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December 16, 2002

BY HAND DELIVERY

Regional Hearing Clerk
U.S. Environmental Protection Agency
77 W. Jackson Street (C-14J)
Chicago, IL 60604

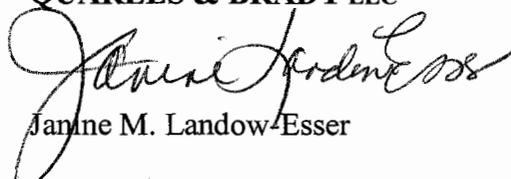
RE: RCRA 3008(h) Administrative Order, Stewart Warner Corporation, Docket No. RCRA-05-2003-0001

Dear Clerk:

Enclosed for filing please find Stewart Warner Corporation's Response and Affirmative Defenses to Administrative Order and Request for Hearing and Proof of Service in the above-captioned matter. As required by Section XXIV of the Order, a copy of the attached is also being delivered to Michael J. McClary, Esq., Office of Regional Counsel, U.S. EPA, Region V.

Sincerely,

QUARLES & BRADY LLC



Janine M. Landow-Esser

JMLE:rjg
Enclosure

cc: Michael J. McClary, Esq.
U.S. EPA
Robert Rein
Geoffrey Glanders

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF RESPONDENT:) ADMINISTRATIVE ORDER
) U.S. EPA Docket No. RCRA-05-2003-0001
Stewart Warner Corporation)
1541 Drover Street)
Indianapolis, Indiana)
U.S. EPA ID NO.) Proceeding under Section 3008(h) of the
IND 005 213 715) Resource Conservation and Recovery Act,
as amended, 42 U.S.C. § 6928(h).

RECEIVED
REGIONAL HEARING
CLERK

DEC 15 3:18

PROOF OF SERVICE

State of Illinois)
SS)
County of Cook)

Janine Landow-Esser, being duly sworn, deposes and says that on this 16th day of
December, 2002, a copy of:

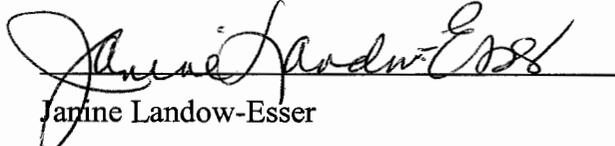
1. Response and Affirmative Defenses to Administrative Order and Request for
Hearing; and
2. Proof of Service

was served via hand-delivery to the following persons:

Regional Hearing Clerk
U.S. EPA
Region V (C-14J)
77 W. Jackson Street
Chicago, IL 60604

Mr. Michael J. McClary
Office of Regional Counsel
U.S. EPA
Region V (C-14J)
77 W. Jackson Street
Chicago, IL 60604

I declare that the statements above are true to the best of my information, knowledge and belief.


Janine Landow-Esser

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF RESPONDENT:) ADMINISTRATIVE ORDER
) U.S. EPA Docket No. RCRA-05-2003-0001
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RECEIVED
REGIONAL HEARING
DEC 15 2003 1:18

RESPONSE AND AFFIRMATIVE DEFENSES TO
ADMINISTRATIVE ORDER
AND REQUEST FOR HEARING

On October 15, 2002, the United States Environmental Protection Agency (“EPA”) served the Stewart Warner Corporation (“SW”) with an Administrative Order (“Order”) pursuant to Section 3008(h) of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6928(b).

Pursuant to Complainant’s Modification of Initial Administrative Order, signed by Joseph M. Boyle, Chief RCRA Enforcement and Compliance Branch, US EPA, Region 5, on November 15, 2002, EPA agreed to extend the time for SW to file a response and request for hearing from November 15, 2002 to December 16, 2002. SW, by and through its attorneys, Quarles & Brady LLC, hereby responds to the Order and requests a hearing in accordance with Section XXIV of the Order, Section 3008(b) of RCRA, and 40 C.F.R. Part 24 (2002). Because the order requires SW to perform corrective measures in addition to an investigation, SW believes that the hearing procedures set forth in 40 C.F.R. Part 24, Subpart C apply to this matter. In response to the Order, SW states as follows:

III. STATEMENT OF PURPOSE

- 1. Perform IM at the Facility to relieve threats to human health and/or the environment;**

The Facility does not present a risk to human health and/or the environment. Among other things, any discharge of potentially contaminated groundwater that may occur does not significantly increase the potential for unacceptable impacts to humans, surface water, sediments, or biota. In the alternative, if a risk does exist, Interim Measures are not necessary because the contamination is already stabilized.

2. Complete an RFI to fully determine the nature and extent of any release of hazardous waste at or from the Facility;

An RFI for the Facility has already been performed, therefore a full RFI is not necessary.

