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11/7/83

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Frederick Tinkham,	)	Docket Nos. RCRA-83-1018,
Tinkham Investments and	)	83-1019 and 83-1020
Judy Tinkham,	)	
	)	
Respondents	)	

Decision and Order on Motion to Dismiss or For Partial Summary Judgment

These proceedings, which have been consolidated pursuant to Respondents' motions, were commenced by the Regional Administrator's issuance on July 12, 1983, of complaints and compliance orders, identical save for the amount of the proposed penalty, against Frederick Tinkham, Tinkham Investments and Judy Tinkham. The complaints recited that they were filed pursuant to § 3008 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6928, and § 104 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9604. Respondents were charged with violations of § 3007 of RCRA, 42 U.S.C. 6927, and of § 104(e) of CERCLA, 42 U.S.C. 9604(e). A penalty of $8,000 was proposed to be assessed against Frederick Tinkham, $8,100 against Tinkham Investments and $8,100 against Judy Tinkham.

Findings in support of the complaints are to the effect that Frederick and Judy Tinkham are residents of the State of New Hampshire, that Tinkham Investments is a partnership organized under the laws of New Hampshire,

that each of the Respondents own property upon which hazardous wastes and substances, as those terms are defined in RCRA, 42 U.S.C. 6903(5) and CERCLA, 42 U.S.C. 9601(14), have been disposed or handled, and that, as a consequence, each of the Respondents handles or has handled hazardous wastes and hazardous substances and is considered a disposer of hazardous wastes and hazardous substances. It was further alleged that, by letter, dated April 1, 1983, the Regional Administrator, pursuant to § 3007 of RCRA and § 104(e) of CERCLA, requested Respondents to furnish certain information regarding past field investigation studies and disposal practices on lots in Londonderry, New Hampshire owned by them, that a response to said letter was due on or before April 18, 1983, and that on April 18, 1983, Respondents, through counsel, replied, contending that EPA lacked the authority under either 42 U.S.C. 6927 or 42 U.S.C. 9604 to require production of the requested information.

On April 25, 1983, EPA, Region I, issued a letter explaining its position that it was authorized to require production of the requested information and asking for a prompt response. Counsel for Respondents replied on June 7, 1983, furnishing part of the information sought, addressing past disposal practices at the Londonderry site. EPA reiterated its position that it was authorized to require production of the information sought, asking for a complete response within seven days and warning that failure to do so would result in the initiation of enforcement action (letter to Respondents' counsel, dated June 20, 1983). It was alleged that Respondents' counsel received the letter on June 22, 1983, that a complete response was thus required on or before June 29, 1983, and that to date, such a response has not been received. Respondents' failure to provide the

information was asserted to be a violation of § 3007 of RCRA (42 U.S.C. 9604(e). In accompanying compliance orders, Respondents were ordered to furnish the information sought within five days of receipt of the complaints.

Respondents answered, denying that they handle or have handled hazardous wastes or hazardous substances, denying that EPA's letter of April 1, 1983, constituted or purported to be an "order" within the meaning of § 3008 of RCRA, 42 U.S.C. § 6928 and alleging that to the extent the letter sought information acquired by counsel in connection with then-pending litigation, the request was beyond EPA's authority under § 3007 of RCRA or § 104(e) of CERCLA. The answers also alleged that on December 29, 1982, Respondents, by counsel, had agreed to permit EPA's Field Investigation Team (FIT) contractor to enter the premises and that at the time the letter of April 1, 1983, was issued the FIT contractor had already commenced a site investigation of the subject premises and EPA either possessed or knew it would possess the factual information requested. Counsel for EPA was assertedly aware that counsel for Respondents had charged in a letter, dated March 28, 1983, that EPA was withholding information it had agreed to provide. Respondents denied the allegation that they had refused to provide the information sought by EPA, stating that on April 15, 1983, counsel had written EPA, requesting certain information EPA was believed to have agreed to provide.

