

DISTRICT COURT
DOUGLAS COUNTY
FILED

AUG 20 1997

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF DOUGLAS

Phyllis L. Haarstad
DK Court Administrator
Deputy

SEVENTH JUDICIAL DISTRICT

State of Minnesota, by its Attorney)
General Hubert H. Humphrey III, and)
its Minnesota Pollution Control Agency,)

Plaintiff,)

vs.)

Rollies Sales & Service Inc., Dale)
Walsh, and Roland A. Walsh,)

Defendants.)

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

Court File No. C2-95-296

Pursuant to Plaintiff's Complaint, filed April 5, 1995, the above-entitled matter came on for Court Trial before the Honorable Paul L. Ballard, Judge of District Court, on the 28th day of April through the 1st of May, 1997, at the Douglas County Courthouse, Alexandria, Minnesota.

Ms. Jocelyn F. Olson, Assistant Attorney General and Ms. Janette K. Brimmer, Assistant Attorney General, appeared on behalf of the Plaintiff. Mr. Joseph G. Maternowski, Attorney at Law, Minneapolis, appeared on behalf of the Defendants.

The Court, having reviewed the evidence presented at trial, the arguments of counsel, and all of the documents filed herein, now makes the following:

FINDINGS OF FACT

1. The Plaintiff in this action is the State of Minnesota by its Attorney General and its Minnesota Pollution Control Agency (MPCA).

2. Hubert H. Humphrey III is the Attorney General of the State of Minnesota and is empowered under common law and Minn. Stat. §§8.01 et seq. (1996) to commence suits for the protection of public rights. Humphrey is specifically charged with enforcement of the statutes and rules relating to air, water, and land pollution. Minn. Stat. §115.071, subd. 3-5 (1996).

3. The MPCA is a statutory agency of the State. The MPCA is responsible for administering and enforcing statutes and rules relating to air, water, and land pollution, which statutes and rules have general application throughout the State.

4. In 1976, Congress adopted the Resource Conservation and Recovery Act, 42 U.S.C. §§6901 et seq. (RCRA), providing for the regulation of the management of hazardous waste. In adopting RCRA, Congress provided for eventual state control of the hazardous waste program and set up a mechanism for the U.S. Environmental Protection Agency (EPA) to grant authority to states to operate the program. 42 U.S.C. §6926. In states that receive authorization, the state environmental agency administers the state program in place of the federal government. To receive and maintain authorization, the state program must be equivalent to the federal hazardous waste program and consistent with federal or state programs applicable to other states. 42 U.S.C. §6926(b).

5. Minnesota has adopted statutes and rules governing the management of hazardous waste, Minn. Stat. Ch. 116 (1996) and Minn. Rules chs. 7001 and 7045 (1993), and has received EPA authorization for its hazardous waste program pursuant to RCRA. 50 Fed. Reg. 3756 (January 28, 1985); 40 C.F.R. §272.1200. The MPCA

has maintained its EPA authorization by amending its rules from time to time to ensure that the rules are equivalent to federal regulations. Pursuant to Minn. Stat. §14.37, subd. 1 (1996), the rules adopted by the MPCA have the force and effect of law.

Minnesota has also adopted statutes and rules relating to the prevention of pollution of the underground waters of the state. Minn. Stat. Ch. 115 (1996) and Minn. Rules ch. 7060 (1993).

6. Rollies Sales & Service Inc. (Rollies) is a Minnesota corporation with a facility located at Highway 27 West, Osakis, Minnesota, 56360.

7. Rollies was incorporated on January 13, 1988. In 1988, Roland Walsh arranged for the incorporation of the company and caused the corporation to issue 50 percent of the stock in his own name and 50 percent of the stock in the names of three of his children: Gary Walsh, Dale Walsh, and Julie Fernow. Roland Walsh served as chief executive officer of Rollies until February 8, 1988. Dale Walsh became the chief executive officer of Rollies on July 3, 1988.

8. In 1992, the officers of the Rollies corporation were: Dale Walsh, President; Gary Walsh, Vice President; and Julie Fernow, Secretary/Treasurer. The current shareholders of Rollies are Dale Walsh, Gary Walsh, and Julie Fernow. Dale Walsh is currently the President of Rollies.

9. Rollies is in the business of selling and installing gas pumps, canopies, and storage tank systems.

10. At the time of the MPCA's June 4, 1992 inspection of Rollies, Roland Walsh owned 35 percent of Rollies' stock. In 1991, Roland Walsh had transferred a

total of 15 percent of his Rollies stock to Dale Walsh, Gary Walsh, and Julie Fernow. On December 12, 1992, Roland Walsh transferred all of his remaining stock to Dale Walsh, Gary Walsh, and Julie Fernow.