4. Implement the corrective measure or measures selected by U.S. EPA at the Facility;

The authority vested to EPA in this paragraph is arbitrary and unreasonable because it is overbroad.

V. FINDINGS OF FACT

13. The same containers were at the Facility during an inspection in April of 1986.

SW lacks information or knowledge sufficient to form a belief as to the factual allegations in this paragraph and therefore leaves EPA to its proofs.

15. The Facility (see Figure 1):

- i. is located on a glacial outwash aquifer, which consist primarily of sand and/or gravel with discontinuous, interbedded layers of finer grained silt and clay, (The last two sentences of footnote 2 to this assertion state:
“Groundwater flow is generally east-southeast towards the White River. However, local groundwater flow may have been influenced by the use of high capacity pumping wells located near the site.)**

SW states that Eli Lilly operates the high capacity pumping wells referenced in footnote 2. SW also states that the Eli Lilly dewatering operation *significantly* impacts the groundwater flow from the Facility.

- 16. Respondent ceased manufacturing operations at the Facility in December of 1989, and dismantled and transferred equipment and most of its manufacturing operations to its Troy and Tell City, Indiana, facilities.**

SW denies this paragraph as the assets of SW were sold, and the Troy and Tell City facilities are owned by an unrelated entity which also bought the Stewart Warner name.

- 21. Respondent reported the existence of another AOC, called the Suspect UST Farm (AOC D). In 1990, Versar conducted a magnetometer survey over a small portion of the site to investigate for the possible presence of UST. This area was surveyed based on a 1939 site plan. Versar interpreted the survey data to identify seven USTs: three 10,000-gallon gasoline tanks, one 9,000-gallon coal oil tank, one 15,000-gallon fuel oil tank, one 11,200-gallon coal oil tank, and one 7,500-gallon motor oil tank. By excavating exploratory test pits, Respondent confirmed the locations of five of the USTs. U.S. EPA has no reports of soil or groundwater sampling in the immediate vicinity of these tanks.**

SW admits the allegations in this paragraph but further answers that SW removed five of the USTs identified in the Versar report. SW further answers that the other two suspect tanks could not be located.

- 22. Respondent also reported detection of the following elevated levels in the groundwater:**

- b. concentrations of selenium, arsenic, and other hazardous constituents were detected in the soils at SWMU 1 and SWMU 2, at levels which exceeded the health-based screening levels identified by Respondent.**

SW denies that selenium and arsenic exist at the Facility in levels that present a risk to human health or the environment. SW further answers that the assertion in Paragraph 22(b) is inconsistent and/or irrelevant as it has nothing to do with groundwater.

- 23. Releases to the groundwater from the Facility have migrated under a residential area and into the basement dewatering system of the adjacent Eli Lilly facility.**

SW denies the assertions in this paragraph and further states that water is not migrating from the Facility because the Eli Lilly dewatering operation is drawing the potentially contaminated water from the Facility into its system.

- 24. The presence of the hazardous wastes identified above may pose a threat to human health or the environment.**

SW denies that conditions at the Facility pose a threat to human health or the environment for the reasons stated elsewhere in this answer and to be further developed in SW's memorandum that will be submitted according to 40 C.F.R. § 24.14.

- 27. Inorganic arsenic has been recognized as a human poison since ancient times, which can produce death in large doses, and is known to cause cancer in humans in lower doses.**

SW lacks information or knowledge sufficient to form a belief as to the factual allegations in this paragraph and therefore leaves EPA to its proofs.

- 28. Selenium can cause rashes, heat, swelling, and pain upon contact with skin. Breathing selenium dust can cause dizziness, fatigue, and irritation of mucous membranes. In extreme cases, collection of fluid in the lungs (pulmonary edema) and severe bronchitis have been reported. Accidental swallowing of selenium over a long period of time can cause a loss of feeling and control in arms and legs. If mildly excessive amounts of selenium is ingested over long periods of time, brittle hair and deformed nails can develop.**

SW lacks information or knowledge sufficient to form a belief as to the factual allegations in this paragraph and therefore leaves EPA to its proofs.

VI. CONCLUSION OF LAW AND DETERMINATIONS

Answering Sections VI through XXVI, SW incorporates its answers to Sections III through V herein by reference, and states that, based on such answers, there is no need for the work required by, or any of the other provisions set forth in, Sections VI through XXVI of the Order.

Without waiving its objection to Sections VI through XXV in their entirety, SW also states as follows:

- 5. The actions required by this Order are necessary to protect human health and/or the environment.**

SW denies that conditions at the Facility pose a threat to human health or the environment for the reasons stated elsewhere in this answer and to be further developed in SW's memorandum that will be submitted according to 40 C.F.R. § 24.14. In the alternative, and without waiving any objections previously or subsequently asserted, SW further answers that to the extent that a risk does exist, the IM required in this Order is not necessary because the contamination has been stabilized.

