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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

Supplementary Findings and Conclusions, October 18, 1999

(Supplementary Findings and Conclusions
to the Decision and Order of October 8, 1999.)

In the Matter of

City of Athens, Ohio

Respondent

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Docket No. RCRA

Judge Greene

SUPPLEMENTAL ORDER and RULINGS; and ADDITIONAL FINDINGS AND CONCLUSIONS

The four-count complaint charged Respondent (sometimes referred to as "City") with numerous violations of the Act and regulations which resulted in substantial part from the frequent cleaning of painting equipment used in various City painting activities. In connection therewith, materials associated with painting and cleanup including solvents, thinners, and kerosene, which are hazardous wastes, were disposed of or were allowed to flow on the ground in front of the painting facility. Certain other materials related to vehicle maintenance operations were also allowed to flow on the ground, or were hosed or drained into an on-site underground tank, where they were stored for several years. In effect, the City was charged with the full panoply of violations that could be brought for activities which, in Complainant's view, constituted operation of a hazardous waste landfill and a hazardous waste storage facility (the ground in front of the paint shop and the storage tank) without having complied various prerequisites for such activities under federal and/or state legislation and applicable regulations. The four counts

included the following charges.

Count I:

- Failure to provide notification to the Administrator of the Environmental Protection Agency (EPA) as required by section 3010 (42 U.S.C. 6930) of the Act on or before August 18, 1980; [\(1\)](#)
- Failure to determine whether waste disposed of on the ground outside the painting facility (paint shop) hazardous, and failure to determine whether waste stored in a tank (referred to in the complaint as the "grease pit") was hazardous, as required by 40 C.F.R. § 262.11 and Ohio Code (OAC) 3745-52-11; [\(2\)](#)
- Failure to obtain an EPA identification number while continuing to treat, store, or dispose of hazardous waste at its garage, in violation of 40 CFR § 262.11. [\(3\)](#)

Count II

- Failure to apply for a Part A permit on or before November 19, 1980, while continuing to dispose of, treat, or store hazardous waste after that date in violation of § 3005(a) of the Act, 42 U.S.C. § 6925(a), 40 C.F.R. § 270.10(e), and OAC 3745-50-40. [\(4\)](#)

Count III.

- Failure to obtain a general waste analysis, failure to inspect for malfunctions and deterioration according to a written schedule, and failure to train personnel and maintain records of their compliance with the requirements of 40 C.F.R. Part 265, Subpart B, and OAC 745-65-10 to 18, in violation of these said provisions. [\(5\)](#)
- Failure to develop and maintain a contingency plan for the facility, in violation of 40 C.F.R. Part 265, Subpart D, (or OAC 3745-65-50/56. [\(6\)](#))
- Failure to maintain a written operating record at the facility; and failure to submit a biennial report of facility activities to EPA or to the State of Ohio, as appropriate, in violation of the Act, 40 C.F.R. Part 265, Subpart E, (or OAC 3745-65-70/77. [\(7\)](#))
- Failure to equip, test, and maintain alarm systems, fire protection equipment, spill control equipment, and decontamination equipment to be used in emergencies, in violation of the Act, of 40 C.F.R. Part 265, Subpart C; and of OAC 3745-65-30/37. [\(8\)](#)
- Failure to implement a groundwater monitoring program no later than November 19, 1981, in violation of 40 C.F.R. Part 265, Subpart F, (or OAC 3745-65-90/94), while continuing to dispose of hazardous materials used or generated in connection with City painting activities. [\(9\)](#)
- Failure to have a written closure plan for each hazardous waste management unit at the facility no later than May 19, 1981, in violation of the Act, and of subpart G of Part 265 of 40 C.F.R.; [\(10\)](#)
- Failure to estimate the costs of closing such facilities and failure to establish assurance of financial ability to close the facility;
- Failure to estimate post-closure costs, and failure to establish assurance of financial ability to perform post closure care and to maintain liability insurance for injury and property damage caused by sudden or nonsudden accidental occurrences arising from operations of the facility, in violation of the Act, and of Subpart H of 40 C.F.R. Part 265; [\(11\)](#)
- Failure to inspect the hazardous waste storage locations weekly, in violation of the Act, Subpart I or 40 C.F.R. Part 265 (and OAC § 3745-66-90 through 92); [\(12\)](#)
- Failure to assess the integrity of, and perform daily inspections of, the tank system ("grease pit") where hazardous painting material waste was stored and failure to comply with other requirements (not specified) of the applicable subpart in violation of Subpart J of 40 C.F.R. Part 265 and the Act (and OAC 3745-66-90 through 92); [\(13\)](#)
- Failure to comply with any of the "special re-quirements" pertaining to landfills set forth in 40 C.F.R. Subpart N, in violation of the Subpart N requirements and the Act (or OAC 3745-68-01 through 16). [\(14\)](#)

Count IV.

