UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

DECISION AND ORDER of 10/8

In the Matter of	:	
The City of Athens, Ohio	:	Docket No. RCRA-V-W-14-93
	:	Judge Greene
Respondent	:	

DECISION AND ORDER FOLLOWING
UPON COMPLAINANT'S MOTIONS FOR PARTIAL SUMMARY
DECISION AND UPON RESPONDENT'S MOTION TO DISMISS,
and MOTION TO DISMISS OR IN THE ALTERNATIVE FOR
SUMMARY DECISION.

The complaint in this matter charges Respondent with numerous violations of the Resource Conservation and Recovery Act of 1976, as amended (hereafter "RCRA" or "the Act"), 42 U.S.C. 6928, and regulations issued pursuant to authority contained therein in connection with the operation of a garage and vehicle painting area. It is alleged, *inter alia*, that Respondent is a "person who owns or operates a facility which generates, treats, stores, and/or disposes of hazardous waste" in

connection with the operation of its garage; that Respondent was therefore required to but did not obtain an EPA identification number[(1)]; was required to determine whether the solid waste generated was hazardous; that Respondent treated, stored, or disposed of hazardous waste at its garage after November 19, 1980, without applying for or receiving an appropriate permit[(2)]; that Respondent was required to, but did not, equip, test, and maintain alarm systems, fire protection equipment, spill control equipment, and decontamination equipment for use in emergencies[(3)]; and that Respondent was required to, but did not, implement a groundwater monitoring program prior to November 19, 1981.[(4)]

This matter was originally assigned here in August, 1993. During the next four years, the parties negotiated in good faith and reported status at four to six week intervals, approximately, pursuant to orders. From the outset it seemed clear that they would settle, and indeed they reported consistently that they expected to do so.[(5)] Most if not all material facts as to whether violations had been committed as charged were undisputed. The size of the monetary penalty to be imposed had essentially been agreed upon, and continued so for much of this period. The issues related principally to the nature and extent of the compliance order to be entered. In 1997 this placid situation with its economical use of resources changed during a short period when, it appears, officials of the State of Ohio made certain demands by way of closure or clean-up of the site (the formal record does not reveal all of the details) that had not theretofore been made -- or so Respondent believed -- and were unacceptable to Respondent. At this point pretrial exchange and stipulations were scheduled. Certain continuances were granted[(6)] for good cause shown, amid conference calls[(7)] and status reports. New counsel appeared for Complainant.[(8)] Notice of trial, following the filing and amendment of pretrial exchanges, was issued on February 3, 1998, but was continued pursuant to joint motion in part because of the appearance of additional counsel for Respondent, formal notice of which was made in April, 1998. A second postponement was ordered in order to accommodate Respondent's discovery, which was resolved informally[(9)]. The matter was again about to be tried when a motion for partial summary judgment was filed. Such motions being frequently helpful in resolving outstanding issues and assisting in settlement, the trial was again continued pending resolution of the motion. A second such motion was filed (December, 1998) followed by Respondent's motion to dismiss or, alternatively, for summary decision,[(10)] in connection with which a continuance was sought and granted;[(11)] and by Respondent's motion to dismiss on additional grounds.[(12)] It was determined that the four dispositive motions should be considered and decided together.

This procedural history is set forth in part because it is clear that until approximately one year ago the public interest and the economic use of resources dictated that these parties be given every opportunity to resolve the matter in an agreed disposition: Moreover, it was convenient to address in one decision the issues that arose in the past eighteen months and were presented in four motions, in order to narrow such issues and focus attention most effectively upon them. It is noted that violations were not continuing during these settlement efforts, and that it was not until a few months ago that either party pressed for trial. In appropriate situations -- in fact in most situations -- requiring that parties try a case sooner rather than later is an effective settlement tool, and if it should fail in that capacity, the matter can nonetheless be resolved by decision and order. Here, however, the advantages of continuing settlement efforts were significant and far more in the public interest than a lengthy and costly trial. Moreover, the devising of appropriate compliance orders can sometimes best be accomplished by the parties, with encouragement from the presiding official.

In order to avoid further efforts to require rapid resolution by this office of all matters regardless of the merits or suitability of doing so in particular cases, this decision as to all four motions is made at this time, despite an oral provision to defense counsel[(13)] that they could have an additional twenty-one days in which to brief Respondent's position respecting Complainant's earlier partial summary judgment motion.

Complainant's first motion for partial summary judgment, including attachments, sets forth, in great detail, evidence in support of each charge of the complaint. The strength of the presentation is persuasive that Respondent was at relevant times a generator and disposer of hazardous waste, subject to the 40 CFR Part 265 regulations; that Respondent failed to give proper notification of its activities, failed to determine whether the waste being generated was hazardous, failed to obtain an EPA identification number while continuing to dispose of hazardous waste; and failed, *inter alia*, to apply for a RCRA permit; develop contingency plans, maintain a written operating record, or submit a biennial report of facility activities.(14) Clearly, also, no adequate groundwater monitoring existed, and there was no written closure or post closure plan. (Complainant's Memorandum at 32-34.) As to each of these matters and the others addressed, no material issue of fact appears that remains to be decided. At every point Complainant demonstrates that a particular charge has either been admitted, or that the record thus far does not overcome the evidence set forth(15). It is concluded that Complainant's first motion for partial summary determination should be granted, for the reasons given therein, which are hereby adopted.