Counsel for EPA apparently provided Respondents certain information, by letter, dated May 3, 1983, admitting having made an agreement with counsel for Respondents to do so, but denying the scope of the agreement. Respondents denied EPA's characterization of the June 7 letter, asserting

that the letter expresses Respondents' continuing belief that EPA has not been forthcoming with information it had agreed to supply and offering to share information in Respondents' possession with EPA, if EPA counsel agreed to abide by his agreement. Respondents state the belief that they have complied or substantially complied with the request in the letter of April 1, referring to well logs, water level measurement data and well location data allegedly furnished on July 6, 1983 and to other data within the scope of the April 1 letter, provided under date of July 13, 1983.1/ As affirmative defenses, it was alleged, inter alia, that EPA does

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1/ Information requested by the letter included the following:

1. Boring/Monitoring well logs and monitoring well installation data.

2. Location map of borings and monitoring wells, and survey information.

3. Water levels from monitoring wells, and depth to top of bedrock.

4. Results of water and soil analyses.

5. Any maps, charts, memos, letters, reports based upon the above identified data.

* * *

1) Between December 31, 1968 and December 31, 1982, did you dispose of or arrange for the disposal of any hazardous wastes or substances in the areas highlighted in yellow on the attached map? (Assessor's map #7)

2) If the answer to the above inquiry is in the affirmative, identify the location of the disposal site(s) at which your hazardous wastes or substances were disposed, and the date of disposal. Also provide copies of all documents in your possession, custody, or control which concern, refer, or relate to the shipment of such wastes or substances.

The extent of the information actually supplied by Respondents is not clear.

not have civil penalty authority under CERCLA and has no legal authority under either RCRA or CERCLA to compel Respondent to provide the information asked for in the letter of April 1, 1983.

Under date of September 20, 1983, Respondents filed a motion to dismiss or for partial summary judgment as to liability for the proposed penalty assessments contending (1) that EPA has no jurisdiction over the Tinkham site under RCRA and thus the orders and penalty assessment purportedly issued under § 3008 of RCRA are ultra vires and (2) that even if EPA has jurisdiction under RCRA, the findings set forth in the complaints and orders do not establish a violation on which penalty assessments under § 3008(c) can be based. In support of the motion, Respondents have submitted an affidavit of July Tinkham, which is to the effect that neither Fred S. Tinkham, Tinkham Investments nor Judy Tinkham has ever disposed of or handled, hazardous wastes at the so-called "Tinkham Garage Site," nor has any of the mentioned parties ever controlled, directed, dealt with, acted upon, or performed any functions with regard to any such wastes, and further that none of the mentioned parties has ever managed or operated the property for the purpose of storage, treatment, handling or disposal of hazardous wastes. Respondents therefore assert that the site is inactive and, as such, not covered by RCRA. Respondents point out that CERCLA confers no administrative penalty authority and argue that § 3007 does not authorize Complainant to compel Respondents to furnish the site-related information sought.

Opposing the motion, Complainant says that the RCRA provision it seeks to enforce is § 7003, the "imminent hazard" provision, that § 7003 can be applied to inactive sites, that as owners of the Tinkham Site,[2/]

2/ The parties agree that the site has been placed on the "National Priorities List," 47 F.R. 58476, and is thus eligible for superfund expenditures under §§ 104 and 105 of CERCLA. The site is in Response Category D, action to be determined (47 F.R. 58483).

Respondents are persons who dispose of, handle and have handled hazardous wastes within the meaning of § 3007 and that the information requested by EPA is within the scope of § 3007. Complainant explains that the purpose of the request was to determine whether the site may present an imminent and substantial endangerment (opposition at 3). Replying to these arguments, Respondents emphasize, inter alia, that Complainant did not purport to bring this action under § 7003 and that Complainant's attempt to construe the definitional provisions of RCRA as encompassing passive as well as active conduct is neither logical nor in accord with the Agency's official position at the time the initial hazardous waste regulations were issued.