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- Disposal of spent solvents assigned EPA hazardous waste numbers F003 and F005 without falling into any of the "exceptional conditions" set forth at 40 C.F.R. § 268.30(a), and without (a) having met applicable treatment standards or (b) having been granted an exemption, in violation of section 3004(e) of the Act [(42 U.S.C. § 6924(e)], and 40 C.F.R. 268.30(a); [\(15\)](#)
- Failure to test the hazardous waste painting materials to determine if they were subject to land disposal restrictions, in violation of 40 C.F.R. § 268.7(a) (or OAC 3745-59-07) and the Act; [\(16\)](#)
 - Failure to mark the storage tank clearly and comply with operating record requirements set forth in EPA RCRA regulations or Ohio EPA regulations, in circumstances where the waste was stored in the tank solely to facilitate proper recovery treatment or disposal, in violation of 40 C.F.R. § 268.50(a)(2)(ii)(or OAC 3745-59- 50) and the Act. [\(17\)](#)

Additional Findings and Conclusions - General

As provided by the decision and order of October 8, 1999, the following findings and conclusions are made in addition to those elsewhere herein, and in the Decision and Order of October 8, 1999:

The complaint herein was lawfully filed pursuant to appropriate provisions of the Resource Conservation and Recovery Act ("RCRA," or "the Act"), 42 U.S.C. § 6928, and regulations promulgated in accordance with authority granted therein. The State of Ohio was notified pursuant to section 3008(a) of the Act, 42 U.S.C. § 6928(a). Constitutional rights were not violated as a result of failure to notify Respondent in advance of the filing. [\(18\)](#)

At all relevant times Respondent owned and operated a facility known as the City Garage in Athens, Ohio, which included a "paint shop." Respondent is a "person" as defined in the Act, 42 U.S.C. §6903(15) and is subject to regulations issued pursuant to Subtitle C thereof, 42 U.S.C. §§ 6921-6939, and regulations of the State of Ohio incorporated by reference as part of the applicable state hazardous waste management program of the State of Ohio. At all times during which the State of Ohio did not have authorization to administer and enforce a hazardous waste program, persons who treated, stored, or disposed of hazardous waste were subject to federal legislation and regulations.

Respondent generated hazardous waste as described in 40 CFR Part 261 by virtue of various painting activities in the City of Athens, substantial quantities of which were both disposed of on the ground at the City Garage, or stored in containers. In addition, Respondent generated hazardous materials in connection with the servicing of automobiles at the City Garage, substantial quantities of which were both stored at and disposed of at the City Garage. Respondent stored hazardous waste for a period in excess of 180 days, and accumulated more than 1000 kilograms of hazardous waste on site at one time. Respondent did not establish either a "small quantity generator" or a "conditionally exempt small quantity generator" affirmative defense and is therefore subject to all requirements of 40 C.F.R. Part 265 until such time as a permit is issued for the facility or until pertinent regulations of 40 C.F.R. Part 265 regarding closure and post-closure are complied with. Consequently, Respondent owned or operated a facility that treated, stored, and/or disposed of hazardous waste, and is subject to the requirements of 40 C.F.R. Parts 262, 265, and 270, as well as to the applicable provisions of the Ohio Administrative Code (OAC).

Additional Findings and Conclusions as to Specific Violations.

Respondent failed to notify the EPA Administrator pursuant to 3010 of the Act on or before August 18, 1980; failed to determine whether wastes disposed of and stored were hazardous; and failed to obtain an EPA identification number while continuing to treat, store, or dispose of hazardous waste at the City Garage, all as charged in Count I of the complaint herein.

Respondent was required to submit a part A application, as charged in Count II of

the complaint herein.

Respondent failed to obtain a general waste analysis, failed to inspect for malfunctions and deterioration according to a written schedule, failed to train personnel and maintain records of their compliance with the requirements of 40 C.F.R. Part 265, Subpart D (Contingency Plan and Emergency Procedures) and applicable state regulations; Respondent failed to develop and maintain a contingency plan for the facility, failed to maintain a written operating plan for the facility, and failed to submit a biennial report of facility activities to EPA or to the State of Ohio, as appropriate; failed to equip, test, and maintain alarm systems, fire protection equipment, spill control equipment, and decontamination equipment to be used in emergencies; failed to implement a groundwater monitoring program no later than November 19, 1981, while continuing to dispose of hazardous materials used or generated in connection with city painting activities; failed to have a written closure plan for each hazardous waste management unit at the facility no later than May 19, 1981; failed to estimate the costs of closing such facilities and failed to establish assurance of financial ability to close the facility; failed to estimate post-closure costs, and failed to establish assurance of financial ability to perform post-closure care and to maintain liability insurance for injury and property damage caused by sudden or nonsudden accidental occurrences arising from operations at the facility; failed to inspect hazardous waste storage locations weekly, failed to assess the integrity of, and perform daily inspections of, the tank system where hazardous waste was stored; and failed to comply with "special requirements" pertaining to landfills set forth at 40 C.F.R. Subpart N, all as charged in Count III of the complaint herein.

Respondent disposed of spent solvents assigned EPA hazardous waste numbers F003 and F005 without falling into any "Exceptional condition" set forth at 40 C.F.R. 268.30(a), and without having met applicable treatment standards of (b) having been granted an exemption; failed to test hazardous waste painting materials to determine whether they were subject to land disposal restrictions; and failed to mark the storage tank clearly and comply with operating record requirements set forth in regulations issued pursuant to authority of the Act by EPA and in Ohio EPA regulations, in circumstances where the waste was stored solely to facilitate proper recovery, treatment, or disposal, all as charged in Count IV of the complaint herein.

