

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Administrative
Penalty Order Issued to Curtis
Hemmingson, d/b/a Quick Stop
Wash-n-Fill, 900 Highway 212 West,
Granite Falls, Minnesota 56241

FINDINGS, OF FACT,
CONCLUSIONS,
RECOMMENDATION
AND MEMORANDUM

The above-entitled matter came on for hearing before Allan W. Klein,
Administrative Law Judge, on February 15, 1994, in St. Paul.

Appearing on behalf of Quick Stop Wash-n-Fill and Curtis Hemmingson was
Curtis Hemmingson and his wife, Donna Hemmingson.

Appearing on behalf of the Minnesota Pollution Control Agency staff was
Ann E. Cohen, Assistant Attorney General.

The hearing took only part of the day on February 15, and the record
closed at the end of the hearing.

Minn. Stat. P 116.072, subd. 6(e) provides that the Commissioner may not
issue a final Order until at least five (5) days after receipt of this
Report.

The person to whom an Order is issued may, within those five days, comment to
the Commissioner on the recommendations, and the Commissioner must consider
the
comments. The final Order may be appealed in the manner provided in Minn.
Stat. PP 14.63 to 14.69.

STATEMENT OF ISSUE

Is the \$4,270 nonforgivable penalty assessed against Curtis Hemmingson
reasonable under all of the circumstances?

FINDINGS OF FACT

1. Quick Stop Wash-n-Fill is a service station and convenience store
in
Granite Falls. It is owned and operated by Curtis Hemmingson and his wife,
Donna Hemmingson.

2. On November 3, 1989, the MPCA received an Underground Storage Tank

Notification Form from Curtis Hemmingson, indicating that the facility had four underground storage tanks. There is a 500-gallon tank, a 2,000-gallon tank, a 4,000-gallon tank, and an 8,000-gallon tank. The form indicated that each of the tanks was in service, but that it was unknown when the tanks were first installed. The form further indicated that the facility used the "inventory control" method of leak protection, and that none of the four tanks had any history of leaking.

3. On November 15, 1991, an anonymous informant identified the Quick Stop Wash-n-Fill as possibly being out of compliance with the state's underground storage tank rules.

4. On November 25, 1991, Teresa Gilbertson, a student intern, called Curt Hemmingson and ascertained that he had not had any tank tightness tests performed for the past four years. Gilbertson informed him that such testing was required annually since 1989 (with exceptions), and that he was out of compliance. She forwarded information to Hemmingson to assist him in having the tests performed. Ex. 12.

5. On December 30, 1991, Gilbertson visited Granite Falls, and confirmed that Hemmingson was out of compliance. Ex. 8.

6. On January 2, 1992, Nancy Mortland, of the Agency's Marshall office, directed a certified letter to Hemmingson, indicating that the facility was still out of compliance with regard to leak detection (tank testing) requirements. The letter directed Hemmingson to submit a written plan detailing how he would come into compliance within 30 days of receipt of the letter. Ex. 8. Mortland received no response to this letter.

7. On February 3, 1992, Gilbertson spoke with Hemmingson, who indicated that he planned to remove the tanks. He agreed to submit a written plan to the Marshall office as soon as possible. Ex. 7.

8. On April 3, 1992, Gilbertson paid a site visit to the facility, and talked with Curtis Hemmingson. She indicated that the Agency had still not received any written compliance plan. She told Hemmingson that failure to submit a plan could result in enforcement action, including fines. Hem

9. On April 6, 1992, Hemmingson sent a letter to Mortland in the Marshall office, indicating that he was currently getting bids on tank removal, and that once he received bank financial approval, he would proceed to have the tanks removed during the summer of 1992. The letter went on to say: "In the meantime we have contacted Rollies to have our tanks tested. I will let you know when this is completed." Ex. 10.

10. On July 23, 1992, Janelle Jacobson, a new student worker in the Marshall office, contacted Rollies Sales and Service (a tank maintenance firm in Osakis) to determine whether or not there had been any testing done for Quick Stop Wash-n-Fill. She learned that Hemmingson had contacted Rollies

about bids for removal, but that the removal project appeared to be at a standstill. That same day, Jacobson contacted Hemmingson, and learned that he did have bids for removal, but he stated that he had not yet been to the bank to discuss the matter with them. He was now hoping to remove the tanks in the fall of 1992. Ex. 16.

