UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	:	
Gary Development Company	:	**Docket No. RCRA-V-W-86-R-45**
Respondent	:	

DECISION AND ORDER

Resource Conservation and Recovery Act, §3008(a) 42 U.S.C. 6928(a).

Respondent's facility was held to have received hazardous wastes for storage, treatment, or disposal, and is therefore subject to hazardous waste regulation under RCRA and the Indiana Administrative Code.

Appearances:

Marc Radell, Esquire, Office of Regional Counsel, U. S. Environmental Protection Agency, Region V, 77 West Jackson Blvd., Chicago, IL 60604, for complainant.

Warren Krebs, Esquire, 1600 Market Tower Building, Ten West Market Street, Indianapolis, Indiana, for respondent.

Before: J. F. Greene
Administrative Law Judge

Decided April 8, 1996

This matter arises under section 3008(a) of the Resource Conservation and Recovery Act (RCRA, the Act), 42 U.S.C. § 6928(a), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), Pub. L. 98-616, 98 Stat. 3224 (1984). Complainant, the Director of the Waste Management Division, United States Environmental Protection Agency, Region IV (Complainant), seeks to enforce against the Respondents the provisions of the HSWA and Federal regulations promulgated thereunder, 40 CFR Part 268, which govern land disposal of hazardous waste.

Complainant alleged that Respondent Globe Aero, Ltd., Inc. (Globe Aero) generated and managed hazardous wastes identified in the federal regulations (40 CFR § 261.31) as hazardous waste numbers F002, F003, and F005, and disposed of such wastes onto the ground and into a surface impoundment, in violation of section 3004(e) of RCRA and 40 CFR § 268.30. These provisions restrict land disposal of hazardous wastes after November 8, 1986.[1]

In addition, Globe Aero was charged with failing to determine whether the waste was restricted from land disposal, in violation of 40 CFR § 268.7(a); failure to supply information regarding the nature of wastes transported to an off-site facility, in violation of 40 CFR § 268.7(b)(1); failure to test

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1. The State of Florida is authorized to carry out a hazardous waste program in lieu of the Federal program, pursuant to section 3006 of RCRA, but is not authorized to administer or enforce the provisions of the HSWA. 50 Fed. Reg. 3908 (January 29, 1985).

the waste to determine whether it met applicable treatment standards, in violation of 40 CFR § 268.7(c); and failure to follow waste analysis plan requirements, as required by 40 CFR § 264.13 and 40 CFR Part 268. The complaint alleged further that Respondent The City of Lakeland, Florida (City), owned the property upon which Globe Aero operated its facility and was therefore also liable for the violations alleged. Complainant proposed a civil penalty in the amount of $139,250 against both Respondents jointly, i. e. against Globe Aero as the operator, and against the City as the owner of a hazardous waste management facility.

Globe Aero, a corporation doing business in the State of Florida, operates a facility located at 3240 Drane Field Road, Lakeland, Florida, in the northwestern section of the Lakeland Airport. At the time of the alleged violations, the facility performed aircraft shuttling, repair, maintenance, and refurbishment services, including paint stripping and repainting of small aircraft. Paint stripping took place out of doors on an inwardly sloped rectangular concrete pad surrounded by a berm. This activity involved the application of a chemical solvent, "B&B 5075 NP," ("B&B 5075") to the exterior of the aircraft. B&B 5075 contains sixty-two percent to sixty-six percent methylene chloride. When the aircraft were rinsed with water, the resulting wastewater and residue, including dissolved paint and paint chips, collected in a concrete sump in the middle of the pad. A pipe led from the sump to a ditch, or swale. Solids

which accumulated in the sump were removed and disposed of off-site.

On May 19, 1986, Mr. Steve Curry, an inspector from the Florida Department of Environmental Regulation (FDER), conducted an inspection of Globe Aero's facility. Although paint stripping had not been performed for three months prior to the inspection, he reported that wastewater from the paint stripping operation overflowed from the sump to a ditch which in turn flowed to a percolation pond. He observed standing water in the ditch and sludge on the ground adjacent to the concrete pad. Consequently, FDER issued a warning notice to Globe Aero regarding its failure to determine whether the wastewater and sludge from the paint stripping operation met the definition of a hazardous waste, as required by 40 CFR § 262.11.

In response, Globe Aero hired a consultant, Alamo-Saxena, to make a hazardous waste determination by sampling and testing soil in appropriate areas of the facility. No paint stripping was taking place during Alamo-Saxena's inquiry. However, rather high concentrations of volatile organic compounds (VOCs) were detected in two of three soil samples. Upon request from FDER, Globe Aero submitted an annual report for hazardous waste activities in calendar year 1987 and stated that it was a small quantity generator of less than 100 kilograms of hazardous wastes in any month.

On January 11, 1989, EPA inspector Mr. Daryl Himes and a representative of the FDER conducted an inspection of Globe

Aero's facility. The EPA inspector reported that he observed paint chips, sludges and standing liquid where the pipe emptied into the ditch. He reported also that several pieces of the berm surrounding the concrete pad were out of place, and that paint chips and sludges were lying on the ground outside the berm and concrete pad.

Based upon these observations and information from the FDER and from the owner of the facility, Mr. Philip Waldman, EPA issued the complaint alleging that wastewater from paint stripping operations flowed from the sump through the pipe to the ditch, and then over the ground into a pond which constituted a surface impoundment at the facility. Complainant claimed that the spent B&B 5075 paint stripper was contained in the wastewater. In addition, EPA claimed that spent paint thinner, namely Lacquer Thinner CLT 5000 ("CLT 5000"), was disposed of after use into the sump, and was contained in the wastewater. CLT 5000 contains toluene, methanol and acetone.

Complainant alleged that after use the paint thinner and chemical solvent are spent solvents which are listed as hazardous wastes in the Federal regulations under RCRA. Thus, the complaint charged Globe Aero with land disposal of hazardous wastes in violation of the Federal land disposal restrictions.

In its answer to the complaint, Globe Aero denied that the wastewater -- including the residue, dissolved paint and paint chips -- was properly characterized as hazardous waste. It also denied that the pipe, ditch or pond were utilized for or formed

part of a land disposal facility. Therefore Globe Aero denied that it violated RCRA or any regulatory provisions issued thereunder.

The City admitted that it owns the land upon which the Globe Aero facility is situated, but denied liability on the basis that it is an innocent landowner and not an owner or operator of a hazardous waste facility.

As other administrative and judicial decisions were issued which may have some bearing on matters in this proceeding, further submissions from the parties followed, including Globe Aero's Motion for Summary Order of Dismissal, dated June 19, 1992; Complainant's response, dated September 24, 1992; Complainant's submission dated November 24, 1992; Globe Aero's letter dated December 3, 1992; Globe Aero's and Complainant's Briefs in Response to Scheduling Order, dated February 5, 1993; and Globe Aero's Notice of Supplemental Authority and Renewal of Motion to Dismiss, dated April 29, 1994. The following decision is based upon consideration of the entire record and the submissions of the parties.[2]

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2. On September 1, 1993, Globe Aero moved to supplement the record with a Contamination Determination Report, dated August 1993 ("Blasland Report"), on a contamination assessment of soil and groundwater performed at the facility by Blasland, Bouck & Lee as consultants to Globe Aero. The assessment had been conducted pursuant to a consent order between Globe Aero and the State of Florida upon an action filed in State court on July 11, 1991 seeking to enforce the state hazardous waste regulations and formal investigation and closure of the site. CX 21; Blasland Report at 1-4. Complainant opposed the motion on the basis that the samples for the Blasland Report's site assessment were taken four years after EPA's inspection took place, the current site

(continued...)