11. Roland Walsh is the chief executive officer of Riverside Equipment, Inc. (Riverside), formerly named Rollie's Tank Service of Osakis, Inc. Riverside was incorporated in 1981. The shareholders of Riverside consist of Roland Walsh and ClaraJayne Walsh. Roland and ClaraJayne own the land and buildings where Rollies and Riverside Equipment are operated. Riverside leases the land and buildings owned by Roland and ClaraJayne to Rollies. Riverside also leases equipment to Rollies and bills Rollies for its use of any equipment, personnel, and parts owned by Riverside.

12. Defendant Dale Walsh continued a portion of the business that had been conducted at the same site by Roland Walsh under various names including Rollies Welding and Tank Company, Rollies Tank Service, and Rollies Tank Service, Inc. (Hereinafter "predecessor business") since 1981. The registered corporate name of the predecessor business was "Rollies Tank Service of Osakis, Inc." In 1991, the name of "Rollies Tank Service of Osakis, Inc." was changed to "Riverside Equipment, Inc."

13. Roland Walsh, Rollies, and the predecessor businesses of Rollies have been in the business of providing, installing, and servicing equipment at gas stations and bulk petroleum facilities, and the excavation and salvaging of underground and above-ground storage tanks.

14. In the 1980's, the United States Congress and the State of Minnesota enacted laws to address widespread contamination caused by leaking storage tanks.

These laws encouraged tank owners to excavate existing underground tanks and install tank systems with leak detection systems. The state of Minnesota also created a cleanup fund that is designed to reimburse tank owners and operators for costs related to the cleanup of leaking tank sites.

15. In 1988, Defendants began providing the service of assisting gas station owners and other small businesses to comply with federal and state laws regulating underground storage tanks.

16. In July, 1991, Rollies filed with the MPCA a "Notification of Hazardous Waste Activity, Management of Used Petroleum Tanks and Tank Bottom Sediment." The MPCA then placed Rollies on a list which the MPCA then provided to gas station owners, tank excavators, and others who needed the services of the types of companies that were on the MPCA's list.

17. Pursuant to Minn. Rules ch. 7105 (1993), Rollies was certified by the MPCA as a tank excavator and has notified the state of its tank salvage activities. In February, 1990, Rollies hired Bruce Store as Director of its environmental services and to ensure compliance with all environmental regulations.

18. In addition, in 1990 and 1991, nine individuals employed by Rollies, including Defendant Dale Walsh, applied for and received MPCA Underground Storage Tank Supervisor Certification and received a Certificate of Underground Storage Tank Training. This certification and training is required by the MPCA rules governing the installation, repair or closing of underground storage tanks. The required training course is specifically aimed at familiarizing those who attend the course with state

statutes, rules, and other requirements related to the excavation and handling of used underground storage tanks.

19. Under Minn. Rules pts. 7045.0292, subp. 6 and 7001.0520, subp. 2 (1993), a very small quantity generator (VSQG) of hazardous waste is exempt from the requirement to obtain an MPCA hazardous waste facility permit for the treatment, storage, or disposal of hazardous waste if the generator complies with the waste accumulation requirements of Minn. R. 7045.0292, subp. 6 (1993).

20. Pursuant to Minn. Rules pts. 7045.0225 through 7045.0245, in 1992, Rollies was licensed by the MPCA as a VSQG generator of hazardous waste.

21. During the time period relevant to the complaint herein, Rollies' business included transportation of used underground and aboveground storage tanks to its Osakis facility and salvage of tanks at the facility. Prior to accepting those tanks for salvage, Rollies constructed a 100 foot by 100 foot concrete pad in the yard of its facility so that tanks could be cleaned on the concrete surface. The pad was lined with a claymax layer above a base of natural clay found at the site. Any runoff that drained onto the concrete pad should have been directed to an oil-water separator system. This system was designed to capture and permit recovery of all petroleum residue.

22. Tanks that were to be salvaged were stored in Rollies' yard. Tanks were supposed to be cleaned on the concrete pad so that the petroleum product and residue would not come into contact with the ground. Salvaging the tanks began with either cutting or "poking" a hole in each tank to allow a vacuum truck to remove as much as possible the remaining petroleum product and residue. The residue would consist of petroleum product, sand, rust, dirt, and gravel.

23. The vacuumed-out material was put into one of two 8,000 gallon settling tanks that sat at the south end of Rollies' concrete pad. When the liquids "settled out" on the top of the tanks, Rollies pumped off as much petroleum "product" as possible.

24. The petroleum "product" that was pumped off the settling tanks was used as fuel in forced air furnaces in the buildings at Rollies' facility.

25. The remaining residue in the settling tanks was placed in to large sludge pods. The captured oil was vacuumed off and put in to holding tanks. The captured oil was used to heat the Rollies facility.