11. In December of 1992, Jacobson again spoke with Hemmingson, who indicated that the tanks had not been removed during the previous fall, and were still being used. She also learned that there had not been any tank testing.

12. On March 19, 1993, Mortland issued an formal Warning Citation to Hemmingson, indicating that the Agency was aware of three violations. The first related to failure to perform leak detection, the second related to failure to maintain leak detection records, and the third related to failure to provide leak detection data to the Agency. The citation directed Hemmingson to provide results of tank tightness tests within 30 days of receipt of the citation. The results were to be sent to the Marshall office. Hemmingson received the citation on March 22. Ex. 11. In response to the citation, Hemmingson contacted Rollies in Osakis, and arranged for tank tightness tests on the 8,000-gallon tank and the 4,000-gallon tank. The 2,000-gallon tank was no longer in service, and the 500-gallon tank could be tested by less expensive means.

13. On April 13, 1993, an employee of Rollies did perform tank tightness tests on the two largest tanks. Both tanks passed the test. Hemmingson paid Rollies between \$1900 and \$2,000 for this testing. As the Rollies tester was leaving the service station, Hemmingson spoke with him about forwarding the test results to the Agency's Marshall office. The Rollies tester assured Hemmingson that Rollies would do so. After leaving, the tester discovered he had left something behind, and returned to the service station. Again, Hemmingson spoke with him and again the tester assured Hemmingson that Rollies would send the results to the Marshall office. Despite these assurances, Rollies did not send the results to the Marshall office at that time.

14. On May 28, 1993, Mortland convened an enforcement forum to consider the appropriate response to Hemmingson's failure to do anything about his tanks. The forum decided on an administrative penalty order as the appropriate tool.

15. After it was decided that an administrative penalty order would be issued, Mortland and others proceeded to prepare the penalty order itself and compute the appropriate fines. On August 31, 1993, Mortland called Hemmingson and told him that a formal letter, known as a "ten-day letter", would be sent to him, and that he should watch for it. When she explained this was a prelude

to a penalty order and a fine, Hemmingson expressed surprise. He thought that once he had done the required testing within 30 days of the warning citation, everything was cleared up. Mortland knew nothing about the April testing. Hemmingson emphatically assured Mortland that Rollies had done the testing, and that she should call Rollies to verify it. Mortland was surprised to hear this, as she had not received any prior information to suggest that the testing had been done. She cal

16. On September 1, 1993, the Agency's Marshall office received a written report from Rollies indicating that they had, in fact, done the April testing, and that all three tanks tested (the 8,000-gallon, the 4,000-gallon, and the 500-gallon tank) had passed the tests. Ex. 15.

17. On August 31, Mortland sent the "ten-day letter" to Hemmingson, indicating that the Agency had found the facility to be in violation of two rules, and that he had ten days to respond in writing to explain any inaccuracies. Ex. 14.

18. During the ten days following the issuance of the letter, Hemmingson called Mortland to be sure that Rollies had sent her the April testing results.

19. On September 21, 1993, Mortland contacted Rollies, and asked that the computer printout of the April test be sent to the Agency. On September 22, Rollies did fax the results to the Agency. Ex. 15.

20. Mortland reconvened the enforcement forum to relay the newly discovered information regarding the April test and Hemmingson's belief that Rollies would send the results to the Agency shortly after the test. It was determined that there should be no change in the decision to issue an APO, because responsibility ultimately rests with the owner and operator, not with a testing service such as Rollies. On October 19, 1993, Mortland completed a final draft of the penalty calculation worksheet, which contains the underlying basis and calculations for the fines at issue. Ex. 13.

21. On November 29, 1993, the Agency served an Administrative Penalty Order on Hemmingson. The Order states two rules violations, and assesses a total penalty of \$8,750. Of that total, \$4,270 is nonforgivable, while \$4,480 would be forgiven if Hemmingson took the corrective actions required by the letter. The Order contained a provision regarding appeal, which Hemmingson invoked by filing a timely request for a hearing. The Assistant Attorney General handling the matter wrote back to Hemmingson asking for a more specific statement of issues, which he provided by a letter dated January 17, 1994. The gist of Hemmingson's letter is that the nonforgivable portion of the fine is

unreasonable because Hemmingson had gotten Rollies to do the test within the 30 days demanded in the warning citation. Hemmingson also asserted that the fine was unreasonable in light of the Hemmingsons' financial condition.