DISCUSSION

I. Whether Globe Aero disposed of hazardous wastes in violation of RCRA and the land disposal restrictions.

It is undisputed that B&B 5075 is a mixture or blend of solvents, and that it contains more than ten percent of methylene chloride. CX 16. Once such a solvent has been used, it is a spent solvent.[3] The Federal regulations list F002 hazardous waste (in pertinent part) as "The following spent halogenated solvents: . . . methylene chloride; all spent solvent mixtures/blends containing, before use, a total of ten percent or more (by volume) of one or more of the above halogenated solvents or those listed in F001, F004, or F005 . . . ." Therefore, spent B&B 5075 is F002 hazardous waste.

(...continued)
condition is irrelevant to this proceeding, and the report thereon is misleading, as it does not reflect the risk of exposure to contaminants at the time of the hearing in this proceeding. In those four years, the type of hazardous wastes at issue, volatile organic constituents, would have volatilized or dissipated, according to expert opinion. (Affidavit of Judith A. Sophianopoulos, attached to EPA's opposition.) EPA also objected to the Blasland Report's statement of facts concerning site history.

The latter objection is well taken to the extent that facts in the Blasland Report with regard to site history are duplicative of the evidence already submitted in this proceeding. As to results of the contamination assessment, however, such information is relevant to the extent that it supports the findings of the previous site assessments which are in evidence, and to the extent that it shows any long-term effects of the contamination, which may bear on the potential for harm with regard to the penalty calculation. The Blasland Report will be admitted into the record and accorded the weight it is due.

3. A solvent is spent when it is used and no longer fit for use without being regenerated, reclaimed or otherwise reprocessed. 40 CFR § 261.1(c)(1), 50 Fed. Reg. 53316 (December 31, 1985).

Under Section 3005(e) of RCRA, owners and operators of facilities which treat, store or dispose of such spent solvent mixtures were required to submit notification of hazardous waste activity and Part A of a hazardous waste permit application, by January 30, 1986. 50 Fed. Reg. 53315 (December 31, 1985). There is no evidence in the record that either Globe Aero or the City of Lakeland had obtained a RCRA permit or complied with these requirements in regard to disposal of hazardous waste at the Globe Aero facility.[4] Tr. 265.

Globe Aero denied that it disposed of hazardous waste onto land. Based upon the testimony of its expert witness, Dr. Travis Hughes, it was argued that the spent solvent would evaporate so readily that its presence in any subsequent waste stream may not be detectable. Globe Aero argued further that the spent solvent once mixed with rinsewater did not render the entire mixture a hazardous waste regardless of the characteristics or chemical properties of the mixture. It was pointed out that Complainant did not evaluate the chemical/physical reaction between the painted surfaces, solvent, and contact medium gel, and never tested or characterized the paint sludge, waste stream or the water standing in the swale. Tr. 391-393.

The general questions as to Globe Aero's liability in this proceeding are whether the mixture of rinsewater, dissolved

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4. This proceeding addresses only the violations of HSWA and implementing regulations; FDER is addressing other alleged hazardous waste violations which arose out of the January 11, 1989 inspection. Tr. 268.

paint, paint chips and spent solvent was hazardous waste, and whether hazardous wastes were disposed of on land in violation of RCRA and 40 CFR Part 268. More specifically, the questions are: (1) whether the waste mixture was a hazardous waste in view of the fact that the "mixture rule," 40 CFR § 261.3(a)(2)(iv), has since been invalidated; (2) whether it has been shown by a preponderance of the evidence that F002 waste was disposed of in violation of the land disposal restrictions; (3) whether hazardous waste was disposed into a surface impoundment; (4) whether it has been shown by a preponderance of the evidence that F003 and F005 wastes were disposed of in violation of land disposal restrictions; and (5) whether any of the exemptions to the land disposal restrictions apply to Globe Aero.

A. Background.

In order to be classified as a hazardous waste, a substance must meet the definition of a "solid waste," defined in Section 1004(27) of RCRA: "any garbage, refuse, sludge . . . and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations . . . ." "Hazardous waste" is defined as follows:

> a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may -- (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported or disposed of, or otherwise managed.

Pursuant to Section 3001 of RCRA, EPA promulgated regulations, found at 40 CFR Part 261, which identify and list hazardous wastes. A solid waste is a hazardous waste if, with certain exclusions and exceptions not relevant here, either it exhibits any of the characteristics of hazardous waste as stated in 40 CFR Part 261 Subpart C or is listed in Subpart D. A waste is hazardous under Subpart C by virtue of exhibiting certain characteristics, whereas a waste is hazardous under Subpart D simply by virtue of being listed. 40 CFR §§ 261.20(a), 261.30(a). The spent solvents at issue in this proceeding are listed in Subpart D.

B. The Mixture Rule.

A regulatory provision commonly known as the "mixture rule" was the basis for Complainant's claim that not only the spent solvent, but the entire mixture of wastewater, paint residue and spent solvent, was a hazardous waste. Tr. 132. Paragraph seven of the complaint alleged, "Solid waste, including wastewater, dissolved paint and paint chips, become [sic] a hazardous waste when mixed with a hazardous waste, pursuant to 40 C.F.R. § 261.3(a)(2)(iv)." The latter provision, the mixture rule, provided that a hazardous waste is "a mixture of solid waste and one or more hazardous wastes listed in Subpart D." 45 Fed. Reg. 33119 (May 19, 1980).

During the course of this proceeding, the mixture rule was invalidated in *Shell Oil Co. v. EPA,* 950 F.2d 741 (D.C. Cir.

1991). Globe Aero moved for dismissal of the complaint on grounds that if the mixture rule is invalid, the wastewater and residue cannot be deemed a hazardous waste.

However, the Environmental Appeals Board (the Board or EAB) rejected that argument in a case in which the facts were very similar to those in this proceeding. The Board held that a mixture of F002 spent solvent with the rinsewater, dissolved paint and paint chips resulting from paint stripping operations rendered the entire waste mixture an F002 hazardous waste under the definition of F002 set forth in 40 CFR § 261.31. *In re Cypress Aviation, Inc.*, RCRA (3008) Appeal No. 91-6 (Order Denying Reconsideration, November 17, 1992) The Board stated,"In essence, the definition of F002 wastes by its own terms renders some 'spent solvent mixtures' hazardous wastes," and "the *Shell Oil* mandate did not affect this provision." Slip op. at 5.

Globe Aero attempted to distinguish that decision from the situation at hand on the basis that the mixture rule was in effect at the time that the Initial Decision of *Cypress Aviation* became final.[5] However, the mixture rule was held to be void *ab initio* (United States v.. Goodner Brothers Aircraft, Inc., 966 F.2d 380 (8th Cir. 1992) prior to the EAB's ruling, which could

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5. Globe Aero also distinguished *Cypress Aviation* on two other grounds: (1) unlike Cypress Aviation, Globe Aero clearly refuted the allegation that hazardous wastes were land disposed, and (2) without a mixture rule Globe Aero would have been exempt from land ban restrictions as a small quantity generator. As to the former argument, the Board's conclusion that the Cypress waste was F002 under 40 CFR § 261.31 and not under the mixture rule was a matter of law and was not based on the evidence. The latter argument is discussed below, *infra* at 23-24.

have supported a finding that at the time of the Initial Decision, the wastewater and residue were improperly classified as a hazardous waste under the mixture rule.[6] However, the wastewater mixture was not classified as hazardous under the mixture rule. The Board specifically stated that the mixture rule was "unnecessary to the determination that the wastes involved . . . are hazardous." *Cypress Aviation,* slip op. at 4. Instead, the EAB relied solely on the phrase "spent solvent mixtures" in the definition of F002 in 40 CFR § 261.31 to conclude that a "waste mixture" of wastewater, dissolved paint, paint chips and spent solvent is F002 hazardous waste.

