Fact more properly termed a Conclusion of Law is hereby adopted as such.

4. As the agency proposing the civil penalty, the Minnesota Pollution Control Agency has the burden of proving by a preponderance of the evidence that an Underground Storage Tank violation has occurred.

5. The MPCA established by a preponderance of evidence that Big O Partnership violated Minn. Rules 7150.0330 by failing to conduct proper inventory control and Minn. Rules 7150.0310 by failing to conduct an annual tank tightness test for two years (1991 and 1992).

6. The \$3,476 nonforgivable penalty assessed against Big O Partnership in the Administrative Penalty Order of June 21, 1994, is not unreasonable within the meaning of Minn.Stat. § 116.072, subd. 6(c). That statute prohibits an Administrative Law Judge from recommending a change in the amount of a proposed penalty unless the penalty is found to be unreasonable.

7. The Commissioner's decision to issue the Administrative Penalty Order to Big O Partnership as the owner of the tanks located at Stan's Standard in Motley, Minnesota, rather than the operator of the station was not an abuse of discretion.

Based on these Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the nonforgivable penalty of \$3,476 contained in the June 21, 1994, Administrative Penalty Order issued to Big O Partnership be AFFIRMED.

Dated this 31st day of January, 1995.

PHYLLIS A. REHA
ADMINISTRATIVE LAW JUDGE

NOTICE

Pursuant to Minn.Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape Recorded; 7 cassettes
 Transcript Prepared by
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MEMORANDUM

Minn.Stat. § 116.072 provides that the Administrative Law Judge may not alter the amount of the Agency fine unless it is deemed “unreasonable,” considering the six factors listed in the statute: (1) The willfulness of the violation; (2) The gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state; (3) The history of past violation; (4) The number of violation; (5) The economic benefit gained by the person by allowing or committing the violation; and (6) Other factors as justice may require if the commissioner specifically identifies the additional factors in the commissioner's order. Big O argues that the MPCA’s enforcement action on this matter is unfair, improper, and results in an “unreasonable” penalty assessment. The Administrative Law Judge rejects this argument based on the following analysis.

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I. Selective Enforcement

Big O alleges that, as owner of underground storage tanks, it has been the victim of selective enforcement of UST rules because the MPCA never enforces the rules against tank operators, to whom the rules also apply. This claim fails for four primary reasons:

1. The rules governing underground storage tanks give the Agency discretion in seeking recovery from either owners or operators, or both. Minn. Rule 7150.0010, subp. 1.

2. The MPCA amply demonstrated during the hearing that while enforcement actions are generally directed at owners, it has considered and will continue to consider enforcement actions against operators where deemed appropriate to serve the goals of the UST compliance program. What's more, many tank owners simultaneously fulfill the role of operator; in such cases, an action against the owner is also an action against the operator.
3. Big O did not establish the essential elements of a typical selective enforcement claim. A claim of selective enforcement requires proof of bad faith. State v. Russell, 343 N.W.2d 36, 37 (Minn.1984). Specifically, discrimination must be proved on the basis of race, religion, or the exercise of a constitutional right. *Id.* No evidence was provided to demonstrate such bad faith on the part of the MPCA in its enforcement of UST rules against Big O.
4. Practically speaking, the relative power held by most owners vis-à-vis their operators substantially weakens any argument that owners alone bear the full weight of UST regulatory efforts. As demonstrated in this case by Orton's unilateral power to close the Motley station after learning of tank tightness testing violations, owners are not left helpless when assessed penalties for UST violations, watching equally culpable operators go unchecked for their non-compliance. Owners generally have considerable power over operators, which they can exercise to force operators to share the regulatory compliance burdens applicable to USTs.

II. Improper Rulemaking

Coupled with this unfairness argument, Big O raises in its brief the issue that the MPCA's decision to focus enforcement efforts on owners constitutes an unpromulgated rule in violation of Minn. Stat. Ch. 14 (1992). For the reasons cited in the MPCA's responsive brief, this interpretation of the Agency's actions seems unwarranted. As noted above, the MPCA has not determined that it will enforce the UST rules only against owners. The MPCA's case-by-case assessment of whether to pursue owners or operators in enforcement actions, given its finite resources in such matters, is an internal management decision, properly left to the discretion of the Agency.

III. Lack of Due Process, Economic Benefit

Big O also alleges in its post-hearing brief that it was denied due process by being excluded from the Agency's enforcement forum to assess the violations noted at the Motley site and determine an appropriate penalty. This argument must also fail. As noted in the MPCA responsive brief, Big O is getting its due process in this contested case hearing.