VII. WORK TO BE PERFORMED

1. **Pursuant to § 3008(h) of RCRA, 42 U.S.C. § 6928, Respondent is ordered to perform the acts specified in this Order, in the manner and by the dates specified herein.**

For reasons stated elsewhere in this answer and to be further developed in SW's memorandum that will be submitted according to 40 C.F.R. § 24.14, SW denies that the actions required by this Order are necessary to protect human health and/or the environment.

2. **All work undertaken pursuant to this Order must be performed in a manner consistent with, at a minimum: the attached Scopes of Work; all U.S. EPA-approved workplans; RCRA and other applicable Federal laws and their implementing regulations; and applicable U.S. EPA guidance documents.**

The requirements of this paragraph are arbitrary, unreasonably burdensome, and unnecessary because, as discussed further below, certain Scopes of Work, work plans, and other deliverables are unreasonable, overbroad, and/or unnecessary or have already been completed.

5. **INTERIM MEASURES – Respondent shall implement IM to protect human health and the environment, and shall, at a minimum, perform the following tasks:**

Without waiving any objections previously or subsequently asserted, SW answers that to the extent a risk exists, the IM required in this Order is not necessary because the contamination has been stabilized and many of the deliverables referenced in the Order have already been completed.

- a. **Submit for approval to U.S. EPA within 60 days after the effective date of this Order, an IM Work Plan, developed in a manner consistent with Attachment I;**

This paragraph is inconsistent with Attachment I because Attachment I requires the IM Work Plan to be submitted within 30 days of the effective date of the Order. SW states that the 60 day time frame is adequate and further answers that certain requirements in Attachment I associated with the Health and Safety Plan, the Quality Assurance Project Plan, and the Data Management and Reporting Plan are arbitrary, unreasonably burdensome and unnecessary because they have already been completed.

- e. **Attain the following objectives:**

- i. **Stop the migration of contaminated groundwater across the Facility property lines,**

This requirement is arbitrary, unreasonably burdensome and/or unnecessary due, in part, to the effect the Eli Lilly dewatering operation has on the Facility.

- ii. **Stop and prevent all human exposures to the contaminated groundwater;**

This requirement is arbitrary, unreasonably burdensome and/or unnecessary due, in part, to the effect the Eli Lilly dewatering operation has on the Facility.

- f. **Complete the construction and begin operation of the IM within 240 days after the effective date of this Order.**

This requirement is arbitrary, unreasonably burdensome and/or unnecessary because the IM objectives, as stated above, are not achievable.

6. RCRA FACILITY INVESTIGATION – Respondent shall submit to U.S. EPA:

- a. **A Description of Current Conditions (DOCC) Report, developed in a manner consistent with Attachment II, within 30 days of the effective date of this Order. The DOCC Report is for U.S. EPA's review and comment and not subject to Section IX: Agency Approvals/Proposed Contractor.**

This requirement is arbitrary, unreasonably burdensome and/or unnecessary because a DOCC has already been submitted.

- b. An RFI Workplan, developed in a manner consistent with Attachment II, within 90 days of the effective date of this Order, which shall detail the methodology Respondent will use to:**

This requirement is arbitrary, unreasonably burdensome and/or unnecessary because a RFI Work Plan has already been submitted.

9. ADDITIONAL WORK

EPA's right to require additional work as stated in this paragraph is arbitrary, unreasonably burdensome, and/or unnecessary.

VIII. AGENCY APPROVALS/PROPOSED CONTRACTOR

- 4. Any such disapproval, or disapproval with comments, of a revised and resubmitted workplan, report, specification, or schedule, shall be deemed a violation of this Order and subject Respondent to the stipulated penalties provision found at Section XXIII, unless waived by U.S. EPA.**

EPA's broad authority to disapprove a work plan or other deliverable without just cause, coupled with the possibility of stipulated penalties without the opportunity to correct/modify the deliverable is arbitrary, unreasonably burdensome and/or unnecessary.

- 12. U.S. EPA reserves the right to disapprove Respondent's contractor at any time during the period that the Order is effective.**

EPA's unlimited discretion to disapprove a contractor is arbitrary, unreasonably burdensome and/or unnecessary and should be limited for cause.

IX. QUALITY ASSURANCE

The requirements identified in this section have already been completed and are therefore unnecessary.

XI. ACCESS

1. **U.S. EPA, its contractors, employees, and/or any duly designated U.S. EPA representatives, is authorized to enter and freely move about the Facility pursuant to this Order for the purposes of:**

EPA's access rights are unnecessarily broad because they are not limited to reasonable times, upon reasonable notice, and upon presentation of appropriate identification.