No case law contrary to this conclusion has been cited by the parties. A federal magistrate judge distinguished *Cypress Aviation* in a criminal proceeding, concluding that the regulatory listing of F002 did not encompass spent solvent wastes that were mixed with other nonhazardous waste streams *after* use. Rather, such mixtures were intended to be covered by the mixture rule. *United States v. Recticel Foam Corp.,* 858 F. Supp. 726, 730-734 (E.D. Tenn. 1993)(Report and Recommendation). In *Cypress Aviation*, as in the present case, the substances (solvent, paint and water) were mixed *during* use.

This distinction highlights the difficulty with the allegation in paragraph 7 of the complaint, to the effect that a

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6. See, *In re Hardin County, Ohio,* RCRA (3008) Appeal No. 93-1, at 10 (Final Decision and Order, April 12, 1994)(EAB noted that of all tribunals which have directly considered whether the mixture rule was void *ab initio,* none have concluded that it was not.)

mixture of water, dissolved paint and paint chips becomes a hazardous waste when mixed with spent solvent under the mixture rule. The paint stripping process involved essentially two steps: first the mixture of paint and solvent, and then separation from the aircraft of the paint and solvent by application of water. Only upon completion of both steps was a waste substance or wastestream produced. A federal court has stated that "a 'mixture' of a listed hazardous waste - spent solvents - and water is not a hazardous waste under the regulations' so-called 'mixture' rule," because water is not a solid waste. *U.S.* v. *Johnson*, 886 F. Supp. 1057, 1067 (W.D. N.Y. 1995). Inherent in the usual process of using a solvent is a contaminant -- the substance being dissolved, such as paint -- and often some method of removing the solvent and contaminant from a medium, such as a spray of water. Thus, a spent solvent is usually mixed with other substances during use. This process is distinct from a post-use combination of a hazardous waste, such a spent solvent and a solid waste, which mixture would be covered by the mixture rule.

It is concluded, therefore, that based upon the decision on appeal in *Cypress Aviation*, Complainant has established that Globe Aero's waste stream, which consisted of a mixture of spent B&B 5075 and rinsewater, dissolved paint and paint chips, is hazardous waste under the definition of F002 waste in 40 CFR § 261.31.

C. Whether F002 waste was land disposed in violation of land disposal restrictions.

The record shows that approximately one half to one 55 gallon drum of B&B 5075 was applied to each aircraft stripped at the Globe Aero facility. Tr. 619. Approximately 25 aircraft were stripped there between November 8, 1986 and January 11, 1989. Tr. 385, 638-639, 654, 668, 688-689. The solvent was left on the aircraft for approximately four hours, and then the paint and solvent were sprayed off the aircraft with a high-pressured water hose. Tr. 616, 638, 697, 764. The resultant wastewater mixture flowed into the sump in the middle of the concrete stripping pad, and upon reaching the sump's capacity of 72.93 gallons, the wastewater mixture flowed into a pipe which emptied into a swale. RX 1; Tr. 200, 225, 440, 442, 552, 639, 763-764. On January 11, 1989, paint chips and dissolved paint sludge were lying on the ground outside the berm of the concrete pad. CX 1(a), 1(d), 1(i), 1(m), 2; Tr. 41, 193-197, 205, 667, 688-689. Dissolved paint and paint chips were also lying in and along the surface of the water in the swale. CX 1(b), 1(c), 1(j), 2; Tr. 199-201, 202-203. Vegetation for several feet outside of the concrete pad appeared to be dead or dying. CX 1(a),(i),(j),(m); CX 2 p. 2; Tr. 370.

Section § 3004(e) of RCRA provides as follows, in pertinent part:

> (1) Effective 24 months after November 8, 1984 . . . the land disposal of the hazardous wastes referred to in paragraph (2) is prohibited unless the Administrator determines the prohibition of one or more methods

> of land disposal of such waste is not required in order to protect human health and the environment for so long as the waste remains hazardous . . . .
> (2) The hazardous wastes to which the prohibition under paragraph (1) applies are as follows --
> . . .
> (B) those hazardous wastes numbered F001, F002, F003, F004 and F005 . . . .

Land disposal is defined as "placement in or on the land . . . and includes, but is not limited to, placement in a landfill, surface impoundment, waste pile, injection well, land treatment facility . . . ." 40 CFR § 268.2; *see also,* RCRA § 3004(k).

It is clear, and warrants no extended discussion, that this definition encompasses the placement of waste on the ground surrounding the concrete pad and placement of waste in the swale at the end of the pipe leading from the sump.

To be determined here is whether Complainant showed by a preponderance of evidence that F002 hazardous waste was placed on the ground surrounding the concrete pad, on the ground at the end of the pipe, and in the pond; whether the spent solvent evaporated out of the wastewater prior to disposal; and the effect of any such evaporation on the question of Globe Aero's liability for land disposal of F002 hazardous waste.

The principal evidence presented by Globe Aero which addresses these questions is contained in a report by its consultant, P.E. La Moreaux and Associates, Inc. (PELA). After the complaint was issued, Globe Aero hired PELA to perform an assessment of site contamination. Hydrogeology of the site was investigated, and soil and groundwater samples were analyzed. The report, dated September 5, 1989, stated that VOCs were

detected in soil samples taken near the discharge pipe, but not methylene chloride. RX 1 p. 9. Groundwater samples taken from that area, however, did show contamination with methylene chloride; one sample had 3,906 micrograms per liter, or 4 parts per million, and another had 77.2 micrograms per liter. RX 1 p. 9, 13, Table 2; Tr. 789-790, 859.

Interpreting this data, Globe Aero's expert witness Dr. Travis Hughes, a geologist and geochemist employed by PELA, testified that methylene chloride "tends not to be retained long in the soils," and that it either degrades or flushes through to the groundwater. Tr. 720. He also pointed out that the amount of methylene chloride in all but two of the groundwater samples was at or below 19 micrograms per liter, which, he testified, could be discounted for laboratory error. Tr. 790.

The Alamo Saxena report detected 20 micrograms of methylene chloride in a soil sample taken near the concrete pad, and 4.8 micrograms of methylene chloride in a soil samples taken near the discharge pipe, but these results were not confirmed. CX 7 Plate 3; Tr. 745-747.

Dr. Hughes testified that methylene chloride is extremely volatile, with a vapor pressure of a little over 360 millimeters, which means that it evaporates very easily. Tr. 715-716, 765. He stated that it could have mixed with the washwater and been discharged from an overflow of the sump, but that the primary fate of the methylene chloride is evaporation. Tr. 763-764. He applied calculations of rates of evaporation to an assumed set of

facts approximating those in Globe Aero's paint stripping operation, and concluded that "A very strong inference from [a] theoretical point of view is that all the methylene chloride would evaporate." Tr. 766.

However persuasive such a theory may be, it does not negate the fact that significant amounts of methylene chloride were detected in groundwater near the discharge pipe and in soil near the concrete pad. F002 hazardous waste does not become nonhazardous by virtue of the evaporation of some or most of the methylene chloride. Indeed, 40 CFR § 261.3(c) and (d) provide that a hazardous waste will remain a hazardous waste unless and until, in the case of a waste listed in 40 CFR Part 261 Subpart D, it has been excluded pursuant to a rulemaking petition for delisting, under 40 CFR §§ 260.20 and 260.22.

Therefore, a preponderance of the evidence shows that F002 hazardous waste was placed on the ground in the swale and adjacent to the concrete pad.

