STATE OF MICHIGAN

IN THE 26TH CIRCUIT COURT FOR THE COUNTY OF MONTMORENCY

JOSEPH B. ENGLISH, and JOEY's
OIL COMPANY, a Michigan Corporation,

Plaintiff,

vs.

File No.: 02-000138-CE
Hon. John F. Kowalski

MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Defendant.
_____/

LAWRENCE P. HANSON (P30373)
Attorney for Plaintiff
P.O. Box 456
Indian River, Michigan 49749
(231) 238-0505

JENNIFER M. GRANHOLM(P40922)
Attorney General
6 Penn Plaza
Petoskey, Michigan 49770
(231) 348-2922

NEIL S. SILVER (38224)
Co-Counsel for Plaintiff
300 East Long Lake, Ste. 200
Bloomfield Hills, Michigan 48304
(248) 540-2300
_____/

OPINION

The issue here is whether Plaintiff is entitled to declaratory relief or any other legal or equitable relief in this Court. More specifically, the issue is whether Plaintiff is entitled to the continuance of the Temporary Restraining Order issued June 12, 2002, or to the issuance of a similar permanent injunction.

Trial was held on August 28-30, 2002, and witnesses testified on behalf of Defendant, Michigan Department of Environmental Quality (MDEQ). Based on that testimony, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff Joseph B. English is the owner of a gasoline station in Atlanta, Michigan, which, over the years, has sold food, bait, alcoholic beverages, soda pop, fishing gear, kerosene, off-road diesel fuel, and regular diesel fuel.

2. In 1992, Plaintiff reported a release of petroleum products from an underground storage tank (UST) into the groundwater. Environmental Management & Engineering Services, Inc. (EMES) discovered free-phase petroleum product in the groundwater. It was also discovered in 1992 that a tank which had been storing no-lead gasoline for several years was removed in 1992 and a pinhole observed in the side of the tank.

3. Plaintiff hired a consultant, Sunberg, Carlson & Associates (SCA), which installed a free-product recovery system in 1994. The free-product recovery system originally installed by SCA consisted of pumps, a bag filter, and three large carbon vessels. One pump brings up "free product," the other brings up contaminated groundwater with "dissolved phase" free product. The recovered free product is stored in an above ground storage tank (AST) and later transported off site. The contaminated groundwater is pumped up into a treatment shed, a small building housing the free product recovery system. The contaminated water is passed through the bag filter that eliminates sand, silt, and other particulate matter. The contaminated water is then pumped through three carbon vessels that eliminate the hazardous gasoline components commonly known as BTEX. When the water is discharged from the carbon vessel, it is free of BTEX and discharged into a drainage structure located on highway M-32.

4. Bills for services of SCA were being paid by the Michigan Underground Storage Tank Financial Assurance Act (MUSTFA) Fund. When the above Fund became insolvent in 1995, payments to the SCA ceased and the recovery system was shut down. It did not start running again until it was repaired by DLZ, Inc. and Compliance, Inc. in May of 2000.

5. In September of 1995, Plaintiff dug a large hole on his property and removed a large quantity of soil contaminated with gasoline compounds and deposited the same on his property. Plaintiff then began to discharge untreated water into the environment.

6. In March of 1998, Plaintiff was advised by certified letter that he was not in compliance with the Natural Resources Environmental Protection Act (NREPA), 1994 PA 451, specifically "Part 213," and on April 17, 1998, Defendant placed red tags on the tanks at the gasoline station.

7. Plaintiff, through his attorney Neil Silver, and the MDEQ, represented by Barry Selden, negotiated an agreement whereby the red tags could be removed. The tags were removed August 20, 1998.

8. It was incumbent upon Plaintiff that he not only comply with the terms of the agreement mentioned above, but that he also comply with his responsibilities under Part 213 of NREPA. Plaintiff was required to have a qualified contractor (QC) file a corrective action plan (CAP). He was also required to file a final assessment report (FAR). By use of these reports, to comply with said Part 213, the QC would identify the type of contamination, impacted soils, hydrological characteristics of the site and other technical information. The QC would have to develop a plan to clean up the site that met Part 213 requirements and was approved by the MDEQ. The cleanup itself would have to be monitored, with detailed reports filed with the MDEQ, again in compliance with Part 213.

