

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Field Citation
Issued to Khaled Abdel-all, d/b/a
Crosstown Market

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Kathleen D. Sheehy on May 19, 2011, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota. The OAH record closed at the conclusion of the hearing that day.

Beverly M. Conerton, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2127, appeared for the Minnesota Pollution Control Agency (MPCA).

Khaled Abdel-all, owner of the Crosstown Market (Respondent) appeared without counsel.

STATEMENT OF ISSUE

Did the Respondent fail to conduct annual testing of underground storage tanks at his gasoline station; and if so, should the Field Citation assessing a penalty in the amount of \$1,000 be affirmed?

The Administrative Law Judge concludes that the Respondent failed to conduct the required tests and that the Field Citation should be affirmed.

Based on all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Khaled Abdel-All has operated the Crosstown Market at 5750 34th Avenue South in Minneapolis for the past 17 years. The business is a retail gasoline station and convenience store, with two 10,000-gallon fiberglass underground storage tanks for gasoline.¹

2. In 1998 the Respondent installed automatic tank monitors, as required by changes in state and federal law. The pressurized piping system that connects the

¹ Testimony of Khaled Abdel-All.

Respondent's underground tanks to the pumps is subject to separate monitoring requirements. Under state law, the owner must conduct annual line leak detection tests and line tightness tests of the piping system.² In addition, the owner must keep records of those test results for at least ten years.³

3. The MPCA has a Joint Powers Agreement with Hennepin County, pursuant to which the County conducts tank inspections on behalf of the MPCA. On April 29, 2004, a tank inspector employed by Hennepin County's Department of Environmental Services inspected the Respondent's tanks. She noted in her report that the owner had not conducted annual line leak detection tests or tightness tests.⁴ The inspector issued a compliance order requiring the Respondent to obtain those tests and to forward the results to her by July 29, 2004.⁵ The inspector also gave to the Respondent a copy of an MPCA fact sheet titled "Leak Detection for Pressurized Piping" and the MPCA's Question and Answer Book pertaining to underground storage tanks in Minnesota.⁶ These materials explain the testing requirements and the need to retain documentation of the test results.⁷

4. On October 14, 2004, the Respondent provided the test results to the inspector. The County accepted the passing results and took no further action.⁸

5. After another inspection on September 20, 2007, the MPCA issued a Field Citation Warning to the Respondent, who had not conducted a line tightness test or line leak detector test since the previous inspection in 2004. The Respondent was warned that unless the tests were performed and the results sent to the MPCA by November 26, 2007, he would be fined in the amount of \$1,000.00 for those violations.⁹

6. The Respondent had the tests done on January 4, 2008, and he thereafter forwarded the results to the MPCA.¹⁰ Although the tests were not timely, the MPCA accepted the passing results and took no further action.¹¹

7. On September 20, 2010, a Hennepin County inspector again inspected the Respondent's tanks. The Respondent had done no testing of the piping system since the previous tests were done in 2008. On September 27, 2010, the inspector issued a compliance order requiring the Respondent to provide the annual test results by November 18, 2010.¹²

² Minn. R. 7150.0300, subp. 6 A(1); 7150.0340, subps. 2 & 3.

³ Minn. R. 7150.0450, subp. 3 D (2)(g) & (h).

⁴ Ex. 7 at 5; Testimony of Shirley Smith.

⁵ Ex. 8.

⁶ Ex. 8; Exs. 9-10; Test. of S. Smith.

⁷ Ex. 9 at 37-38, B-23-B25; Ex. 10.

⁸ Ex. 8; Test. of S. Smith.

⁹ Ex. 6; Test. of K. Abdel-All.

¹⁰ Ex. 12.

¹¹ Testimony of Benjamin Palmquist.

¹² Ex. 4; Test. of K. Abdel-All.

8. When the results were not provided by January 3, 2011, the MPCA issued a Field Citation to the Respondent. The citation called for a penalty of \$1,000, calculated as two testing violations per tank for a total of four violations at \$250 each.¹³

9. On January 11, 2011, the Respondent had the testing performed, and he forwarded the passing results to the MPCA.¹⁴

10. It costs between \$400 and \$500 to have the line leak detection test and line tightness testing performed.¹⁵

11. The Respondent appealed the Field Citation on January 18, 2011. He agreed to waive his right to an expedited hearing because of a conflict in his schedule. He agreed that the hearing would be scheduled at a time that was mutually convenient.

11. The MPCA issued the Notice and Order for Expedited Hearing on April 26, 2011, scheduling the hearing to take place on May 19, 2011.