D. Whether hazardous waste was disposed of in a surface impoundment.

Complainant alleged that hazardous waste was disposed of in a pond which constitutes a surface impoundment. The pond was located approximately 110 feet from the end of the pipe leading from the sump in the concrete pad. CX 1(g), 1(h), 7. Globe Aero does not deny that on occasion, water in the swale flowed over the ground and into the pond. CX 7; Tr. 208, 225-226, 231, 586,

734-735.

However, the pond was created in 1982 as a borrow pit, to obtain fill dirt for raising the level of the ground to support the hangar. RX 1; Tr. 375-376, 586, 662, 734. The record shows no evidence of wastewater, paint chips or dissolved paint in or near the pond. CX 1(a), 1(h); Tr. 377. Vegetation around the pond did not appear to be stressed or dying at the time of EPA's inspection. Tr. 377. No volatile organics or chlorinated hydrocarbons were detected in a soil sample taken between the swale and the pond, according to the Alamo Saxena Report. CX 7 p. 4.

PELA reported that concentrations of methylene chloride in two samples taken from the surface water of the pond were approximately 3 and 9 micrograms per liter. RX 1, p. 9, Table 2; Tr. 790. PELA suspected that these results may be due to laboratory error, because such error is frequent with methylene chloride, which is used and commonly present in laboratories. Tr. 748. Therefore, another sample was taken approximately one month later in which no methylene chloride was detected. RX 1 p. 9; Tr. 790. No VOCs were detected in samples of sediment taken from the bottom of the pond. RX 1 p. 9. The PELA report concluded that the pond was not designed, constructed or used as a percolation pond and that the pond has not been adversely affected by Globe Aero's activities. RX 1 p. 13. There is no basis on the record of this proceeding upon which to conclude that the pond is a surface impoundment.

E. Whether F003 and F005 hazardous waste was disposed of in violation of land disposal restrictions.

CLT 5000 was used at Globe Aero's facility to wipe down airplane surfaces and to clean painting tools and equipment. Tr. 675-676. CLT 5000 is composed of 43.5 percent toluene, 23.1 percent acetone and 19.3 percent methanol. CX 23; Tr. 178.

In pertinent part, 40 CFR § 261.31 defines as hazardous waste F005:

> The following spent non-halogenated solvents: Toluene . . .; all spent solvent mixtures/blends containing, before use, a total of ten percent or more (by volume) of one or more of the above non-halogenated solvents or those solvents listed in F001, F002, or F004 . . . .

F003 hazardous waste is defined in pertinent part as including:

> . . . acetone . . . and methanol; all spent solvent mixtures/blends containing, before use, only the above spent non-halogenated solvents,; and all spent solvent mixtures/blends containing, before use, one or more of the above non-halogenated solvents, and, a total of ten percent or more(by volume) of one or more of those solvents listed in F001, F002, F004 and F005 . . . .

CX 27 (50 Fed. Reg. 53315 (December 31, 1985)). CLT 5000 was a solvent blend containing, before use, acetone and methanol, and more than ten percent of toluene, and therefore the spent CLT 5000 was F003 and F005 hazardous waste as defined in 40 CFR § 261.31.

The evidence showed that Globe Aero purchased approximately one 55 gallon drum of CLT 5000 per month between January 1986 and January 1989. CX 25; Tr. 171, 178-180. It was used to wipe down planes after they were stripped and rinsed, and to clean painting

tools. Tr. 675-677, 767.

The solvents in CLT 5000 evaporate quickly upon exposure to air. Tr. 337-338, 676, 767, 769. Globe Aero takes the position that there was no credible evidence in the record concerning disposal of CLT 5000 by any means other than evaporation. (Respondent Globe Aero's Proposed Findings of Fact and Conclusions of Law ¶ 19.) Although Mr. Waldman testified that Globe Aero had a contract with Safety Kleen Corporation "who takes care of all the excess waste products from Globe Aero for all paint thinning operations," documentation in the record of Safety Kleen's services did not indicate that spent CLT 5000 or F003 or F005 hazardous waste was disposed of by Safety Kleen. CX 25; Tr. 684. Moreover, in its letter of April 5, 1989, to EPA, Globe Aero did not respond to EPA's inquiry as to the type of solvent used in the maintenance shop machine. CX 24, 25. Globe Aero never specifically stated that Safety-Kleen removed any spent CLT 5000.

The issue is whether Complainant has shown that any spent CLT 5000 was disposed of onto land. Mr. Himes testified that an employee of Globe Aero told him during the inspection that spent paint thinner was disposed of into the sump on the concrete pad. Tr. 263, 338-339, 382-383.

Mr. Waldman testified that CLT 5000 was poured onto painting instruments to clean them, and two or three gallons would be left in a container which would be put out on the concrete pad to evaporate. Tr. 678. If it did not evaporate then "it had been

splashed on the concrete." Tr. 678. He admitted that some may get into the sump. Tr. 678-679.

However the question arises, given the small amount of paint thinner that would enter the sump, whether any of it was actually discharged out of the pipe. If the sump was not full of liquid, it is conceivable that no spent CLT 5000 ever flowed out through the pipe into the swale. However, that question is resolved by the evidence of high levels of toluene in the soil and groundwater near the end of the pipe.

The Alamo Saxena Report noted high levels of toluene (77,900 micrograms per kilogram), ethylbenzene and xylenes (14,200 and 5,800 micrograms per kilogram respectively) in soil near the concrete pad, and 140 micrograms per kilogram of toluene in soil between the concrete pad and the swale. CX 7 Plates 1, 3, 10, 11; Tr. 745. From samples taken near the end of the pipe, PELA found 274,500 micrograms per kilogram of toluene in soil, and 10,430 micrograms per liter in groundwater. RX 1 Table 2. PELA also detected ethylbenzene and xylenes in the soil from that area, and those substances as well as benzene in groundwater samples from that area. RX 1 p. 9, Table 2.

The PELA Report concluded that this profile of contaminants is characteristic of petroleum fuel, which indicates that the source of contamination is petroleum fuel rather than spent CLT 5000. RX 1 p. 9, 13; Tr. 749-750, 757, 858. Dr. Hughes testified that he was "personally aware that contamination from petroleum was in the soils" at the time PELA conducted its

analysis. Tr. 840, 856.

However, the conclusion that the source of contamination is fuel rather than spent solvent is undermined by the fact that the evidence does not show that either Alamo Saxena or PELA tested samples for the presence of methanol or acetone. RX 1; CX 7. Furthermore, there was no evidence or reliable testimony of any petroleum spills at the site. Tr. 841. Dr. Hughes' testimony concerning the possible release or draining of fuel from the airplanes onto the concrete pad is merely speculative and, therefore, unpersuasive. Tr. 750-752.

A preponderance of the evidence shows that F003 and F005 hazardous waste was disposed of in the swale at the end of the discharge pipe by flowing through the pipe from the sump in the concrete pad. The mixture of the spent CLT 5000 with any F002 waste in the sump did not affect the status of the wastes as hazardous and regulated under RCRA. Such a mixture would constitute a hazardous waste which includes F002, F003 and F005.

F. Exemptions from the land disposal requirements.

Spent solvent wastes F001 through F005 were prohibited from land disposal as of November 8, 1986, unless they met regulatory treatment standards or were granted an exemption or extension pursuant to 40 CFR §§ 268.5 and 268.6; 51 Fed. Reg. 40637, 40641 (November 7, 1986); CFR § 268.30(a) and (d). Between that date and November 8, 1988, certain exemptions were applicable for generators of a small quantity (under 1000 kilograms) of hazardous waste per month and generators of a "solvent-water

mixture, solvent-containing sludge or solid, or solvent-contaminated soil . . . containing less than 1 percent total F001-F005 solvent constituents . . . ." 51 Fed. Reg. at 40641; 40 CFR § 268.30(a)(1) and (3).