26. Rollies did generate hazardous waste. Rollies admitted in reports submitted to the MPCA in 1990 (ex. 5), 1991 (ex. 8), and 1992 (ex. 12), that it generated hazardous waste.

27. Rollies was subject to hazardous waste reporting rules as Rollies generated hazardous waste.

28. Additionally, in July, 1991, Rollies reported that it managed petroleum sediments and shipped those sediments "off site to a hazardous waste hauler/disposal" in an MPCA form entitled "Notification of Hazardous Waste Activity, Management of Used Petroleum Tanks & Tank Bottom Sediment."

29. Those shipments were picked up by a company called Determan, out of Fridley, Minnesota, who hauled those shipments from Rollies in the summer of 1990, and the fall of 1991.

30. In February, 1992, the MPCA informed Rollies of a change in reporting and licensing for generators of hazardous waste. Generators no longer needed to

submit annual reports to the MPCA. Rather, generators needed to apply for and obtain a license. Licenses were classified based on the amount of waste generated by the applicant. In 1992, the MPCA indicated to Rollies that it qualified as a VSQG, and asked Rollies to pay the corresponding amount for that license.

31. The license application form asks for information on wastes, specifically excluding products. Rollies listed on its 1992 license form that it generated hazardous waste in the form of 18 gallons of solvent and 100 gallons of sludges.

32. Hazardous waste is refuse that may pose a potential hazard to human health. Waste does not include products which may be and are intended to be recycled.

33. The contents of the used tanks at Rollies contained petroleum sludges which Rollies attempted to recycle by vacuuming out the tanks. The recovered portion was first put into settling tanks, where petroleum which settled to the top was vacuumed out. After all the petroleum had settled to the top, and was vacuumed out, the residue was placed in settling pots. Again, the petroleum was separated from the waste and vacuumed off. The remainder in the settling pot was waste to Rollies, as there was no intent to recycle that waste by Rollies, nor did Rollies have the capacity to recycle that waste.

34. On June 4, 1992, MPCA staff members Joseph Henderson, Alexis Khan, and Doug Bellefeuille conducted an inspection of Rollies' facility at Highway 27 West, Osakis, Minnesota.

35. When Rollies collected the used storage tanks from customers, Rollies' intent was salvaging the residue in those tanks by recycling. There was no intent by Rollies to store the residue in the salvaged tanks for later disposal. There was no reliable evidence presented to this Court that the residue in the tanks sat at the facility without being put into a recycling process for more than a reasonable period to constitute storing under Minn. Stat. §116.081.

36. There were no records produced, nor reliable testimony, on how long the sludge pots (which were eventually shipped to Determan's for disposal) were on site at the time of the inspection.

37. No testing was completed by MPCA staff of the residue left in the salvaged tanks after such tanks had been vacuumed by Rollies staff. No amounts were measured by MPCA staff of the residue left in the tanks after vacuuming, to determine if the remainder was of a large enough quantity to constitute storage of a waste.

38. No testing was conducted of the concrete pad at Rollies, nor was expert testimony presented that the pad design was defective such that the pad caused pollution to the surrounding land and water.

39. There was no need to evaluate the tank sludges that were brought to Rollies and placed into the recycling process, as they were not "wastes," but products that Rollies intended to recycle.

40. During their inspection, MPCA staff noted paint and paint thinner wastes. Rollies produced no records that these wastes had been evaluated to determine if the wastes were hazardous. Failure to evaluate such wastes could pose a risk to the

public because such waste could be mismanaged if not properly identified.

41. The residue in the sludge/settling pots at Rollies was waste. There was no evidence presented that Rollies had those wastes evaluated while on site at Rollies. Those wastes were eventually evaluated by Determan's and determined to be hazardous. Failure to evaluate such wastes could pose a risk to the public because such waste could be mismanaged if not properly identified.

42. There was no reliable evidence presented by an expert that the cement pad at Rollies' facility was not impermeable. MPCA staff failed to test the ground surrounding Rollies and the residues in the tanks on Rollies' lot to determine if any potential pollution in the ground or water came from the tanks at Rollies.

43. There was no labeling of the sludge/settling pots on Rollies' site as hazardous waste. While it was part of the recycling process, after the last vacuuming of the sludge pots took place, it should have been considered a container of waste and subject to the labeling rules. If the waste paint and thinners had been evaluated as hazardous, they too would have needed proper labeling. In addition to labeling the wastes as hazardous, the containers also needed to note the date that the waste began to accumulate in the storage area. Failure to label these containers could have posed a threat to the public, as any spillage could have been mishandled by authorities or employees of Rollies.

44. No records were found by the MPCA of regular inspection by Rollies of the waste containers. Failure to regularly inspect containers containing waste could pose a threat to the public as regular inspections could detect any spillage or leakage

from the containers.