Complainant states that because it does not have sufficient factual information to make such a determination, it neither agrees nor disagrees that the "Tinkham Site" is inactive (opposition at 1, footnote 1). For the purposes of this motion, Complainant says, however, that it assumes the site is inactive and defines inactive, as used in the opposition, as a "site not subject to EPA's regulatory program for hazardous waste and where no present generation, storage, treatment, transportation, disposal or handling of hazardous wastes is occurring by way of active and intentional human conduct." For the purpose of this opinion, this definition is accepted.

Discussion

Respondents contend that RCRA is regulatory in nature, establishing a permit program, standards and penalties applicable to generators, transporters and disposers of hazardous waste. They further contend that the overall scheme looks forward, not backward and that RCRA simply does not address

abandoned or inactive sites containing hazardous waste (memorandum in support of motion at 4). Acknowledging that there is authority to the contrary, Respondents rely upon United States v. Waste Industries, 556 F. Supp. 1301 (E.D.N.C., 1982) for the proposition that the statute requires someone's active conduct.

The cited decision was rendered in an action under § 7003 of RCRA3/ for injunctive relief to correct a problem allegedly caused by the leaching of toxic wastes from a landfill. The court pointed out that § 7003, the imminent hazard provision, highlighted five activities for which EPA may seek injunctive relief: handling, storage, treatment, transportation and disposal and that the instant action was based upon the contention an imminent danger was presented by "disposal" occurring at the landfill. Applying familiar canons of statutory construction, ejusdem generis (general words in a statute embrace only objects similar to those embraced by specific words) and noscitur a sociis (meaning of doubtful words in a statute should be determined by reference to their association with other words in the same grouping), the court concluded that "disposal" suggested or entailed active conduct and refused to read "leaking" in the statutory

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3/ Section 7003, 42 U.S.C. 6973, provides in part:

> "(a) Authority of Administrator--Notwithstanding any other provision of this Act, upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person contributing to such handling, storage, treatment, transportation, or disposal to stop such handling, storage, treatment, transportation, or disposal or to take such other action as may be necessary. The Administrator shall provide notice to the affected State of any such suit. The Administrator may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment."

definition of disposal[4/] as encompassing inactive or passive conduct. The court emphasized that this conclusion was in accord with the language of 7003 that a court may "restrain any person contributing to" the disposal of hazardous waste and maintained internal consistency as to the use of the present tense between § 7003 and the balance of RCRA. Additional language of § 7003 "or to take such other action as may be necessary," which has been relied upon by some courts as a basis for applying § 7003 to inactive sites, was considered not to cloak courts with power unrelated to the scope of RCRA, but simply to give courts some discretion in fashioning relief similar to restraining parties from continuing harmful activities. The court determined this conclusion was supported by the location of § 7003 in the miscellaneous provisions of RCRA, which would hardly be the case if 7003 was intended to be substantive, and by EPA's failure to promulgate regulations governing inactive sites.[5/] The court concluded that a likely reason for § 7003 was to provide a means of relief from unsafe practices regarding hazardous waste during the period between the passage of RCRA and the effective date of implementing regulations.

4/ Section 1004(3), 42 U.S.C. 6903, defines disposal as:

> "(3) The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constitutent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters."

5/ 40 C.F.R 262-67 (1982). Although EPA stated that RCRA is written in the present tense, and that its regulatory scheme is prospective, as reasons for the fact that the Subtitle C regulations did not address inactive sites, it also concluded that inactive and abandoned sites could be addressed under the imminent hazard provision of § 7003 (45 F.R. May 19, 1980, at 33170). No reasons for this conclusion were given.

The court noted that the legislative history of § 7003 of RCRA was brief, that although RCRA was amended in 1980 (P.L. 96-482, October 21, 1980), to change the operative language of § 7003 from "is presenting" to "may present" an imminent and substantial endangerment to health or the environment, the tense of "contributing to," defining persons subject to being restrained or other judicial control, was unchanged and that the passage of CERCLA constituted Congressional recognition that RCRA was not adequate to deal with problems created by inactive and abandoned hazardous waste sites. The government's action was dismissed.