22. The Hemmingsons' total income was approximately \$24,000 during "last year", which is probably calendar year 1993. A fine of \$4,270 represents approximately 18% of the \$24,000.

23. The Hemmingsons have no employees. The two of them operate the station together, with one of them there at all times that the business is open. In most cases, the station is open 15 hours per day, seven days per week.

24. The Agency has just under 46,000 underground storage tanks registered with it. It is aware of nearly 7,000 which are leaking. The U.S. Environmental Protection Agency estimates that on the average, 30% of all underground storage tanks will eventually leak.

25. The rules governing the state underground storage tank (UST) program took effect in July of 1991. However, they were closely modeled after federal rules which had been in effect since December of 1988. Hemmingson had registered his four tanks with the Agency in 1989.

26. During 1991, the Agency held a series of workshops around the state. These were announced by means of a mailer which was sent to all registered owners or operators of underground storage tanks. The workshops were held during the winter, spring and fall of 1991, as well as more sporadically in 1992 and 1993. Of particular relevance to the Hemmingsons would be workshops offered in Willmar in January of 1991, and Marshall in October of 1991. Ex. 4.

27. In addition to workshops, the Agency also has a publication, called "The Tank Monitor", which is sent to all registered owners and operators. Ex. 2. This publicati

28. Hemmingson's failure to have his tanks tested saved him the cost of testing. As of November 1991, it had been at least four years since Hemmingson had had the tanks tested. The Agency chose only to look at years 1990, 1991 and 1992 for the purposes of computing the economic benefit which Hemmingson incurred as a result of not doing the testing. Based upon national survey data, verified by informal local contacts, the Agency estimated that each tank would cost an average of \$350 to test. On the assumption that there were three tanks which needed testing (the 2,000, 4,000 and 8,000-gallon tanks), the Agency estimated an economic benefit of \$1,050 per year for the three years at issue, for a total of \$3,150 for all three years. The actual cost paid by Hemmingson to Rollies in April of 1993 for testing three tanks worked out to

between \$1,900 and \$2,000. The Agency's estimate of \$1,050 per year is well below Hemmingson's actual cost.

Calculation_of_Penalty

29. The Agency has developed a thorough evaluation process for determining the amount of a fine to be assessed in administrative penalty situations. This process is described in Ex. 5, and its application to the Hemmingson violations is described in Ex. 13. The process is based upon statutory factors (Minn. Stat. P 116.072, subd. 2).

30. The penalty order and the fines were based upon two separate violations: the first was a failure to perform leak detection tests, while the second was failure to submit leak detection records to the Agency. The first was deemed to be a "serious" violation, having "moderate" potential for harm. The second was viewed to be a "serious" violation, having only "minor" potential for harm. These factors are considered in computing a base penalty, which in this case was \$3,500 for the failure to perform leak detection, and \$500 for the failure to submit records, for a total base penalty of \$4,000. This \$4,000 figure was then enhanced by a 40% additur to reflect the staff's evaluation of Hemmingson's failure to come into compliance. The staff felt that there had been more than enough contacts with Hemmingson to inform him of what was wrong and what needed to be done. With almost 46,000 registered tanks, and almost already 7,000 leaking ones, the staff simply does not have the resources to have many individual contacts with each owner or operator. When there are a large number of individual contacts, but there is no compliance, the staff feels a large enhancement is appropriate.