XII. RECORD PRESERVATION

4. **All documents pertaining to this Order shall be stored by Respondent in a centralized location at the Facility to afford ease of access by U.S. EPA or its representatives.**

As no facility exists on the site, the document repository will be created and maintained at SW's consultant's office in Indianapolis, Indiana.

XIII. REPORTING AND DOCUMENT CERTIFICATION

3. **U.S. EPA may adjust the frequency of progress reports to be consistent with site-specific activities.**

This paragraph is arbitrary and unreasonable because EPA is not required to give reasonable notice before adjusting the frequency of progress reports.

XIV. RESERVATION OF RIGHTS

9. **Notwithstanding any other provision of this Order, no action or decision by U.S. EPA pursuant to this Order, including without limitation, decisions of the Regional Administrator, the Director of the Waste, Pesticides and Toxics Division, or any authorized representative of U.S. EPA, shall constitute final agency action giving rise to any right of judicial review prior to U.S. EPA's initiation of a judicial action to enforce this Order, including an action for penalties or an action to compel Respondent's compliance with the terms and conditions of this Order.**

This paragraph is not consistent with 40 C.F.R. § 24.20 which states that the decision by the Regional Administrator in an appeal of an Initial Administrative Order is a final agency action.

XVII. INDEMNIFICATION OF THE UNITED STATES GOVERNMENT

- 1. Respondent shall indemnify and save and hold harmless the United States Government, its agencies, departments, agents, and employees, from any and all claims or causes of action arising from or on account of acts or omissions of Respondent or its officers, employees, agents, independent contractors, receivers, trustees, and assigns in carrying out activities required by this Order.**

This paragraph is arbitrary and unreasonable because there is no legal authority requiring SW to indemnify the United States for any purpose. SW further answers that, in the alternative, there is no legal authority requiring SW to assume responsibility/liability or to indemnify the United States for claims, causes of action, or harm caused by the United States.

XXIII. PENALTIES FOR NONCOMPLIANCE

If Respondent fails to comply with the terms and provisions of this Order, U.S. EPA may commence an action to require compliance and assess a civil penalty not to exceed \$27,500 for each day of non-compliance, or issue another Order.

EPA's authority under this paragraph is arbitrary, unreasonable, and overbroad.

XXIV. NOTICE OF OPPORTUNITY TO REQUEST A HEARING

- 4. The response must specify each factual or legal determination or relief provision in the Order that Respondent disputes and shall specify the basis upon which it disputes such determination or provision. The response should also include any proposals for modification of the Order.**

There is no legal authority requiring SW to submit a proposal for modification of the Order as part of the response and request for a hearing.

XXVI. TERMINATION AND SATISFACTION

The provisions of this order shall be deemed satisfied upon Respondent's receipt of written notice from U.S. EPA that Respondent has demonstrated, to the satisfaction of U.S. EPA, that the terms of this Order, including the additional tasks determined by U.S. EPA to be required pursuant to this order, or any continuing obligation or requirements, have been satisfactorily completed.

This paragraph is arbitrary and unreasonable because it contains no standards for determining when the terms of the Order have been satisfactorily completed.

ATTACHMENTS I through V

SW incorporates its answers to Section III through Section XXVI by reference and states that, based upon such answers, there is no need for the work required by the Order or Attachments I through V. To the extent that Attachments I through V may be determined to be valid, SW reserves the right to raise other specific objections to their provisions.

AFFIRMATIVE DEFENSES

1. The Order fails to state a claim upon which relief may be granted.
2. The Order is not authorized under RCRA or any other applicable legal authority. For example, RCRA Section 3008(h), 42 U.S.C. § 6928(h), which is EPA's purported authority for the Order, applies only to "a facility authorized to operate under section 6925(e) of this title." Because the SW facility was permanently shut down and no longer exists on the property, SW cannot is not "authorized" to operate under 6925(e), thus 3008(h) cannot serve as a basis for the Order.
3. The Order is not supported by the Administrative Record.
4. The Order is arbitrary, capricious and an abuse of discretion.
5. The Order should include provisions authorizing project managers to extend deadlines up to 90 days without management approval, for dispute resolution; for force majeure/excusable delay; and other appropriate provisions consistent with EPA's practice in other RCRA corrective action matters, decisions of the Environmental Appeals Board and other applicable authority.
6. SW intends to place at issue every factual allegation not admitted herein and SW reserves the right to assert additional affirmative defenses at any time prior to hearing in this matter.

CONCLUSION

SW requests a hearing in this matter and that the Order be dismissed or, in the alternative, modified pursuant to the reasons identified above.

Dated this 16th day of December, 2002.


JANINE LANDOW-ESSER

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500 W. Madison Street

Chicago, IL 60661-2511

Attorneys for Respondent:

Stewart Warner Corporation