Responding to these arguments and to United States v. Waste Industries, supra, Complainant says that RCRA § ~~7003~~ 3007, as amended by the 1980 amendments, authorizes EPA to require the furnishing of information concerning hazardous waste-related activities and studies for the purpose, inter alia, of enforcing "this title" (RCRA) from any "person who generates, stores, treated, transports, disposes of or has handled hazardous wastes" (emphasis supplied) (opposition at 3). Complainant emphasizes that the language "to take such other action as may be necessary" means that § 7003 must be read as applicable to any site where an imminent and substantial endangerment exists because of the handling, storage, treatment, transportation or disposal of hazardous waste. It is pointed out that the Act's definition of "disposal" includes "leaking," which is allegedly inevitably going to occur at inactive sites.

Conceding that RCRA is principally a regulatory statute aimed at modifying ongoing waste management practices, Complainant says that the imminent hazard provision upon which it relies for jurisdiction is clearly remedial and not regulatory. Complainant asserts that § 7003 is meant to manage pollution problems arising because of inadequacies in the regulatory program (opposition at 5). Support for this position is found in the

location of § 7003 in a subchapter apart from the regulatory provisions[6] and in the fact that § 7003 is, by its terms, to be applied "(n)otwithstanding any other provision of this Act." Complainant also relies on legislative history in connection with the 1980 amendments to RCRA[7] and the enactment of CERCLA.[8]

6/ As support for its argument that a regulatory statute can contain provisions which are clearly remedial in nature, Complainant refers to RCRA § 3013, added by § 17(a) of the 1980 amendments (P.L. 96-482, October 21, 1980). The cited section, entitled "Monitoring, Analysis and Testing," authorizes the Administrator to, inter alia, order an owner or prior owner of an active or inactive site to conduct monitoring, analysis, testing, and reporting where he determines that the presence or release of hazardous waste may present a substantial hazard to human health or the environment. Complainant did not purport to be acting under § 3013 in requesting information from Respondents. Respondents assert that Complainant did not make findings necessary to support a § 3013 order and point out that, because § 3013 contains its own enforcement provision [an action in federal district court], civil penalty authority under § 3008 is not available (reply at 4, footnote 2). Respondents' contention that findings are necessary in order to invoke § 3013 is clearly correct (House Conference Report 96-1444 at 41, 42, U.S. Code Cong. & Adm. News (1980) at 5041).

7/ Although not cited by Complainant, Senate Report No. 96-172, May 15, 1979, accompanying S. 1156 (Solid Waste Disposal Act amendments of 1980, P.L. 96-482, October 21, 1980), at 3 (U.S. Code and Administrative News, 96th Congress, Second Session at 5021) provides in part: "Section 9(a) expands the Administrator's authority to request information or examine the records of a person handling solid waste. At present, this authority applies only to actions under subtitle C dealing with hazardous wastes. The amendments would allow such access for the purposes of the entire Act."

"The amendments also clarifies that the Agency's access, entry, and inspection authority applies to persons or sites which have handled hazardous waste in the past but no longer do so."

"Finally, the amendment gives the Agency the option of requesting that persons handling such wastes either provide records or furnish information in the form of a summary."

Sec. 9(a) of S. 1156 became § 12 of the Solid Waste Disposal Act Amendments of 1980, P.L. 96-482 (Oct. 21, 1980). As enacted, the authority to request information under § 3007(a) is, of course, limited to hazardous waste.