Additional Conclusions.

Whether or not Respondent had knowledge of facts that constituted violations of applicable requirements is not relevant to a determination of liability for violations under the Act.

No genuine issues of material fact remain regarding Respondent's liability for the violations charged in the complaint herein.

Taking all facts and circumstances into account, including future costs of compliance and the interests of justice, it is determined that a fair and reasonable monetary civil penalty to be assessed for violations found herein is \$98,000.

Complainant's August 18, 1999, Motion to Consider Additional Evidence

Complainant's August 18, 1999, motion for consideration of additional evidence, responded to on August 31, 1999, and replied to September 1, 1999 (received September 7, 1999) will be granted. The evidence in question is a declaration from the principal author and field researcher of a study performed by Ohio University

for the City of Athens to determine the source of tetrachloroethylene and trichloroethylene contamination of the city's West State Street Well Field.⁽¹⁹⁾ The declaration does in fact comply with Title 28⁽²⁰⁾; moreover, it is not inadmissible in administrative proceedings simply because it is hearsay. (Complainant's Reply in Support of its Motion for Consideration of Additional Evidence, at 1-2).

This report relied upon statements of city employees who worked at the City Garage and paint shop. The individuals referred to in the study reportedly stated that at least one of them had said that "in past years they . . . cleaned painting equipment resulting in the disposal of paints and solvents on the gravel in front of the paint shop."⁽²¹⁾ In that report at 17, it is said that "our investigation indicates that TCE, other solvents, and paints, have been regularly disposed at and around location C (Figure 23). Location C was the area outside of the Paint Shop, in the City Garage Compound. This statement was based on the field work we had performed for the study, and was supported by what the City employee(s) had told me during 1990."⁽²²⁾ Moreover,

At least one City employee told me there was an underground storage tank (UST) that they used to put oil and/or solvents into. The location of the UST, which was pointed out to me, was east of monitoring well MW-7 from my study and between it, the service garage building and the property line. The employee(s) said the oil and/or solvents were put into the UST for about 20 years, however, it never seemed to fill up. In addition, the employee(s) said that water accumulated in the UST after rain. It is obvious to me that there was a leak in the UST.⁽²³⁾

Correction of Monetary Civil Penalty set forth in
Decision and Order of October 8, 1999.

The amount of monetary civil penalty determined to be fair and reasonable, taking all appropriate considerations into account in setting it, was incorrectly stated and assessed owing to a typographical error. The parties have been informed orally of this error. The correct amount is \$98,000.

SUPPLEMENTAL ORDER

Complainant's motion of August 18, 1999 (response filed August 31, 1999; reply filed by Complainant on September 1, 1999) for consideration of additional evidence is hereby granted; the Regional Hearing Clerk is instructed to add the Declaration of Ian A. Gillis of July 23, 1999, to the record in this matter.

Respondent's motion of October 28, 1998, for leave to amend its answer to the complaint is hereby granted.

The monetary civil penalty set forth in the Decision and Order of October 8, 1999, at 8, and in the Order and Compliance Order therein at 9, shall be, and is, as corrected, \$98,000.

J. F. Greene
Administrative Law Judge

Washington, D. C.
October 18, 1999

1. Complaint at 3, ¶¶ 11-12.
2. Complaint at 3-4, ¶¶ 13-15.
3. Complaint at 4, ¶¶ 17-19.
4. Complaint at 5, ¶¶ 21-24.
5. Complaint at 6, ¶¶ 28-30.
6. Id. ¶¶ 34-36.
7. Complaint at 7, ¶¶ 37-39.
8. Complaint at 6, ¶¶ 31-33.
9. Complaint at 7, ¶¶ 40-43.
10. Complaint at 8, ¶¶ 44-47.
11. Complaint at 8-9, ¶¶ 48-50.
12. Complaint at 9, ¶¶ 51-54.
13. Complaint at 9-10, ¶¶ 52-57.
14. Complaint at 10, ¶¶ 58-60.
15. Complaint at 10-11, at ¶¶ 62-65.
16. Complaint at 11, ¶¶ 66-68.
17. Complaint at 11, ¶¶ 69-71.
18. See Respondent's *Motion to Dismiss for Lack of Mandatory Prior Notice as Required by 40 C.F.R. § 22.37(a)-(e)*, and Memorandum in Support, February 2, 1999, wherein Respondent asserted that failure to give notice violated its constitutional rights. It is noted that Ohio authorities issued notices of violation to the City on several occasions in 1991-1992. (See Complainant's December 21, 1998, motion at 4, which refers to Complainant's exhibits 11, 13, 18, and 20.
19. *Report for Locating the Source of TCE in Athens City Wells*, 1989-1990.
20. 28 U.S.C. § 1746.
21. Declaration of Ian A. Gillis, at 2.
22. Ibid.
23. Complainant's Motion for Consideration of Additional Evidence, *Declaration*, at 2-3.



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