Complainant's second motion for partial summary determination is essentially an elaboration upon and support for the first, and is equally persuasive. Respondent's lengthy and able response, however, is ultimately unable to overcome an almost complete lack of anything substantive to challenge Complainant's strong position and show that any material issue of fact remains to be decided. Accordingly, Complainant's second motion, while repetitive of the first, is also granted for such new points as are made.

Respondent's motion to dismiss for failure to give thirty days' notice is denied, for the reasons set forth by Complainant in its brief(16) which are entirely correct and are adopted here. Respondent's motion to dismiss or alternatively for summary decision is denied, since it is clear that Complainant has established a prima facie case with respect to the charges set forth in the complaint. Moreover, the affidavits attached to the motion are inadequate to support the proposition that no material issues of fact remain to be decided. Again, for reasons set forth in Complainant's brief, which are hereby adopted, the motion must be denied.

Detailed findings and conclusions beyond those made herein, including Respondent being subject to and liable for violations of section 3005(a) of the Act and 40 CFR Parts 262, 265 and 270, will be filed within ten days of this date.

While Complainant has not sought determination as to the penalty and compliance order, this matter can be resolved without an evidentiary hearing and without additional briefing unless the parties specifically request further briefing. A monetary civil penalty of $98,000 is appropriate, considering all aspects of the record and the costs of compliance.

Complainant's proposed compliance order is unacceptably broad, in that it provides an open-ended requirement that Respondent must comply with whatever Ohio EPA may require. The proposed order provides that Respondent must comply with Ohio EPA demands as to a closure plan for the "grease pit" at the garage(17) and groundwater monitoring. Under such circumstances, Respondent would have no way of calculating its future expenses or exposure. This is neither reasonable nor fair. The compliance order must reflect the charges, including the pollutants involved in Respondent's operation, and the requirements of the Act and regulations. It may not be arbitrary.

ORDER and COMPLIANCE ORDER

It is ordered that Respondent's motion to dismiss, and its motion to dismiss or alternatively for summary decision, shall be and are hereby, denied.

It is ordered that Complainant's motions for partial summary decision shall be, and they are hereby, granted.

A civil monetary penalty of $98,888 is hereby imposed for violations of the Act and regulations.

The compliance order attached to the complaint is appropriate in all respects save those outlined above, and is hereby entered with the exception of the word "approvable," which is removed from all paragraphs in which it appears; and it is further ordered that Respondent shall have sixty (60) days rather than forty-five (45) days in which to comply.

_____
J. F. Greene
Administrative Law Judge

October 8, 1999
Washington, D. C.

1. Complaint at 4, ¶¶17-19.

2. Complaint at 5, ¶¶ 22-24.

3. Complaint at 6, ¶¶ 31-32.

4. Complaint at 7, ¶¶ 42-43.

5. See status reports dated, or received, September 3, 1993, October 29, 1993; December 7, 1993; January 28, 1994; April 11, 1994; May 16, 1994; June 20, 1994; July 21, 1994; August 18, 1994; September 16, 1994; October 24, 1994; December 2, 1994; January 18, 1995; February 16, 1995; March 23, 1995; April 26, 1995; July 5, 1995; August 22, 1995; September 12, 1995;

October 1l, 1995; January 16, 1996; March 11, 1997; May 7, 1996; July 10, 1996; September 26 and 30, 1996; November 12, 1996; January 10, 1997; March 11, 1997. In addition, the parties reported status orally in various conference calls.

6. March 11, 1997; May 21, 1997. Most of the motions were joint, agreed, or unopposed.

7. April 28, 1997; May 20, 1997; August 12, 1997; September 18, 1997; October 14, 1997, January 15, 1998.

8. October, 1997, - January 7, 1998 (formal notice of substitution).

9. August, 1998, conference calls.

10. February 1, 1999.

11. Complainant's Motion of February 12, 1999.

12. February 2, 1999.

13. September 22, 1999.

14. Complainant's Memorandum in Support of Motion for Partial Accelerated Decision, at 9, 12, 14, 15, 19, 21, 22, 24, 26-28, 29-30.

15. At the time of this decision, Respondent has not yet responded to this motion.

16. *Complainant's Response Opposing Respondent's Motion to Dismiss Complaint,*

Compliance Order, and Proposed Civil Penalty, February 22, 1999, particularly at 3-5. Complainant also points to In the *Matter of American Ecological Recycle Research Corporation*, RCRA (3008) Appeal No. 83-3, which is on point.

17. Pursuant to the proposed order, for instance, Respondent must produce "an approvable closure plan" for the tank, and an "approvable" plan for groundwater monitoring. Such requirements are open-ended, and not necessarily pinned to the specific charges in the complaint, and consequently hard to square with fairness. In effect, pursuant to this proposed order, Respondent must do whatever Ohio EPA says it must do.