8/ House Report No. 96-1016 (Part I), May 16, 1980, accompanying H.R. 7020 (CERCLA, P.L. 96-510, December 11, 1980) at 22 (U.S. Code and Administrative News, 96th Congress, Second Session at 6125) documents deficiencies in RCRA as follows:

Complainant says that its position is firmly buttressed by case law, including Solvents Recovery Service of New England, 496 F. Supp. 1127 (D. Conn. 1980); United States v. Price, 523 F. Supp. 1055 (D.N.J. 1981), affirmed 688 F.2d 204 (3rd Cir. 1982) and United States v. Reilly Tar and Chemical Corp., 546 F. Supp. 1100 (D. Minn. 1982). Complainant argues that the single case supporting Respondents' position, United States v. Waste Industries, supra, reaches the conclusion that § 7003 does not reach

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8/ Footnote continued

> "(c) Deficiencies in RCRA have left important regulatory gaps.
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> (1) The Act is prospective and applies to past sites only to the extent that they are posing an imminent hazard. Even there, the Act is of no help if a financially responsible owner of the site cannot be located.
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> (2) RCRA does not authorize EPA and the Department of Justice to subpoena documents or persons suspected of illegal or inadequate hazardous waste disposal practices.
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> (3) RCRA does not require people to reveal the existence and monitor possible pollution from inactive waste disposal sites.
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> * * *."

Id. at 5, 5023

> "Imminence in this section [§ 7003] applies to the nature of the threat rather than identification of the time when the endangerment initially arose. The section, therefore, may be used for events which took place at some time in the past but which continue to present a theat to the public health or the environment. Additionally, use of the imminent hazard provisions of this Act does not preclude further enforcement actions against the violators."

The quoted language appears to have originated in a report on Hazardous Waste Disposal by the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, 96th Congress, 1st Session (Committee Print 96-IFC 31) (Eckhardt Report) at 7, 32.

inactive sites by a tortuous construction, deserving of little precedental weight (opposition at 15, footnote 9).

Complainant states that Congress, in enacting CERCLA was not responding to RCRA's total failure to address inactive sites, but rather the ability to effectuate a clean-up only where a private, viable source of funds was available. It argues that multiple remedies are no novelty to the law and in effect, the fact that the government may have multiple remedies under CERCLA and RCRA is no reason for reading RCRA restrictively.

United States v. Solvents Recovery, supra, relied heavily on the existence of a federal common law of nuisance[9/] and was decided prior to City of Milwaukee v. Illinois, 451 U.S. 304 (1981) (Milwaukee II), wherein the Supreme Court ruled that the Clean Water Act occupied the field and displaced the federal common law of nuisance with regard to water pollution. United States v. Waste Industries, supra, and United States v. Price, supra, concluded that RCRA preempted the federal common law of nuisance regarding hazardous waste management and it is not at all clear that Solvents Recovery would have been decided the same way subsequent to Milwaukee II. In United States v. Price, supra, the court relied upon the fact that the definition of disposal in § 104(3) included "leaking," which ordinarily did not occur through affirmative action, and upon legislative history of the 1980 amendments to RCRA wherein it was indicated that "contributing to" in § 7003 was meant to be interpreted in a liberal, not a restrictive fashion and that someone who "generated" hazardous waste might be someone

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9/ "It would be inconsistent with that body of law [federal common law of nuisance] to limit the application of § 7003 to cases of continuing volitional acts of disposal." 496 F. Supp. at 1140.

"contributing" to an endangerment.10/ United States v. Price was affirmed by the Third Circuit, 688 F.2d 204 (3rd Cir. 1982). The court, relying on the "Eckhardt Report" (note 8, supra), concluded with little or no analysis: "There is no doubt, however, that it [§ 7003] authorizes the cleanup of a site, even a dormant one, if that action is necessary to abate a present threat to the public health or the environment." 688 F.2d at 214.

United States v. Reilly Tar and Chemical Corp., supra, relied primarily upon the district court's reasoning in United States v. Price, supra, in denying defendant's motion to dismiss the government's action, which was based in part on § 7003, for the reason defendant no longer owned the property in question.

