

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 N. 5TH STREET
KANSAS CITY, KANSAS 66101

ENVIRONMENTAL PROTECTION AGENCY REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF:)

US Army Corp of Engineers, Chemistry and)
Material Quality Assurance Laboratory)
420 South 18th Street)
Omaha, Nebraska)

EPA ID No. NE7210890029)

Respondent,)

Proceeding under Section)
3008(a) and (g) of the Resource)
Conservation and Recovery Act,)
as amended, 42 U.S.C. § 6928(a) and (g).)

COMPLAINT, COMPLIANCE
ORDER AND NOTICE OF
OPPORTUNITY FOR HEARING

Docket No. RCRA-07-2006-0233

I. PRELIMINARY STATEMENT

1. This Complaint, Compliance Order, and Notice of Opportunity for Hearing (Complaint) is issued pursuant to Section 3008 (a) and (g) of the Solid Waste Disposal Act (SWDA), as amended by the Resource Conservation and Recovery Act of 1976 (RCRA) and the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. § 6928 (a) and (g), and in accordance with the United States Environmental Protection Agency's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules of Practice), Title 40 Code of Federal Regulations (C.F.R.) Part 22.

2. The Complainant is the Chief of the RCRA Enforcement & State Programs Branch of the Air, RCRA, and Toxics Division of the United States Environmental Protection Agency (EPA), Region 7, who has been duly delegated the authority to bring this action. The Respondent is the United States Army Corp of Engineers, Chemistry and Materials Quality Assurance Laboratory, a federal facility, owned and operated by the United States Army Corp of Engineers as a quality assurance laboratory in the State of Nebraska.

3. The authority to execute this Complaint is provided to the Regional Administrators by EPA Delegation No. 8-9-A, dated May 11, 1994. This authority has been delegated to the

Director of the Air, RCRA, and Toxics Division of EPA, Region 7, by EPA Delegation No. R7-8-9-A, dated January 1, 1995, and further redelegated to the Chief of the RCRA Enforcement and State Programs Branch, by EPA Delegation No. R7-DIV-8-9-A, dated June 15, 2005.

4. Section 3008 (g) of RCRA, 42 U.S.C. § 6928 (g), authorizes a civil penalty of not more than \$25,000 per day for violations of Subchapter III of RCRA (Hazardous Waste Management). This figure has been adjusted upward for inflation pursuant to the Civil Monetary Inflation Adjustment Rule, 40 C.F.R. Part 19, so that penalties of up to \$27,500 per day are authorized for violations of Subchapter III of RCRA that occur after January 30, 1997 and before March 15, 2004. In addition, penalties of up to \$32,500 per day are now authorized for violations occurring after March 15, 2004. Based upon the facts alleged in this Complaint and upon those factors which Complainant must consider pursuant to Section 3008 (a) (3) of RCRA, 42 U.S.C. § 6928 (a) (3), as discussed in the RCRA Civil Penalty Policy issued by EPA in June 2003, and attached hereto, including the seriousness of the violations, the threat of harm to public health or the environment, any good faith efforts of Respondent to comply with applicable requirements, as well as other matters as justice may require, the Complainant proposes that Respondent be assessed a civil penalty pursuant to Section 3008 (g) of RCRA, 42 U.S.C. § 6928 (g), for the violations of RCRA alleged in the Complaint. The proposed penalty may be adjusted if Respondent establishes bona fide issues relevant to the statutory factors for the assessment of the proposed penalty.

5. The State of Nebraska has been granted authorization to administer and enforce a hazardous waste program pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, and the State of Nebraska has adopted by reference the federal regulations cited herein at the pertinent parts of Title 128, Nebraska Hazardous Waste Regulations. Section 3008 of RCRA, 42 U.S.C. § 6928, authorizes the EPA to enforce the provisions of the authorized State program and the regulations promulgated thereunder. When the EPA determines that any person has violated or is violation of any RCRA requirement, EPA may issue an order assessing a civil penalty for any past or current violation and/or require immediate compliance or compliance within a specified time period. When the violation occurs in a state which is authorized to carry out its own hazardous waste program pursuant to Section 3006 of RCRA, EPA shall give notice to the state in which such violation has occurred or is occurring prior to issuing the order. The State of Nebraska has been notified of this action in accordance with Section 3008 (a) (2) of RCRA, 42 U.S.C. § 6928 (a) (2).