Complainant alleged in paragraph 19 of the complaint that Globe Aero was not subject to any of the exemptions provided in 40 CFR § 268.30 and 268.5(h). Respondents have not refuted that allegation with any specific evidence, and have not established by a preponderance of the evidence that they qualified for any exemption to the land disposal restrictions. In order to claim an exemption Respondents must present specific evidence in support, because "[g]enerally, a statutory exception (or exemption) must be raised as an affirmative defense, with the burden of persuasion and the initial burden of production upon the party that seeks to invoke the exception." *In re Standard Scrap Metal Company,* TSCA Appeal No. 87-4 at 8 (Final Decision, August 2, 1990), *citing inter alia, United States v. First City National Bank of Houston,* 386 U.S. 361, 366 (1967).

Globe Aero reported to FDER that it was a small quantity generator of less than 100 kilograms of hazardous waste per month apparently on the basis of the erroneous assumption that the only hazardous waste handled by the facility was paint chips. CX 8; Tr. 785.

However, as concluded above, the entire waste mixture of spent solvents, paint and rinsewater was hazardous waste under 40 CFR § 261.31. Globe Aero has not asserted or shown that the

amount of such hazardous waste generated did not ever exceed 1000 kilograms per month during the relevent time period.[7] The record shows that between 75 and 300 gallons of water were sprayed on each airplane to rinse off the solvent and paint, that approximately 24 drums of B&B 5075 were purchased by Globe Aero and an average of one or two airplanes were stripped each month during the time period at issue. CX 25; RX 1; Tr. 170, 312, 386, 617, 619, 638-639, 654, 656, 833-834. There is no basis upon which to find that Globe Aero was exempt from the land disposal prohibition as a small quantity generator.[8]

The fact that Globe Aero's waste is a mixture containing spent solvents and water raises a question as to whether it may be presumed to be a "solvent-water mixture" within the meaning of 40 CFR § 268.30(a), which would shift the burden of proof to Complainant. Indeed, in the preamble to the land disposal

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[7]In the preamble to the final rule providing standards for small quantity generators, EPA stated, "[A] generator may be subjected to different standards at different times, depending upon his generation rate in a given calendar month. . . . if he generates more than 1000 kg in any calendar month, he is deemed to be a large quantity generator, subject to all applicable standards. Thus, any non-exempt waste that is generated during a calendar month is subject to full regulation until it is removed . . . ." 51 Fed. Reg. 10146, 10153 (March 24, 1986).

8. Complainant presented testimony that Globe Aero could not meet the exemptions because it did not comply with the minimum technological requirements of RCRA § 3004(o), such as a double liner and leachate collection system for the landfill (Tr. 512). This argument is not persuasive as applied to the time the alleged violations began. At that time, EPA interpreted RCRA § 3004(h) to require only new landfills and surface impoundments, but not existing units, to comply with those technological requirements. 51 Fed. Reg. 40572, 40603-4 (November 7, 1986).

regulations, EPA stated that the definition of solvent-water mixtures was established "based on this [one percent] maximum solvent concentration that it [EPA] believes is representative of this kind of waste [wastewaters classified as F001-F005]." 51 Fed. Reg. 40572, 40613 (November 7, 1986). However, Respondents have not claimed that any such presumption exists nor has any precedent for making such a presumption been found.

The record does not provide a sufficient basis for finding that the waste mixture contained less than one percent of spent solvent constituents. There is no evidence of sampling and testing of the wastewater. No facts were presented as to specific amounts of spent solvent or solvent constituents in the wastewater.

Had Globe Aero met its burden of proof as to the exemptions, these exemptions did not apply after November 8, 1988. The record suggests that Globe Aero stripped at least one plane between that date and the date of the inspection on January 11, 1989. Tr. 688, 689.

Because Globe Aero did not meet any of the exemptions of 40 CFR § 268.30, the waste was required to meet the treatment standards in 40 CFR Part 268 Subpart D for F002, F003 and F005 wastes before it was disposed of onto land. 40 CFR §§ 268.30(d), 268.41.[9] There is no evidence in the record that Globe Aero's

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9. The standards were 0.59, 0.75, 0.96 and 0.33 for acetone, methanol, methylene chloride, and toluene respectively. If the waste was a solvent-water mixture containing less than one percent total F001-F005 solvent constituents, the standards were (continued...)

waste met those standards. It is concluded that Globe Aero disposed of F002, F003 and F005 hazardous wastes in violation of section 3004(e) of RCRA and 40 CFR § 268.30.

II. Other violations and penalty assessment against Globe Aero

The complaint alleged other violations in addition to improper disposal. Globe Aero was charged with failure to test its waste or use knowledge of the waste to determine whether it was restricted from land disposal as required by 40 CFR § 268.7(a), failure to supply information regarding the nature of the wastes to the off-site disposal facility as required by 40 CFR § 268.7(b)(1), failure to follow waste analyis plan requirements as required by 40 CFR Parts 264 and 268, and failure to test the waste to determine if it met treatment standards before disposal s required by 40 CFR § 268.7(c).[10] Globe Aero

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(...continued)
0.05, 0.25, 0.20,and 1.12 milligrams per liter respectively. 40 CFR § 268.41, Table CCWE.

10. In its post-hearing Brief in Reply to Respondent Globe Aero's Proposed Findings of Fact and Conclusions of Law (at 30), Complainant states a different version of alleged violations. It alleges the "[f]ailure to comply with operating records requirements contained in 40 C.F.R. § 268.73." Such provision does not exist in the land disposal regulations (Part 268), but in the hazardous waste program, 40 CFR Parts 264 and 265, upon which the FDER has taken action. CX 21; Tr. 268. The Brief omits the specific cite to paragraph 268.7(b) which applies to treatment facilities, and cites three violations of 268.7, namely failure to conduct a waste analysis, failure to generate documentation verifying that the treatment standards were met before placement on the ground, and failure to comply with notification and certification requirements. Consistent with the complaint, and in the absence of a motion to amend the complaint, only one violation of section 268.7(a) will be considered.

did not specifically allege that it complied with these requirements. No testimony, or records or other documents were presented as evidence of compliance with these requirements.

40 CFR § 268.7(a) provides that "if a generator's waste is listed in 40 CFR Part 261, Subpart D, the generator must test his waste, or test an extract using the test method described in part 261, appendix II, or use knowledge of the waste, to determine if the waste is restricted from land disposal under this part." Section 268.7(a) also requires data supporting this determination to be retained by the generator on-site, as well as notices and certifications to hazardous waste treatment, storage or disposal facilities as to whether the waste meets treatment standards. Globe Aero hired a consultant to determine contamination of the site, but the waste was not analyzed and no data or documentation of any waste determination was in Globe Aero's files on the day of the 1989 inspection, except for a Material Safety Data Sheet for B&B 5075 and a 1987 hazardous waste generator report. CX 2, 4, 8; Tr. 155, 163, 181, 267. Therefore, Globe Aero is liable for failing to comply with 40 CFR § 268.7(a).