Contrary to Complainant's contention that United States v. Waste Industries, supra, is deserving of little precedental weight, I find that its analysis of RCRA and of § 7003 was thorough and its reasoning persuasive.11/ If Congress intended § 7003 to cover inactive or abandoned hazardous waste sites, it seems anomalous indeed that the only evidence of that intention at the time RCRA was enacted in 1976 is the inclusion of the word "leaking" in the definition of disposal. The definition of disposal is for the purpose of the Act, not solely § 7003, and if the inclusion of the word "leaking" in that definition had the effect claimed, it could as well be argued that the § 3004 standards and the § 3005 permit requirements

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10/ United States v. Price, 523 F. Supp. at 1073, citing and quoting S. Rep. No. 172, 96th Cong., 2d Sess, at 5, U.S. Code and Adm. News (1980) at 5023. In United States v. Waste Industries, supra, the court remarked that by emphasizing the tense of the word "generated" in the cited report's example the court in Price had failed to see the forest for the trees and thus missed the thrust of the example. 556 F. Supp. at 1308. Because liability in the example is based upon negligence, i.e., failure to exercise due care, this criticism of Price appears valid. See United States v. Wade, 546 F. Supp. 785 (E.D. Pa., 1982).

11/ It does not appear that the government saw fit to appeal the decision in Waste Industries.

were also applicable to inactive sites. No such contention has been made or could be made in view of the position EPA adopted at the time the hazardous waste management regulations were promulgated (note 5, supra).

Nevertheless, in view of what appears to be clear Congressional intent in 1980 that § 7003 can be applied to inactive sites and the decision by the Third Circuit in United States v. Price, supra, it is concluded that the issue has been settled adversely to Respondents. Moreover, it should be emphasized that the 1980 amendments to RCRA expanded the scope of § 7003 from a provision empowering the Administrator to "bring suit" to one authorizing the Administrator to, inter alia, issue such orders as may be necessary to protect public health and the environment.12/ While presumably the Administrator's authorization to issue such orders is triggered by the same events or findings as authorize the bringing of a suit and Complainant candidly acknowledges that the information sought is for the purpose of determining whether an imminent endangerment exists, the operative language of § 7003 is "receipt of evidence that * * * any solid or hazardous waste may present an imminent and substantial endangerment to health or the environment." It will be recalled that the 1980 amendments to RCRA broadened the scope of § 3007 to authorize EPA to request information for the purpose of enforcing this title (RCRA), which seemingly includes § 7003, notwithstanding that section's separate enforcement provision. Pertinent here is the question of the evidence available to the Administrator, if any, that the Tinkham Site is or may be presenting a substantial endangerment. Irrespective of the answer to that question, the contention that § 7003 doesn't reach inactive sites is rejected.

12/ Although Complainant appears to be of the opinion that "to take such other action as may be necessary" in the first sentence of § 7003 is an authorization to EPA, the authority granted to the Administrator by that sentence is to "bring suit" and the quoted language is actually an additional authorization to a district court. See United States v. Price, supra, 523 F. Supp. at 1071 (footnote 4).

Turning to the second prong of the motion, Respondents contend that the findings in the complaint do not establish a violation of § 3007 of RCRA (Attachment A) and that the Regional Administrator has no authority to assess a penalty against Respondents under § 3008(c) (memorandum at 10). It is pointed out that the only provision of RCRA relied upon by Complainant is § 3007 (42 U.S.C. § 6927), which by its terms places obligations on "* * * any person who generates, stores, treats, transports, disposes of, or otherwise handles or has handled hazardous wastes * * *." Respondents allege that they are not such persons, being merely passive owners of property upon which EPA believes hazardous wastes have been disposed or handled. Respondents point out that Paragraph 2 of the complaints alleges that [the Tinkhams] own property upon which hazardous wastes ahd hazardous substances have been stored or handled and Paragraph 3 alleges that as a result, Respondents handle or have handled hazardous wastes and hazardous substances and are considered "disposers" of hazardous wastes and substances.