II. COMPLAINT

ALLEGATIONS COMMON TO ALL COUNTS

6. The Respondent, the United States Army Corp of Engineers Chemistry and Materials Quality Assurance Laboratory in Omaha (COE), Nebraska, is owned and operated by the United States Army Corp of Engineers. The COE is a "person" as defined in Section 1004 (15) of RCRA, 42 U.S.C. § 6903 (15).

7. The Respondent's facility is operated as a quality assurance laboratory which conducts analytical testing on water and soil samples which are generated from projects in the Omaha and Kansas City Regional areas.
8. Respondent has been in operation at its current location since 1948 and currently employs approximately eighteen full-time employees at the Omaha facility.
9. On or about October 1, 1986, Respondent notified EPA that it was a small quantity generator (100 to 1000 kg/month) of hazardous waste in the state of Nebraska.
10. Respondent has been assigned the facility identification number NE7210890029.
11. On November 2, 2005, EPA conducted a RCRA compliance evaluation inspection at Respondent's facility. Based on a review of the 2005 manifests and information provided by facility personnel, it was determined that Respondent was operating at that time as a small quantity generator of D006, D007, D008, D009, D010, D018, D020, D028, D029, D030 and D039 characteristic as well as F002, F003 and F005 listed hazardous wastes.
12. Based on information obtained during the inspection, Respondent was issued a Notice of Violation (NOV) on November 2, 2005.
13. On November 14, 2005, the Respondent responded to the November 2, 2005 NOV.

COUNT I

OPERATING AS A TREATMENT, STORAGE OR DISPOSAL FACILITY WITHOUT A RCRA PERMIT OR RCRA INTERIM STATUS

14. Complainant hereby incorporates the allegations contained in paragraphs 6 through 13 above, as if fully set forth herein.
15. The Nebraska regulations at Title 128, Chapter 9, 001.01 (40 C.F.R. § 260.10) state that a small quantity generator is one who generates in a calendar month a total quantity of hazardous waste greater than 100 kilograms and less than 1,000 kilograms. Small quantity generators are subject to this Title 128, Chapter 9.
16. The Nebraska regulations at Title 128, Chapter 9, 007.03 (40 C.F.R. § 262.34 (e) referring to 40 C.F.R. § 262.34 (d)) state that a small quantity generator may accumulate hazardous waste on-site for 180 days or less (or 270 days if the generator must transport the waste, or offer that waste for transportation over a distance of 200 miles or more) without a

permit or without having interim status provided that he complies with the requirements of Title 128, Chapter 9, 007.03A through 007.03G.

Failure to Properly Date and Label Hazardous Waste Containers

17. The Nebraska regulations at Title 128, Chapter 9, 007.03 (40 C.F.R. § 262.34 (e) referring to 40 C.F.R. § 262.34 (d) (4) and 40 C.F.R. §§ 262.34 (a) (2) and (a) (3)) state that a small quantity generator may accumulate hazardous waste on-site for 180 days or less (or for 270 days if the generator must transport the waste, or offer that waste for transportation, over a distance of 200 miles) without a permit or without having interim status provided that the generator complies with the requirements of Title 128, Chapter 9, 007.03A-G.

18. The Nebraska regulations at Title 128, Chapter 9, 007.03D referring to Title 128, Chapter 10, 004.1F (40 C.F.R. §262.34 (e) referring to 40 C.F.R. § 262.34 (d) (4) and 40 C.F.R. § 262.34 (a) (2)) require that the date upon which each period of accumulation begins must be clearly marked and visible for inspection on each container.

19. At the time of the November 2, 2005 EPA inspection, Respondent was accumulating approximately two-hundred ninety (290) containers of hazardous waste in the hazardous waste storage room of the facility which were not properly dated with the accumulation start date.

20. At the time of the November 2, 2005 EPA inspection, Respondent was accumulating one (1) fifty-five gallon lab pack container of hazardous waste in the hazardous waste storage room of the facility which was not properly dated with the accumulation start date.

21. The Nebraska regulations at Title 128, Chapter 9, 007.03D referring to Title 128, Chapter 10, 004.1G (40 C.F.R. § 262.34 (e) referring to 40 C.F.R. § 262.34 (d) (4) and 40 C.F.R. § 262.34 (a) (3)) require that while being accumulated on-site, each container must be labeled or marked clearly with the words "Hazardous Waste."