31. The Agency often divides penalties into two parts: Forgivable penalties and nonforgivable penalties. The penalty calculation worksheet instructions (Ex. 5) indicate that a penalty is to be divided based upon a ".«. . judgment as to what is an adequate consequence for noncompliance and appropriate deterrent for the future" The Agency has developed a policy and practice of usually splitting fines on a 80/20 basis, which it calls a "compliance incentive" -- 80% of the fine is forgiven if certain corrective actions are taken within a specified period of time. The Agency applied that formula to this fine, and separated the \$5,600 total penalty into a \$4,480 forgivable portion, and a \$1,120 nonforgivable portion. The Agency then added \$3,150 to the nonforgivable portion in order to account for the economic benefit which Hemmingson derived from not performing the tests in 1990, 1991, and 1992. The \$1,120 nonforgivable portion of the penalty, added to the \$3,150 economic benefit, yielded a total nonforgivable penalty of \$4,270.

32. The penalty, and its method of calculation is reasonable in this case. \$3,150 of the \$4,270 nonforgivable penalty, or 74% of it, is the amount of money that Hemmingson saved by not doing the tests. There is a rational basis for an enforcement tool which, at a minimum, places the violator in at least as bad a position as he would have been if he had obeyed the law.

Based upon the foregoing Findings, the Adminis

CONCLUSIONS

1. The Minnesota Pollution Control Agency has jurisdiction of the subject matter of this hearing.

2. Proper notice of the hearing was timely given, and all relevant substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter is properly before the Administrative Law Judge.

3. Hemmingson did violate Minn. Rule pts. 7150.0300 (leak detection) and 7150.0240 (records submission) as alleged in the administrative penalty order.

4. The \$4,270 nonforgivable fine was not unreasonable within the meaning of Minn. Stat. P 116.072, subd. 6(c). That statute prohibits an Administrative Law Judge from recommending a change in the amount of a proposed penalty unless he finds the amount of the penalty is unreasonable.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

That the \$4,270 nonforgivable penalty assessed against Curt Hemmingson be
AFFIRMED.

Dated this 28th day of February, 1994.

s/ Allan W. Klein

ALLAN W. KLEIN
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. P 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.

MEMORANDUM

The Administrative Law Judge is prohibited from "tinkering" with the amount of a fine unless he finds it to be unreasonable, considering the factors listed in the statute (willfulness, gravity, history of past violations, number of violations, economic benefit, and other factors "as justice may require").

The Hemmingsons work harder than average for the amount of income which they receive from their gas station. During a recent 12-month period, they received only \$24,000 for their seven-day-per-week, 15-hours-per-day effort. To them, a fine of \$4,270, on top of a testing cost of \$1,950, reduces their income by 25%. This is substantial by any measure. However, the \$1,950 testing cost is required, and certainly cannot be negotiated away by the Agency. Moreover, the \$3,150 savings which Hemmingson realized by not testing for three years should not be overlooked by the Agency. That avoided cost put Hemmingson in a better competitive position than a service station down the street which did incur those costs. Especially in a very competitive industry, such as the retail gasoline industry, it is important that a regulatory system treat all competitors fairly. Two gasoline stations, on opposite corners of an intersection, should face the same regulatory costs if they have the same regulatory characteristics. To require one of them to pay for annual tank tests, but allow the other to avoid them and be penalized in an amount less than the cost of the tests, is unfair to the law-abiding station.

All that remains of the \$4,270 fine is the \$1,120 portion which penalizes the Hemmingsons for not having tested when they should have. While that still represents five percent of the Hemmingsons' income, such a percentage cannot be said to be unreasonable, despite the fact that it must represent a large part of the Hemmingsons' discretionary spending money.

The only other way in which the proposed fine could be viewed as unreasonable is the heavy weight given to complying with agency directives. There were two violations of agency rules at issue in this proceeding. The first was the failure to perform leak detection tests. The second was failure to submit test results to the Agency. The Agency labeled the failure to perform the tests as a "serious" deviation, having "moderate" potential for harm. It labeled the failure to submit the records as a serious deviation based on Hemmingson's "culpability/willfulness". In justifying that enhancement, the Agency described the numerous contacts which it had been forced to make with Hemmingson, to illustrate his knowledge of the violation and his failure to cure it. However, the fact that he ignored the Agency was already considered in arriving at the "serious" rating. It would appear that there has been a "double counting" of the Hemmingsons' conduct. While this double counting follows the worksheet instructions (Exhibit 5) and thus is not any accident or error on the part of the staff, the Agency should consider it when negotiating a payment plan with the Hemmingsons.

A.W.K.