Respondent further point out that RCRA does not define the term "disposer" but § 104(3) (note 4, supra) does define "disposal" in terms of affirmative acts. It is asserted that EPA's regulations have not defined "disposer" to include a passive owner of an inactive site and that although "handle" is not defined in the statute or RCRA regulations, Black's Law Dictionary (4th Ed.) defines handle in terms of affirmative action:

> "To control, direct, to deal with, to act upon, to perform some function with regard to, to have passed through one's hands, to buy and sell, or to deal or trade in. To manage or operate."13/

13/ The definition from Webster's New Universal Unabridged Dictionary, 2d Ed. (1983), cited by Complainant is similar. See also Webster's Third New International Dictionary (1967).

citing the affidavit of Judy Tinkham, Respondents assert that none of these terms apply to them. Relying on United States v. Waste Industries, supra, and New Jersey Dept. of Environmental Protection v. Exxon, 151 N.J. Super. 464, 376 A.2d 1339 (1977),14/ Respondents contend it is well established that RCRA does not impose liability merely as a result of ownership of a site.

Concerning the affidavit of Judy Tinkham to the effect that neither she nor the other Respondents have disposed of hazardous wastes at the site, Complainant says that the affiant is drawing a conclusion of law, which must be disregarded (opposition at 13). To the extent that "leaking" equals disposal,15/ this contention is considered to be correct. Complainant emphasizes the word "control" in the definition of "handle," arguing that Respondents, as owners of property which contains hazardous wastes, control the wastes as a natural incident of ownership of the land (opposition at 17). This is clearly tenuous, because the definition of handle, read as a whole, contemplates active conduct. Complainant also argues that control is the issue and where a landowner could mitigate the disposal of wastes by affirmative action on land he controls, it must certainly be said that he contributes to the disposal, and thus becomes a disposer, by failing to act (Id. at 15). Complainant asserts that this

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14/ The cited case was not decided under RCRA, but involved New Jersey environmental protection statutes.

15/ Complainant's assertion that courts faced with the question have been virtually unanimous in concluding "leaking" equals disposal is hyperbole. For example, in United Stated v. Solents Recovery, supra, the court expressly declined to decide the semantical question of whether "leaking" equals disposal and relied instead upon the view the statute did not distinguish between present harm caused by past disposal practices and present harm caused by ongoing disposal practices, 496 F. Supp. at 1139-40.

contention is supported by the law of nuisance whereby a landowner can be held liable for failing to abate a nuisance irrespective of whether he created it. While in United States v. Price, supra, the current owners, who had no part in the placing wastes on the property, were among those held responsible, this was on the theory a current act of disposal, i.e., leaking, was occurring. Moreover, as Respondents point out (reply at 6), this is not a nuisance case, but an attempt to apply a statute, which defines its scope, to Respondents.

As as independent ground for the motion, Respondents argue that § 3007 limits EPA's authority to demand information "relating to such [hazardous] wastes" as are disposed, generated, stored, treated, or handled by such person and that such terms do not encompass information about the site itself (memorandum at 13-15). This is assertedly because separate provisions of § 3007(a) authorize EPA to enter the premises and acquire such information, and to directly contact any person and to inspect and obtain samples of hazardous wstes. It is argued that the statute only compels covered persons to submit information about "wastes" which EPA, in the exercise of its inspection authorities, could not itself obtain. Respondents assert that the site-related data upon which the penalty assessment is based simply falls outside of the scope of information EPA is authorized to demand under § 3007.