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

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Department have authority to consider and rule on the issues in this contested case hearing pursuant to Minn. Stat. § 116.072, subd 6 (2010).¹⁶

2. As the party proposing that action be taken, the MPCA has the burden of proving the facts at issue by a preponderance of the evidence.¹⁷

3. Minn. R. 7150.0300, subd. 6 A (1), provides that underground piping that conveys regulated substances under pressure must be monitored, in relevant part, using (1) line leak detection conducted according to part 7150.0340, subp. 2; and (2) annual line tightness testing conducted according to part 7150.0340, subp. 3, item A.

4. Minn. R. 7150.0340, subp. 2, provides in relevant part that automatic line leak detectors must be tested annually by an approved person to verify the leak detection threshold of three gallons per hour at ten pounds per square inch line pressure within one hour.

¹³ Ex. 5.

¹⁴ Ex. 11.

¹⁵ Test. of K. Abdel-all.

¹⁶ All citations to Minnesota Statutes are to the 2010 edition; all citations to Minnesota Rules are to the 2009 edition.

¹⁷ Minn. R. 1400.7300, subp. 5.

5. Minn. R. 7150.0340, subp. 3, provides that line tightness testing should be conducted annually to detect a 0.1 gallon per hour leak rate at one and one-half times the operating pressure.

6. Minn. Stat. § 116.073, subd. 1(b), authorizes designated staff of the MPCA to issue citations to an owner or operator who violates Minnesota Rules, Chapter 7150. Staff may issue citations for violations of Chapter 7150 only after the owners and operators have had a 60-day period to correct violations stated in writing by PCA staff, unless the violation is a repeat violation from a previous inspection.¹⁸

7. MPCA staff properly issued a field citation containing a penalty to the Respondent in January 2011 because the Respondent violated the identical rule provisions in both 2004 and 2008.

8. By statute, the penalty for violation of rules relating to underground storage tank system release detection requirements is \$250 per violation, up to a maximum of \$2,000.

9. The Respondent failed to obtain two annual release detection tests for each of two tanks, which amounts to four violations of Chapter 7150 at \$250 each, or \$1,000 total.

10. Field citations may be appealed within 15 days under the procedures in section 116.072, subd. 6.¹⁹

11. The administrative law judge may not recommend a change in the amount of the proposed penalty unless the administrative law judge determines that, based on the factors in Minn. Stat. § 116.072, subd. 2, the amount of the penalty is unreasonable.²⁰ Those factors include the willfulness of the violation, the gravity of the violation, the history of past violations, the number of violations, the economic benefit gained by the person allowing or committing the violation, and other factors as justice may require.²¹

12. A penalty in the amount of \$1,000 is reasonable in this case based on the Respondent's failure to perform the required annual tests.

Based on the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

¹⁸ Minn. Stat. § 116.073, subd. 1(c) (2010).

¹⁹ Minn. Stat. § 116.073, subd. 3.

²⁰ Minn. Stat. § 116.072, subd. 6(c).

²¹ Minn. Stat. § 116.072, subd. 2.

RECOMMENDATION

The Administrative Law Judge recommends that the Field Citation imposing a fine in the amount of \$1,000 be AFFIRMED in all respects.

Dated: June 2, 2011

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

Reported: Digitally recorded (not transcribed)

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the MPCA will make a final decision in this matter after reviewing the administrative record. The Commissioner may adopt, reject or modify these Recommendations. Under Minn. Stat. § 116.072, subd. 6(e), the Commissioner may not make the final decision until this Report has been made available to the parties to the proceeding for at least five days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact the office of Paul Aasen, Commissioner of the MPCA, 520 Lafayette Road North, St. Paul, Minnesota 55155, to find out how to file exceptions or present argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

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

MEMORANDUM

The Respondent does not dispute that he failed to conduct annual tightness testing and line leak detection testing of his piping system. He argues the MPCA acted inconsistently in choosing to fine him in 2011 when it did not do so in the past. In addition, he argues that the agency should be required to remind regulated parties of the obligation to conduct the tests each year.

The Respondent is obligated to know and comply with the rules that govern his operation of an underground storage tank. Moreover, the agency specifically advised him of these obligations in 2004 and 2007. But even when he was explicitly notified of the obligation, the Respondent has failed to act promptly to obtain the tests. The agency has made a more than reasonable effort to educate the Respondent about these requirements, and the Respondent has simply failed to incorporate the testing requirements into his routine business practices.

Moreover, the agency has not acted inconsistently or arbitrarily in issuing a field citation with a penalty. The statute permits MPCA staff to issue a field citation without allowing a 60-day correction period when the violation is a repeat violation from a previous inspection. The Respondent has had two previous warnings regarding the same violations after inspections in 2004 and 2007; in addition, he admitted during the hearing that the tests performed after those inspections are the only tests he has performed on the piping system. This means that the Respondent has failed to conduct the required tests in five of the last seven years. There are no factors that compel a reduction in the amount of the fine, and the Field Citation accordingly should be affirmed.

K.D.S.