22. At the time of the November 2, 2005 EPA inspection, Respondent was accumulating approximately two-hundred eighty three (283) containers of hazardous waste in the hazardous waste storage room of the facility which were not properly labeled with the words "Hazardous Waste."

Improper Management of Satellite Accumulation Containers

23. The Nebraska regulations at Title 128, Chapter 9, 007.04A referring to Title 128, Chapter 9, 007.04A2 (40 C.F.R. § 262.34 (c) (1) (ii)) state that a generator may accumulate as much as 55 gallons of hazardous waste or one quart of acute hazardous waste in containers at or near any point of generation where wastes initially accumulate, which is under the control of the operator of the process generating the waste, without a permit or interim status and without complying

with Chapter 9, 007.03 of this Chapter provided that, among other things, the generator complies with and marks the containers either with the words "Hazardous Waste" or with other words that identify the contents of the containers.

24. The Nebraska regulations at Title 128, Chapter 9, 007.04A referring to Title 128, Chapter 9, 007.04A1 referring to Title 128, Chapter 10, 004.01A2 (40 C.F.R. § 262.34 (c) (1) (i) referring to 40 C.F.R. § 265.173 (a)) require that a container holding hazardous waste must always be closed during storage, except when it is necessary to add or remove waste.

25. At the time of the November 2, 2005 EPA inspection, approximately five (5) satellite accumulation containers of hazardous waste located in a lab area of the facility were not kept closed during storage.

26. At the time of the November 2, 2005 EPA inspection, approximately three (3) satellite accumulation containers of hazardous waste located in the lab area of the facility were not labeled either with the words "Hazardous Waste" or with other words that identified the contents of the containers.

Failure to Inspect Hazardous Waste Containers

27. The Nebraska regulations at Title 128, Chapter 9, 007.03 (40 C.F.R. § 262.34 (e) referring to 40 C.F.R. § 262.34 (d) (4) and 40 C.F.R. §§ 262.34 (a) (2) and (a) (3)) state that a small quantity generator may accumulate hazardous waste on-site for 180 days or less (or for 270 days if the generator must transport the waste, or offer that waste for transportation, over a distance of 200 miles) without a permit or without having interim status provided that the generator complies with the requirements of Chapter 9, 007.03A-G.

28. The Nebraska regulations at Title 128, Chapter 9, 007.03C referring to Title 128, Chapter 10, 004.01A referring to Title 128, Chapter 10, 004.01A4 (40 C.F.R. § 262.34 (e) referring to 40 C.F.R. § 262.34 (d) (2) and 40 C.F.R. § 265.174) require that areas where containers are stored be inspected, at least weekly, looking for leaks and for deterioration caused by corrosion or other factors.

29. At the time of the November 2, 2005 EPA inspection, Respondent was not conducting weekly inspections of the hazardous waste storage room of the facility to check for leaks or for deterioration.

30. Respondent's failure to comply with the conditions set forth in Nebraska regulations Title 128, Chapter 9, 007 and Title 128, Chapter 10, 004 as alleged in paragraphs 17 through 32, subjects Respondent to the requirements of having a permit or interim status for its storage of hazardous waste.

31. Respondent does not have a RCRA Permit or RCRA Interim status to operate as a storage facility, in violation of Section 3005 of RCRA and Title 128, Chapter 12 of the Nebraska Hazardous Waste Regulations.

32. Pursuant to Section 3008 (g) of RCRA, 42 U.S.C. § 6928 (g), and based upon the allegations stated above, Complainant proposes that Respondent be assessed a civil penalty of \$63,260.00 for operation of a RCRA storage facility without a RCRA permit or interim status.

COUNT II

FAILURE TO CONDUCT A HAZARDOUS WASTE DETERMINATION

33. Complainant hereby incorporates the allegations contained in paragraphs 6 through 32 above, as if fully set forth herein.

34. Pursuant to Nebraska regulations at Chapter 9, 001.02 (40 C.F.R. § 262.11) a generator who treats, stores, or disposes of hazardous waste on-site is required to comply with, among other requirements, Chapter 4, 002 of Title 128.