45. Generators of hazardous waste must make arrangements with local emergency responders on what to do if an emergency occurs with the specific hazards contained on site. While local emergency providers knew that Rollies generated waste, there was no "plan of action" in case of a hazardous waste emergency. Rollies failed to post appropriate emergency phone numbers by the telephones. There is also a requirement that adequate aisle space be provided for emergency purposes. From the pictures admitted into evidence, it appears to this Court that on inspection day, adequate aisle space existed. Failure to have a "plan of action" in place with local emergency authorities and failure to list by the telephone emergency numbers could pose a risk to the public by delaying response time by emergency officials.

46. The tank residues transported to Rollies were recyclable product and not waste for purposes of reporting to the MPCA. The MPCA inspectors did not note any other inaccurate quantities reported by Rollies and thus Rollies was appropriately classified as a VSQG.

47. Evidence was presented to this Court of the tank sludges received by Rollies to be recycled (ex. 24). While the tanks were supposed to be vacuumed out before transportation, the logs indicate that many tanks arrived with sludges in them. The sludges were measured by Rollies after their arrival at the site as that is how Rollies measured the amount to charge a customer for disposal of the tank and sludges. Even though the sludges were to be recycled by Rollies, Rollies was required to obtain the appropriate hazardous waste transporter licenses and obtain the

appropriate manifests. Rollies did not obtain the required licenses or manifests. The shipment of the tanks with the sludges without the appropriate licenses or manifests posed a threat to the public health and safety because the safety precautions that are required for lawful transportation of such material was not in place.

48. The State failed to show that Rollies demonstrated an intentional disregard or plain indifference to the law with respect to the violations found. This Court finds that none of the acts were "willful" violations of Federal or State Statutes or Rules.

49. Both Dale Walsh and Roland Walsh were capable of influencing corporate policies and activities of Rollies.

50. Bruce Store was hired by Rollies as the person responsible for Rollies' compliance with environmental laws. Paul Brandt was hired as the director of Technical Services, and he worked beneath Store.

51. While Dale and Roland Walsh approved budget items for Store and Brandt, the violation found above are compliance issues. This court finds that ordering an evaluation of wastes, completing inspection reports of wastes, labeling hazardous wastes, making emergency plans of action and failing to obtain necessary transport documents were duties that would not be carried out nor directly influenced by corporate officers such as Dale Walsh and Roland Walsh. There was no reliable evidence that Dale and Roland Walsh caused these violations to occur.

CONCLUSIONS OF LAW

1. It is in the best interests of the State to encourage recycling efforts of petroleum tank salvagers such as the Rollies operation.

2. Rollies' actions and failures to act have resulted in the following violations of Minnesota statutes and rules relating to the management of hazardous waste and the prevention of water pollution:

A. FAILURE TO EVALUATE HAZARDOUS WASTE: Minn. R.

7045.0214, subp. 1. Rollies violated this rule because they failed to evaluate the waste of the sludge/settling pots and of the paints and thinners to determine if those materials were hazardous.

B. FAILURE TO LABEL HAZARDOUS WASTE CONTAINERS: Minn.

R. 7045.0292, subp. 5, items C and H. Rollies' failure to label hazardous waste containers of the sludge/settling pots and the paint and thinner containers violated this rule.

C. FAILURE TO PERFORM AND DOCUMENT INSPECTIONS OF

HAZARDOUS WASTE CONTAINERS: Minn. R. 7045.0292, subp. 5, item B. Rollies violated this rule by failing to inspect hazardous waste containers and areas where containers were stored and to keep a written record of the dates and findings of these inspections.

D. FAILURE TO MEET EMERGENCY PREPAREDNESS

REQUIREMENTS: Minn. R. 7045.0292, subp. 5, items I and J. Rollies violated this rule by failing to take actions designed to keep the company and local authorities properly prepared in case of an emergency at Rollies' facility.

E. UNLAWFUL TRANSPORTATION OF HAZARDOUS WASTE:

Minn. R. 7045.0371. Rollies transported hazardous waste without complying with the requirements of this rule. Violations included failure to have a hazardous waste transporter license and failure to have a manifest when transporting hazardous waste.

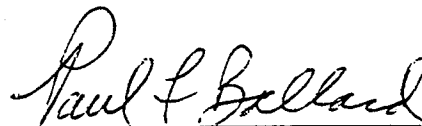
3. Dale and Roland Walsh are not liable for the above violations under the responsible corporate officer doctrine.

4. Rollies' violations of the above Minnesota Statutes and Rules were not willful.

ORDER

IT IS HEREBY ORDERED THAT: Rollies may be liable to the State for a civil penalty for the violations listed above. The penalty phase of this matter shall be scheduled by this Court for a day certain court trial in 1998.

Dated: *August 20, 1997*



Paul L. Ballard
Judge of District Court
Seventh Judicial District

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