Hazardous waste treatment facilities are required to test wastes according to frequencies specified in waste analysis plans required under 40 CFR § 264.13 or 40 CFR § 265.13. Certain information and certification that the waste has been treated in compliance with subpart D must be sent to the land disposal facility with each shipment. 40 CFR § 268.7(b). Although the record shows that paint chips were disposed into a dumpster and

that Globe Aero contracted for removal of wastes (CX 25; RX 1; Tr. 262, 673-674), it has not been established that Globe Aero was a treatment facility or that the hazardous wastes at issue were sent to a separate land disposal facility. The requirements to develop and follow a waste analysis plan are requirements of the Florida hazardous waste program, which has been the subject of an action by the FDER. CX 21; Tr. 268. Therefore, the allegations of failure to follow waste analysis plan requirements and of failure to comply with the requirements of 40 CFR § 268.7(b) are not applicable to this proceeding.[11]

The allegation that Globe Aero did not comply with section 268.7(c) is applicable and supported by the record. That provision requires owners and operators of land disposal facilities to test the waste or an extract of the waste to assure that it is in compliance with applicable treatment standards.

III. Penalty.

Section 3008 of RCRA provides for a maximum civil penalty of $25,000 per day of noncompliance for each violation of a RCRA requirement. Each day of such noncompliance constitutes a separate violation. RCRA § 3008(g). In assessing the penalty, the seriousness of the violation and any good faith efforts to comply with the requirements should be taken into account. RCRA

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11. For this reason, and in addition because there has been testimony and evidence that Globe Aero no longer conducts or plans to conduct paint stripping operations (Tr. 600; Blasland Report at 1-2), Respondents will not be ordered to develop and implement a written plan for the management of the land disposal restricted waste.

§ 3008(a)(3).

Athough several violations of the Part 268 regulations were alleged, Complainant calculated a single penalty of $139,250. CX 11. It was allegedly calculated according to the RCRA Civil Penalty Policy dated May 8, 1984 (Penalty Policy), which sets forth the method of determining a "gravity based" penalty and then considering adjustments to that amount to account for multiple violations, economic benefit of noncompliance, good faith efforts to comply, degree of willfulness or negligence, history of noncompliance, ability to pay, and any other unique factors. CX 12. According to the Penalty Policy, the gravity based penalty is derived from penalty ranges specified in a matrix, which is composed of axes representing the factors of "potential for harm" from the violation and "extent of deviation" from the requirements. These factors represent the "seriousness of the violation" under RCRA § 3008. There are three levels, major, moderate and minor, on each of the axes.

Complainant considered the potential for harm to be major because actual land disposal of restricted wastes occurred over an extended period of time. EPA has a policy which states that violations causing actual exposure or threat of exposure of environmental media to hazardous waste, and in particular improper disposal in violation of land disposal restrictions, are high priority violations. CX 30 pp. 4, 5, 7, Appendix p. 5 (EPA Revised Enforcement Response Policy dated December 1987). The extent of deviation also was considered major on grounds that no

attempt was made to comply with Part 268, two methods of disposal were used (pouring spent CLT 5000 into the sump and rinsing of spent B&B 5075 into the sump), and there were multiple violations of Part 268 (failure to test the waste, failure to notify, etc.). CX 11. Applying the penalty matrix in the Penalty Policy, EPA proposed a gravity based penalty of $25,000, which is the maximum penalty allowed under RCRA for a violation.

The argument that the solvents evaporate and degrade rapidly does not mitigate the penalty assessment. The land disposal restrictions program, and specifically with regard to spent solvents, is aimed at preventing long-term as well as short term harm to human health and the environment. 51 Fed. Reg. 1602, 1703 (January 14, 1986). Methylene chloride is an animal carcinogen, and potential human carcinogen. CX 4, 5, 15; 55 Fed. Reg. 30386 (July 25, 1990). Solvents are not only harmful in the soil and groundwater, but also cause may adverse effects to humans and animals when they become airborne. 51 Fed. Reg. at 1716. While the Blasland Report concluded that soil and groundwater quality has improved dramatically since 1989, contamination of groundwater by VOCs, including toluene, still existed in 1993. Blasland Report at 5-2, 6-1, Appendix G. The contamination assessments conducted by Globe Aero's consultants does not mitigate the extent of deviation, because it does not meet any requirements of 40 CFR § 268.7.

There is no support in the record for finding that the violations were less than major in terms of potential for harm

and extent of deviation. However, the seriousness of the violation overall suggests a penalty at the midpoint of the range set forth in the Penalty Policy. Accordingly, a gravity based penalty of $22,500 is the appropriate assessment against Globe Aero.

Complainant adjusted the gravity based penalty upward by 25 percent, or $6,250, on the basis of Globe Aero's willfulness and negligence in handling solvents for approximately three years. Specifically, Complainant considered the fact that Globe Aero had been warned of its failure to analyze its waste as required by 40 CFR § 262.11 (CX 3), and failed to keep abreast of changes in the hazardous waste regulations in spite of warnings on Material Safety Data Sheets (MSDS) for CLT 5000 and B&B 5075 to dispose of them in accordance with local, state and federal regulations. CX 4, 15.

However, that perspective does not take into account Globe Aero's prompt hiring of a consultant to perform a hazardous waste determination and submit results to the FDER. The report did state that there was a "rather high concentration" of some VOCs in soil samples. CX 7. The report admittedly did not determine whether the waste stream was hazardous under RCRA, and it stated that the data and comments were submitted for Globe Aero's "review and further determination if the shallow soils . . . falls [sic] under [RCRA]." This does not amount to good faith efforts to comply, and Globe Aero may be faulted for believing that the submission of the report was a sufficient hazardous

waste determination under the regulations and for failing to take any further action or follow-up. Globe Aero simply waited for guidance from FDER. Tr. 641-642, 650. However, such fault does not warrant an upward adjustment to the penalty, in light of the facts that Globe Aero is a small company owned by Mr. Waldman and his wife, and that they relied on a consultant to respond to the FDER's concerns.

In addition, EPA proposed a multi-day penalty of $108,000 which is $200 per day for the 540 days, excluding weekends and holidays, from the date that land disposal was banned (November 8, 1986) until the date of the 1989 inspection of the facility. In this proposal, Complainant asserted that it was following a policy used in assessing penalties for facilities which have lost interim status and have failed to obtain a permit (LOIS cases). This policy was followed because there was no guidance for multi-day violations of the land disposal restrictions, but LOIS cases were considered to be equal in seriousness to land disposal violations. CX 11 p. 2. The LOIS policy suggested for settlement purposes per day penalties of $100 to $500 per day of operating without a permit. CX 27.

The Penalty Policy suggests assessing multi-day penalties in cases of "continuing egregious violations," and that it may also be appropriate in other cases. CX 12 p. 12.

In *Cypress Aviation,* the penalty proposed for a continuing violation of the same requirements as those at issue here was rejected; only a one-day penalty of $25,000 was assessed. In

that case, the judge reasoned that possible continued environmental harm from illegal land disposal does not give rise to a separate "land disposal" as defined in 40 CFR Part 268. He further reasoned that implicit in the continuing violation theory is the continuing obligation to clean up the site, and that compelling clean-up is within the State's authority rather than the land disposal restrictions. Yet the State had required clean-up only if a contamination assessment showed the need. Thus, a penalty for a continuing violation seemed inconsistent.

The disposal of hazardous waste into a landfill has been assessed per day penalties as a continuing violation where the actual violation was the operation of a hazardous waste facility without a RCRA permit or interim status. *In re Harmon Electronics, Inc.*, Docket No. RCRA-VII-91-H-0037 (Initial Decision, December 12, 1994). The offense was held to be not simply an act of failing to file for a permit but a state of continued noncompliance with RCRA. *Harmon,* slip op. at 24.