9. In July, 2000, Plaintiff did an "experiment" which resulted in unauthorized tampering with the free-product recovery system being run by DLZ and Compliance, Inc. Plaintiff willfully and deliberately removed hoses connected to the carbon vessels. This tampering resulted in highly contaminated groundwater being discharged into the environment.

10. The Court finds that the 1998 agreement between Plaintiff and Defendant and Part 213 of NREPA required Plaintiff to retain the services of a qualified consultant and undertake cleanup activities at the site. Plaintiff hired SEE, Inc. in 1998. Plaintiff signed an initial contract with SEE requiring the payment of $80,000 for work to be done in 1998. Plaintiff has not made the payments under that contract, and since Plaintiff has not made payments beyond the initial $5,500, therefore, SEE, Inc. has done virtually no work under this contract. A representative of SEE, Inc. testified that the cost of the project would now be more than $150,000.

11. On May 22, 2002, Plaintiff filed a Verified Complaint for declaratory relief and other legal and equitable relief in the Montmorency County Circuit Court. The Plaintiff's Complaint included a request for jury trial and that the Court "order MDEQ to pay Mr. English for the money lost due to the shutdown of Joey's Oil Company...." Additionally, the Complaint asked the Court to grant any other and further legal relief, as the Court deems proper. On May 24, 2002, this Court signed an Amended Temporary Restraining Order, and an Ex Parte Order to Show Cause Why a Preliminary Injunction Should Not Be Entered. The first Temporary Restraining Order provided:

> IT IS FURTHER ORDERED that plaintiff may remove the red tags on the tanks and pumps and provide a copy of this order to his supplier, to establish his legal entitlement to obtain fuel supplies.

12. On Friday, June 7, 2002, the first Temporary Restraining Order dissovled automatically, under MCR 3.310(B)(3). On June 7, counsel for MDEQ faxed Plaintiff's counsel a letter informing him that the MDEQ again intended to "red tag" Plaintiff's fuel tanks on Wednesday, June 12, 2002. On June 11, 2002, Plaintiff filed a motion for extension of the first Temporary Restraining Order. The MDEQ red tagged Plaintiff's fuel tanks on June 12, 2002, at 11:10 a.m. The Hon. Joseph P. Swallow signed a second Temporary Restraining Order on the afternoon of June 12, 2002. The second Temporary Restraining Order stated:

IT IS ORDERED that Plaintiff may remove any red tags on tanks and pumps placed by the Michigan Department of Environmental Quality, and provide a copy of this order to his suppliers to confirm his entitlement to continued fuel supplies.

This order shall continue until the ruling of the court after trial, which shall be held August 29, 2002, to August 30, 2002, or until further order of this court. The judge's office shall telefax a copy of this order to counsel of record. Plaintiff's counsel shall serve a true copy of this order on Defendant's counsel forthwith.

13. On June 18, 2002, MDEQ filed a Motion for Summary Disposition. In addition, on June 27, 2002, Defendant filed a motion to dissolve the Second Amended Temporary Restraining Order and for ancillary relief. On June 28, 2002, Plaintiff filed a First Amended Complaint for declaratory relief and equitable relief. Plaintiff also demanded trial by jury. Defendant filed its Answer, Affirmative Defenses, and a Demand for Reply on July 12, 2002.

CONCLUSIONS OF LAW

The Court concludes that the station owned by Plaintiff is not in compliance with NREPA, 1994 PA 451, specifically, "Part 213." The Court further finds that the specific sections of Part 213, with which Plaintiff has not complied, are as follows:

1. Plaintiff has failed to conduct corrective action activities, in accordance with the process outlined in the Risk-Based Corrective Action (RBCA) in a manner that is protective of the public health, safety, and welfare, and the environment. MCL 324.21304a

2. Plaintiff has failed to conduct free product recovery in a manner that minimizes the spread of contamination into previously uncontaminated zones by using recovery and disposal techniques appropriate to the conditions at the site and in a manner that properly treats, discharges, or disposes of recovery by-products as required by law. MCL 324.21307(2)(c)(i)