35. Pursuant to Nebraska regulation Title 128, Chapter 4, 002 (40 C.F.R. § 262.11) a person who generates a solid waste, as defined in Chapter 2, 003, is required to determine if the solid waste is a hazardous waste using the methods stated in Chapter 4, 002.

36. At the time of the November 2, 2005 EPA inspection, the inspector observed approximately one-hundred fifty (150) containers of outdated chemicals in the sorting room of the Respondent's facility. Respondent had been collecting the one-hundred fifty (150) containers of outdated chemicals in the sorting room of the facility for approximately six months. Respondent had not conducted a hazardous waste determination on any of the one-hundred fifty (150) containers.

37. Following the November 2, 2005 EPA inspection, Respondent performed a hazardous waste determination on the one-hundred fifty (150) containers of outdated chemicals. The Respondent determined that three (3) hazardous waste streams existed within those one-hundred fifty containers.

38. Respondent's failure to make hazardous waste determinations on the waste streams noted in paragraph 38 and 39 is a violation of Title 128, Chapter 4, 002 (40 C.F.R. § 262.11).

39. Pursuant to Section 3008 (g) of RCRA, 42 U.S.C. § 6928 (g), and based upon the allegations above, it is proposed that a civil penalty of \$3,867.00 be assessed against Respondent for its failure to comply with Title 128, Chapter 4, 002 (40 C.F.R. § 262.11).

III. COMPLIANCE ORDER

IT IS HEREBY ORDERED that within thirty (30) days of receipt of this Order, Respondent shall pay a penalty of \$67,127.00. Payment shall be made by certified or cashier's check payable to "Treasurer of the United States" and remitted to the Mellon Bank, United States Environmental Protection Agency, Region 7, P.O. Box 371099M, Pittsburgh, Pennsylvania 15251. A copy of said check shall be sent simultaneously by certified mail, return receipt requested, to:

Kori Kuehl
ARTD/RESP
U.S. EPA Region 7
901 N. 5th St.
Kansas City, KS 66101.

The check must reference the EPA Docket Number of this Complaint and Respondent by name.

IT IS FURTHER ORDERED that Respondent take the following actions within the time periods specified:

No later than **thirty days** from the receipt of this Complaint, Compliance Order and Notice of Opportunity for Hearing, Respondent shall submit the following:

1. Respondent shall provide EPA with evidence (e.g., dated photographs) clearly demonstrating that any containers accumulating hazardous waste (including satellite accumulation hazardous waste containers) have been properly labeled "Hazardous Waste" and that any such containers have been clearly marked with the date upon which the accumulation began as set forth in Nebraska regulation Title 128, Chapter 9, 007.04A.
2. Documentation which demonstrates that Respondent has performed hazardous waste determinations on all solid waste streams produced at the facility. Said documentation should include the following:
 - a. A detailed description of the process that generates the waste;
 - b. A determination of whether or not the waste has been excluded from regulation under 40 C.F.R. Part 261;
 - c. A determination of whether or not the waste has been listed in Subpart D of 40 C.F.R. Part 261; and

d. A determination of whether or not the waste is identified in 40 C.F.R. Part 261 Subpart C. To determine if the waste fails any of the characteristics in Subpart C, especially the Toxicity Characteristic Leaching Procedure Test (TCLP), the waste needs to be analyzed using the procedures set forth in Subpart C of 40 C.F.R. Part 261, or by applying knowledge of the waste characteristics considering the materials or processes used. Any analyses of the waste generated on site must be provided. If knowledge of the process is used, please provide a detailed explanation regarding the basis for this knowledge.

3. Respondent shall provide EPA with evidence (e.g., dated photographs) clearly demonstrating that any containers accumulating hazardous waste have been properly labeled "Hazardous Waste" and that any such containers have been clearly marked with the date upon which the accumulation began as set forth in Nebraska regulation Title 128, Chapter 10, 004.01.

4. Respondent shall provide EPA copies of inspection forms/reports for all weekly inspections of the hazardous waste storage room from December 2005 through May 2006.

All documents required to be submitted by this Complaint and Compliance Order shall be sent to the attention of:

Kori Kuehl
ARTD/RESP
U.S. EPA Region 7
901 North 5th Street
Kansas City, Kansas 66101.