Here, however, FDER, rather than Complainant, charged Globe Aero with operating a facility reasonably expected to be a source of pollution and disposition of hazardous waste without a RCRA permit. CX 21. That alleged violation, like the offense in *Harmon,* may constitute a state of continued noncompliance. In this proceeding, the actual disposal of hazardous waste is at issue. Disposal is an act rather than a state of continued noncompliance. The fact that the waste or waste constituents may migrate does not provide a basis for finding a continued disposal

violation. *See, U.S. v. CDMG Realty Co.,* 875 F. Supp. 1077, 1083-1084 (D. N.J. 1995)(term "disposal" as defined in RCRA § 1004(3), must be limited to its active meaning rather than including the passive, in the context of liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)); *United States v. Petersen Sand & Gravel,* 806 F. Supp. 1346, 1352 (N.D. Ill. 1992)(in context of CERCLA liability, "disposal" refers to a discrete human act with a discrete ending); *Snediker Developers Ltd. Partnership v. Evans,* 773 F. Supp. 984, 988-989 (E.D. Mich. 1991)("the mere migration of hazardous waste, without more, does not constitute disposal within the meaning of [RCRA Section 1004(3), 42 U.S.C.] § 6903(3).")

The City pointed out that the record does not show dates of use of solvent, or of disposal of hazardous waste. The testimony of Mr. Curry, the report of the FDER inspection of May 19, 1986, and the Alamo Saxena Report, taken together indicate that hazardous waste was placed on the ground as of November 8, 1986. CX 3; Tr. 553, 556-557. It is apparent that placement of hazardous waste onto the ground occurred on more than one occasion. There is no evidence that it was cleaned up or that Globe Aero was in compliance with land disposal restrictions from that date until January 11, 1989. However, the record shows only the approximate number of airplanes stripped and number of drums of solvent purchased by Globe Aero. The number of times that wastewater overflowed the sump or was sprayed beyond the berm is

unknown.

There is no basis upon which to assess per day penalties for continuing violations. Accordingly, it is concluded that a penalty of $22,500 is appropriate.[12]

III. Liability of the City of Lakeland.

The City, owner of Lakeland Airport, has leased land to Globe Aero since 1976. Tr. 44, 580, 663. Globe Aero erected a facility including a hangar and offices. The concrete pad for the stripping of aircraft was constructed in 1984. CX 14; Tr. 44, 580, 590.

The City asserted that it was not the owner or operator of a hazardous waste facility, that there were no allegations that the City failed to comply with any law or rules, and that its conduct has not deviated from any regulatory requirements. It also asserted, without evidentiary support, that it had no control over any of the circumstances which resulted in Globe Aero's noncompliance.

The City did not specifically lease land to Globe Aero for use as a hazardous waste facility, and did not own the structures erected there Globe Aero. However, under the regulatory definitions of "facility" and "owner" under RCRA, land is a part

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12. In August 1990, Globe Aero asserted its inability to pay the proposed penalty, and submitted financial documents. Tr. 526-529. However, Globe Aero did not offer the documents into evidence or pursue this argument further at the hearing or in post-hearing briefs. It is therefore deemed to have been abandoned.

of a facility, and an owner includes a person who owns part of a facility. 40 CFR § 260.10. Therefore, a person who owns land upon which a hazardous facility operates is responsible under RCRA as an owner of a facility. *In re Ford Motor Company, et al.*, 3 EAD 677, RCRA Appeal No. 90-9 (Order Denying Review, October 2, 1991), citing 45 Fed. Reg. 33295 (May 19, 1980)("EPA considers both parties [owner and operator] responsible for compliance with the regulations").

Section 3004(d) through (g) of RCRA set forth prohibitions on land disposal of hazardous waste, and section 3008 provides for civil penalties to be assessed against any person who has violated any requirement of RCRA. Each person who owns or operates a hazardous waste facility must have a permit, according to RCRA § 3005(a). RCRA does not link the duty to obtain a hazardous waste permit with the owner's knowledge or control of the facility. *In re Arrcom, Inc. and Drexler Enterprises, Inc.*, 2 EAD 203, RCRA (3008) Appeal No. 86-6 (May 19, 1986)(Owner of a facility at which hazardous waste was stored, with no involvement in the operation of the business, was held accountable for RCRA violations); *Ford,* 3 EAD at 681-682.

An absentee landowner has been held subject to RCRA regulation where, as in the present case, the lessee built, owned and used the structures thereon, and the landowner was not involved in the operation of the lessee's business. *In re Systech Environmental Corp. v. U.S. EPA,* 55 F.3d 1466, 1469 (9th Cir. 1995). Congress has stated, "It is the intent of the

Committee that responsibility for complying with the regulations . . . rest equally with owners and operators of hazardous waste treatment, storage or disposal sites and facilities where the owner is not the operator." H.R. Rep. No. 1491, 94th Cong., 2d Sess. at 27-28 (1976).

The land disposal regulations apply to, *inter alia*, "owners and operators of hazardous waste treatment, storage and disposal facilities." 40 CFR § 268.1(b). The City was held vicariously liable as an owner-lessee for violations of the land disposal regulations in *Cypress Aviation*. The opinion there held that the issue of the City's involvement in or control over the operation was irrelevant, and relied upon the holding in *Arrcom*. Slip op. at 17.

Federal court decisions cited by the City are not on point because they are not brought under RCRA and do not involve interpretation of the same statutory language and policies. Moreover, although they hold owner-lessors not strictly liable, they leave open the possibility of vicarious liability. *Amoco Oil Co. V. EPA,* 543 F.2d 270 (D.C. Cir. 1976)(Gasoline refiner lessor held not strictly liable for violations of Clean Air Act caused by independent retailer lessee, under 40 CFR § 80.(b)(2)(iv); refiner must have some degree of control over retailer to show vicarious liability); *Amoco Oil Co. V. United States,* 450 F. Supp. 185 (W.D. MO 1987)(Lessor held not strictly liable as owner of a retail outlet for lessee's gasoline pump violation of Clean Air Act, where effect was to establish

"blanket vicarious liability" under the guise of "direct" liability); *Chrysler Corp.v. EPA,* 600 F. 2d 904 (D.C. Cir. 1979)(Manufacturers of truck chassis held not vicariously liable for nonconformance with Noise Control Act by manufacturers of truck bodies, where violations were wholly fault of the latter).

In contrast, another statute which addresses hazardous waste violations, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), imposes strict liability upon any person who at the time of disposal owned or operated a facility at which hazardous wastes were disposed of. Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2). There are specific criteria which an "innocent owner" must establish for a defense to such liability: it must be established by a preponderance of the evidence that the owner exercised due care with respect to the hazardous substance concerned, and that he took precautions against foreseeable acts or omissions of the person whose acts or ommissions caused the violation, and the consequences that could foreseeably result. Section 107(b)(3) of CERCLA, 42 U.S.C. 9607(b)(3). It has been held that a person with mere "paper ownership," a trustee to a land trust, with absolutely no control with regard to the site, is not an owner of a facility as contemplated by section 107(a)(2) of CERCLA. *United States v. Peterson Sand & Gravel,* 806 F.2d 1346, 1358-1359 (N.D. Ill. 1992)

Although the City apparently had nothing to do with Globe Aero's activities and the violations found herein, there is no basis in the record for concluding that due care was exercised,

or that the City had no control over its lessee. No basis for finding the City not liable, on this record, comes to mind. Accordingly, particularly in view of the holding in *Arrcom*, it must be held that the City is vicariously liable for violations of requirements applicable to owners of hazardous waste disposal facilities, RCRA § 3004 and 40 CFR sections 268.7(c) and 268.30(a), and is jointly and severally liable as the owner of the land upon which the disposition of hazardous waste occurred.[13]