In the highly competitive retail gasoline industry, it is important that a regulatory system treat all competitors fairly. Competing station owners and operators should face the same regulatory costs if their operations have the same regulatory characteristics. To require one station to pay for annual tank tightness tests but allow another to avoid them and be penalized in an amount less than the cost of the tests would be unfair to the law-abiding station.

Big O admitted that the required tightness tests weren't completed for its Motley station, but argued that owner Orton should not be penalized for the cost of such tests because he received no "economic benefit" in avoiding the tests. Big O claims that if anyone benefited from avoiding the tests, it was Winters, the station operator. Big O's argument fails, primarily

because it ignores the financial connection between a station owner and a station operator. By not paying for annual tank tightness tests, the Motley station had an economic advantage over its compliant competitors. Orton benefits when a station that he owns possesses such competitive advantage, even assuming that Orton was not responsible for paying the cost of the tests outright.

Big O's economic benefit argument would be bolstered if it had shown that Orton and Winters had agreed that Winters would cover the expense of tank testing, but this was not shown. In fact, the parties stipulated that Orton and Winters had not discussed which of them was to be responsible for environmental compliance. What's more, Orton, not Winters, was responsible for paying for tank repairs in the event any were needed. It is uncertain who would have paid for the tightness tests if they had occurred. It is not unreasonable to conclude that Orton would have covered such expense, thereby giving Orton a direct competitive and economic benefit in the amount of the avoided testing costs.

Big O claims unfairness in that the MPCA attempts to enforce violations cited for the first time at the hearing that were not mentioned in the Warning Citation or APO. Big O refers to the fact that the citations appearing in the Warning Citation and APO contain no reference to documentation requirements. Documentation requirements are contained in sections of the Rules not specifically cited in the Warning Citation or APO; if the Agency wishes to penalize for documentation violations, the argument goes, it should have included the documentation citations in the Warning Citation and APO.

Big O's argument calls for an overly technical interpretation of the UST rules, one which ignores their intent and attempts to remove rudimentary inquiry responsibility of Big O. To begin with, Big O is presumed to know the UST Rules in their entirety -- both procedural sections and documentation requirements. Thus, Big O must comply with the law or suffer the consequences. The violation descriptions provided by the MPCA in both the Warning Citation and the APO made reference to the fact that documentation requirements were involved. They describe failures to "record" and failures to "document," and then give the citation for the procedural rule sections for which such documentation was absent. It would be unreasonable to conclude that by relying on the letter of the citations included in the Warning Citation and APO, Big O was completely unaware until the hearing that what the MPCA was unhappy with were documentation violations.

Big O's argument that the MPCA is unjustified in assessing non-compliance penalties for tanks which, due to their removal from service, were fully compliant at the time of inspection, merits brief attention. As noted in the MPCA brief, such argument, if successful, would remove much of the incentive for tank owners and operators to maintain compliance with UST rules. Clearly, the MPCA is justified here in assessing penalties for sufficiently proven regulatory violations -- even those which occurred prior to the date of an on-site inspection.

IV. Evidentiary Ruling, Late Filed Evidence

In a letter to the Administrative Law Judge on December 30, 1994, the MPCA complained that Big O had improperly introduced evidence after the hearing, in violation of Minn. Rules 1400.8607, subp. 2 (1993). Big O responded in a letter of 1/4/95 to the Administrative Law Judge that Minn. Rules 1400.8609, subp. 3, specifically allows receipt of memoranda as part of hearing record, so any evidence submitted with the memoranda is properly included in the hearing record. The language of the Rules in question indicate that the MPCA must prevail on this point.

Big O is correct in asserting that the record remains open until its memoranda are submitted. It does not logically follow, however, that new evidence in such memoranda are properly made part of the hearing record.

Minn. Rules 1400.8609, subp. 3 states that “the record of the contested case proceeding shall be closed upon the completion of the testimony, or receipt of the final written memorandum or transcript, if any, or *late filed exhibits which the parties and the Administrative Law Judge have agreed should be received into the record*, whichever occurs latest” (emphasis added). The language of the rule clearly manifests a distinction between submission of the final arguments and submission of new evidence/exhibits after the conclusion of the hearing. In accordance with the terms of this subpart, the new evidence contained in Big O’s brief would only be allowable if the MPCA and Administrative Law Judge agreed that it should be included in the hearing record. The MPCA properly voiced its non-acceptance of the new Big O evidence, so such evidence, as delineated in the MPCA letter of December 30, 1994 is deemed excluded from this hearing record.

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