IV. NOTICE OF OPPORTUNITY TO REQUEST A HEARING

In accordance with Section 3008 (b) of RCRA, 42 U.S.C. § 6928 (b), this Complaint shall become final unless Respondent files a written answer and requests a public hearing in writing no later than **thirty (30) days** after service of this Complaint.

A written answer to this Complaint must satisfy the requirements of 40 C.F.R. § 22.15 of the Consolidated Rules of Practice, a copy of which is enclosed herein. The answer and request for hearing must be filed with the Regional Hearing Clerk, U.S. EPA Region 7, 901 N. 5th Street, Kansas City, Kansas 66101. A copy of the answer and request for hearing and copies of any subsequent documents should also be sent to Ms. Jennifer Trotter, Office of Regional Counsel, at the same address.

Respondent's failure to file a written answer and request a hearing within **thirty (30) days** of service of this Complaint will constitute a binding admission of all allegations contained in the Complaint and a waiver of Respondent's right to a hearing. A Default Order may

thereafter be issued by the Regional Judicial Officer, and the civil penalty proposed herein shall become due and payable without further proceedings.

V. SETTLEMENT CONFERENCE

Whether or not Respondent requests a hearing, an informal conference may be requested in order to discuss the facts of this case in an attempt to arrive at settlement. To request a settlement conference, please contact Jennifer Trotter, Office of Regional Counsel, U.S. EPA Region 7, 901 N. 5th Street, Kansas City, Kansas 66101, (913) 551-7180.

Please note that a request for an informal settlement conference does not extend the thirty (30) day period during which a written answer and request for a hearing must be submitted. The informal conference procedure may be pursued simultaneously with the adjudicatory hearing procedure.

EPA encourages all parties against whom a civil penalty is proposed to pursue the possibility of settlement as a result of an informal conference. However, no penalty reduction will be made simply because such a conference is held. Any settlement which may be reached as a result of such a conference shall be embodied in a written Consent Agreement and Final Order issued by the Regional Judicial Officer, U.S. EPA Region 7.

If Respondent has neither filed an answer nor requested a hearing within **thirty (30) days** of service of this Complaint, Respondent may be found in default. Default by the Respondent constitutes, for the purposes of this proceeding, admission of all allegations made in the Complaint and a waiver of Respondent's right to contest such factual allegations. A Default Order may thereafter be issued by the Presiding Officer and the civil penalties proposed shall be ordered without further proceedings and Respondent will be notified that the penalties have become due and payable.

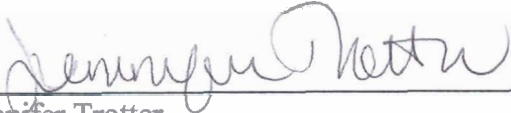
VI. EFFECTIVE DATE

This Complaint, Compliance Order, and Notice of Opportunity for Hearing shall become effective on the date signed by the Chief of the RCRA Enforcement and State Programs Branch, Air, RCRA and Toxics Division, EPA Region 7.


This Order shall only be terminated upon receipt of written notice from EPA that all requirements herein have been satisfied.

IT IS SO ISSUED AND ORDERED:

9-21-06
Date


Jennifer Trotter
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 7

9-21-06
Date


Don Toensing
Chief
RCRA Enforcement and State Programs Branch
Air, RCRA and Toxics Division
U.S. Environmental Protection Agency
Region 7

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand-delivered the original and one true copy of this Complaint, Compliance Order and Notice of Opportunity for Hearing to the Regional Hearing Clerk, Environmental Protection Agency, Region 7, 901 N. 5th Street, Kansas City, Kansas 66101.

I further certify that on the date below I sent by certified mail, return receipt requested, a true and correct copy of the original Complaint, Compliance Order and Notice of Opportunity for Hearing; a copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (40 C.F.R. Part 22); a copy of the RCRA Civil Penalty Policy (June 2003); and a copy of the Civil Penalty Calculation Summary to the following delegated individuals of the United States Army for the U.S. Army Corp of Engineers, Chemistry and Material Quality Assurance Laboratory:

Colonel Richard Hatch, Chief
Litigation Division
Room 400
901 North Stuart Street
Arlington, VA 22203

Douglas B. Taggart, Director
Chief of the Environmental Chemistry Branch
420 South 18th Street
Omaha, NE 68102-2586.

Dated this 26 day of September 2006.