Distinguishing the independent penalty of $12,500 assessed against it in *Cypress,* the City argued here that if its liability is vicarious, then its obligation to pay a penalty should also be vicarious for all or part of the penalty assessed against Globe Aero. It suggested that the full amount of the penalty should be assessed against Globe Aero with the City responsible for only part of it. It pointed out that under Florida law, indemnity is available to one who is vicariously liable, but otherwise free of fault. Thus, the City urges, assessment of an independent penalty against it may impair its claim against Globe Aero. Both the City and Complainant recognize that assessing joint and several liability against the City is not inconsistent with the

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13. It is observed that the requirements of 40 CFR 268.7(a) are not clearly applicable to the City. Those requirements apply to the generator of hazardous waste, and "generator" is defined as "any person, by site, whose act or process produces hazardous waste . . . or whose act first causes a hazardous waste to become subject to regulation." The requirement in 40 CFR § 268.7(c) to test the waste to determine if treatment standards are met applies to the owner or operator of any land disposal facility, and may be held applicable to the City.

principle of vicarious liability, and may be a potential basis for a contribution claim against Globe Aero. (EPA's Response to Lakeland's Supplemental Brief at 6). Accordingly, it will be held that the City is jointly and severally liable for the penalty assessed against Globe Aero.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Globe Aero, Ltd., Inc., ("Globe Aero") is a corporation doing business in the State of Florida, and is a "person" as defined in section 1004(15) of RCRA. Tr. 34. Globe Aero, which is engaged in the business of transporting and shuttling aircraft, performed services of stripping and painting of aircraft. Tr. 31, 602.

2. Respondent The City of Lakeland ("the City") is a municipality in the State of Florida and is a person within the meaning of section 1004(15) of RCRA. Tr. 44-45. The City owns the land upon which Globe Aero built its facility, and leased the land to Globe Aero. Tr. 44. 580, 663.

3. At all times relevant to this proceeding, neither Globe Aero nor the City had a RCRA permit or interim status to dispose of hazardous waste onto land at the Globe Aero facility. Tr. 265.

4. Paint stripping at Globe Aero's facility involved application to the aircraft of the chemical solvent stripper B&B 5075 NP.

Tr. 32-33. The stripper contained 62 percent to 66 percent of methylene chloride. CX 16, Tr. 259. Approximately one half to one 55 gallon drum of B&B 5075 NP was applied to each aircraft. Tr. 619. Approximately 25 aircraft were stripped at the Globe Aero facility between November 8, 1986 and January 11, 1989. Tr. 385, 638-639, 654, 668, 688-689. The solvent was left on the aircraft for approximately four hours. Tr. 616, 764. The paint and solvent were sprayed off the aircraft with a high-pressured water hose. Tr. 638, 697. After the paint and solvent were sprayed off the aircraft with water, the resultant wastewater mixture flowed into a sump in the middle of the concrete stripping pad. RX 1, Tr. 210, 639. Upon reaching the sump's capacity of 72.93 gallons, the wastewater flowed into a pipe which emptied into a swale. RX 1; Tr. 200, 225, 440, 442, 639, 763-764.

5. Upon being rinsed from the aircraft, the B&B 5075 NP was a spent solvent, classified as F002 hazardous waste. Globe Aero's wastewater, which was a mixture of the spent solvent with dissolved paint, paint chips and rinsewater, falls within the definition of F002 hazardous waste as listed in 40 CFR § 261.31.

6. At the time of EPA's inspection on January 11, 1989, several pieces of the berm which surrounded the concrete stripping pad were out of place. CX 1, 2; Tr. 39-40, 189, 193, 207. Paint chips and dissolved paint sludge were lying on the ground outside

the berm. CX 1(a), 1(d), 1(i), 1(m), 2; Tr. 41, 193-197, 205, 667, 688-689. The swale at the end of the pipe leading from the concrete pad contained water. CX 1(j), 2; Tr. 640. Dissolved paint and paint chips were seen in and along the surface of the water in the swale. CX 1(b), 1(c), 1(j), 2; Tr. 199-201, 202-203.

7. The flow of wastewater into the swale and the spray or flow of wastewater onto the ground around the concrete pad constitutes land disposal as defined in 40 CFR § 268.2(c).

8. The pond at the Globe Aero facility was created as a borrow pit. RX 1, Tr. 375-376, 586, 662, 734. The pond was not contaminated by spent solvents. CX 7 p. 4; RX 1 p. 9, and does not constitute a surface impoundment within the meaning of 40 C.F.R. § 260.10. Complainant has not shown by a preponderance of the evidence that Globe Aero disposed of hazardous waste into a surface impoundment during the period November 8, 1986 through January 11, 1989. Accordingly, such waste was not disposed of into a surface impoundment during that period.

9. Methylene chloride was detected in groundwater samples taken in the area near the end of the discharge pipe. RX 1 pp. 9, 13, Table 2; Tr. 789.

10. Wastewater which is an F002 hazardous waste remains F002

hazardous waste at the time of land disposal despite the fact that some or most of the methylene chloride evaporated from the wastewater before it was disposed of onto land.

11. Between November 8, 1986 and January 11, 1989, F002 hazardous waste flowed through the pipe from the sump into the swale in the ground, and that F002 hazardous waste was placed on the ground outside of the concrete pad. Globe Aero disposed of F002 hazardous waste onto land in violation of 40 C.F.R. § 268.30(a) and in violation of section 3004(e) of RCRA.

12. During the period between November 8, 1986 and January 11, 1989, Globe Aero disposed of spent CLT 5000, which is F003 and F005 hazardous waste onto land in violation of 40 CFR § 268.30(a) and section 3004(e) of RCRA.

13. Globe Aero does not meet any of the exceptions listed in 40 CFR § 268.30(a) from the prohibition on land disposal of spent solvent wastes. Globe Aero was not a small quantity generator of hazardous waste; its wastewater was not a solvent-water mixture or solvent-containing sludge of less than one percent total F001-F005 solvent constituents.

14. Globe Aero failed to determine whether the waste was restricted from land disposal and failed to test the waste to determine whether it met treatment standards, and therefore

violated 40 CFR § 268.7(a) and (c).

15. The violations at issue were not continuing violations for which per day penalties may be assessed. An appropriate penalty for the violations of section 3004 of RCRA and 40 CFR §§ 268.30(a) and 268.7(a) and (c) is $22,500.

16. The City of Lakeland is vicariously liable for violations of the section 3004 of RCRA, 40 CFR §§ 268.7(c) and 268.30(a). The City is jointly and severally liable for the penalty assessed against Globe Aero.

ORDER

It is ordered that Respondents shall pay a civil penalty of $22,500 for the violations found herein.

Payment of the full amount of the civil penalty shall be made within sixty (60) days of service of this ORDER upon respondent, by cashier's check to the Treasury, United States of America, sent to the following address: Environmental Protection Agency, Region IV, P. O. Box 100142, Atlanta, Georgia 30384.

And it is FURTHER ORDERED that Respondents shall:

A. Cease the placing of all hazardous waste in or on land.

B. Manifest all shipments of land disposal restricted waste to a hazardous waste treatment, storage or disposal facility in compliance with all applicable RCRA requirements.

C. Comply with all requirements of 40 CFR § 268.7(a) and

(c) for any hazardous waste which is being generated at the Globe Aero Facility.

Notwithstanding any other provision of this Order, an enforcement action may be brought pursuant to section 7003 of RCRA, 42 U.S.C. § 6973, or any other applicable statutory authority, should it be determined that the handling, storage, treatment, transportation, or disposal of solid waste or hazardous waste at the facility may present an imminent and substantial endangerment to human health or the environment.

J. F. Greene
Administrative Law Judge

Dated: June 4, 1996
Washington, D.C.