3. Plaintiff has failed to retain a Qualified Underground Storage Tank Consultant (QC) to prepare a Final Assessment Report, including a tiered evaluation under the RBCA Process, a Feasibility Analysis, a Corrective Action Plan, an appropriate implementation schedule, and a financial assurance mechanism under MCL 324.21309a and has failed to submit the Final Assessment Report to the Department of Environmental Quality. MCL 324.21309a(1) and MCL 324.2131la(1)

4. Plaintiff has failed to retain a QC to complete the remaining corrective actions and reporting requirements, specified in Part 213 of Act 451. MCL 324.21309a(1)

5. Plaintiff has failed to submit reports on the status of the free product delineation and recovery to the USTD, in accordance with MCL 324.21308a(1)(b)(xviii) and USTD Operational Memorandum No. 7 (dated February 6, 1997).

6. Plaintiff has failed to identify the classification for the site, in accordance with MCL 324.21308a(1)(c), and to identify contaminant migration pathways and potential exposure receptors, and abate any acute risks associated with an imminent threat of exposure to these contaminants.

7. Plaintiff has failed to implement an acceptable Corrective Action Plan, under an implementation schedule. MCL 324.21311a(1)(d)(e)

This Court has determined that, under the circumstances of this case, injunctive relief is not appropriate. Accordingly, the Court GRANTS Defendant's Motion to Dissolve the Temporary Restraining Order entered June 12, 2002. The Court further finds that Plaintiff has failed to comply with Part 213 of NREPA and that Plaintiff is not entitled to any injunctive relief pursuant to MCR 3.310.

Pursuant to MCR 2.602(B)(3), an Order consistent with this Opinion shall be submitted by attorney for Defendant.

Dated: November 27, 2002

JOHN F. KOWALSKI, CIRCUIT JUDGE

csg/jlm

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above-entitled cause by enclosing the same in an envelope addressed to each such attorney at his respective address as disclosed by the pleadings of record herein, with postage fully paid, and by depositing said envelope in a United States Post Office depository in Alpena, MI on the

27th day of November, 2002

Dan M LaMarre

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE 26TH JUDICIAL CIRCUIT
MONTMORENCY COUNTY

JOSEPH B. ENGLISH and JOEY'S OIL COMPANY, a Michigan corporation,

Plaintiffs

v

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

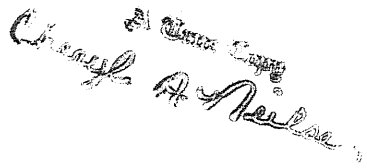
Defendant.
_____/

Case No. 02-138-CE

HON. JOHN F. KOWALSKI (P16181)

LAWRENCE P. HANSON, P.C.
Lawrence P. Hanson (P30373)
6470 South Straits Highway,
P.O. Box 456
Indian River, MI 49749
(231) 238-0505
--Attorney for Plaintiffs

JENNIFER M. GRANHOLM
Attorney General
A. Michael Leffler (P24254)
John P. Mack (P28407)
Assistant Attorneys General
6 Penn Plaza
Petoskey, MI 49770
Telephone: (231) 348-2922
--Attorney for Defendant



ORDER

This case having been tried before the bench on August 28-30, 2002, the parties having submitted extensive testimony, exhibits and trial briefs, and the court having rendered it's opinion dated November 27, 2002, and Defendant DEQ having filed a Second Motion to

dissolve the 2d Amended Temporary Restraining Order (2d TRO) the 2d TRO having been approved on June 12, 2002, and the court being otherwise advised;

IT IS ORDERED that the motion to dissolve the 2d TRO is GRANTED.

IT IS FURTHER ORDERED that the 2d TRO is DISSOLVED.

IT IS FURTHER ORDERED that Plaintiff's request for injunctive relief under MCR 3.310 is DENIED.

IT IS FURTHER ORDERED that Plaintiff's complaint is dismissed with prejudice, for the reasons stated in the court's opinion dated November 27, 2002.

This order resolves the last pending claim and closes the case.

HON. JOHN F. KOWALSKI
Circuit Judge

This Order was signed on the 12th day of December, 2002 at 8:45 o' clock in the fore noon.