Acknowledging that § 3007 is two tiered, the first part creating the duty to furnish information relating to hazardous wastes and giving authorized officials access to waste-related records and the second part giving authorized officials the right to enter, inspect, and obtain samples at waste sites, Complainant asserts that there is nothing in the language of the statute supporting Respondents' contention that the duty to furnish

information is in any manner contingent upon the inablity of the Agency to require the information under its inspection power (opposition at 20, 21). Phrasing the issue in this manner, misses or obscures the principle thrust of Respondents' argument, which is that EPA is authorized to require the furnishing of "information relating to such [hazardous] wastes" and "to have access to and to copy all records relating to such wastes," but that inspection and obtaining of samples can only be obtained by "entry" of the premises or site. Respondents contend that boring and monitoring well data, water and soil analyses, etc. (note 1, supra) are not "waste-related data" EPA is given authority to compel them to furnish, but site-related data, EPA has independent authority to acquire. Respondents' argument is bolstered by the fact § 3013 (note 6, supra) specifically authorizes the Administrator to require monitoring, testing, analysis and reporting, from present or prior owners or operators, provided required findings are made. Respondents assert that Complainant, if entitled to the information, should have sought the information under § 3013, but that having failed to do so, it should not be permitted to warp the statute so as to give it unlimited power under § 3007 (reply at 5).

Respondents' arguments as to the scope of § 3007(a) have considerable merit. It is noted, however, the title of § 3007 "Inspections" and the introduction to § 3007(a) "Access Entry" strongly suggest that the authority to request information therein contained is intended to be incidental to inspections. Entry by a FIT contractor would seem to satisfy this requirement. In view thereof, and of the fact that the weight of authority is that § 7003 can be applied to inactive sites, that under § 7003 as amended,

the Administrator has the authority to issue such orders as may be necessary to protect public health and the environment, that the authority to require the furnishing of information under § 3007(a) may now be invoked for the purpose of enforcing the Act and that if it be assumed that hazardous wastes have spread or leached at or through the site, monitoring well data requested of Respondents could be regarded as "information relating to such wastes" within the meaning of § 3007(a), the motion will be denied.16/ Pertinent questions which, if not answered in the prehearing exchange presently scheduled for November 14, 1983, will be addressed in a supplemental exchange to be accomplished on or before November 20, 1983, are contained in Attachment B.

Conclusion

The motion to dismiss or for summary judgment is denied.

Dated this 9th day of November 1983.

Spencer T. Nissen
Administrative Law Judge

Attachments A & B

16/ It is, of course, clear that the authority to assess a civil penalty under § 3008 must be based upon a violation of Subtitle C, which includes § 3007. It is also clear that to the extent the requests for information are grounded upon CERCLA, the ALJ has no authority with respect thereto.

ATTACHMENT A

INSPECTIONS

Sec. 3007.(a) Access Entry--For purposes of developing or assisting in the development of any regulation or enforcing the provisions of this title any person who generates, stores, treats, transports, disposes of, or has handled hazardous wastes shall, upon request of any officer, employee, or representative of the Environmental Protection Agency, duly designated by the Administrator, or upon request of any duly designated officer, employee, or representative of a State having an authorized hazardous waste program, furnish information relating to such wastes and permit such person at all reasonable times to have access to, and to copy all records relating to such wastes. For the purposes of developing or assisting in the development of any regulation or enforcing the provisions of this title, such officers, employees, or representatives are authorized--

(1) to enter at reasonable times any establishment or other place where hazardous wastes are, or have been, generated, stored, treated, or disposed of, or transported from;

(2) to inspect and obtain samples from any person of any such wastes and samples of any containers or labeling for such wastes.

Each such inspection shall be commenced and completed with reasonable promptness. If the officer, employee, or representative obtains any samples, prior to leaving the premises, he shall give to the owner, operator, or agent in charge a receipt describing the sample obtained and if requested a portion of each such sample equal in volume or weight to the portion retained. If any analysis is made of such samples, a copy of the results of such analysis shall be furnished promptly to the owner, operator, or agent in charge.

ATTACHMENT B

1. When did Respondents acquire the site?

2. If Respondents acquired the site prior to the time hazardous wastes were generated, disposed or placed thereon, what was Respondents' status as to the property? For example, were they lessors with knowledge the property was being used for such purposes?

3. If Respondents acquired the site after its use for hazardous waste disposal had ceased, did they acquire it with knowledge of the prior use?

4. What information does EPA have as to the presence or leaching of hazardous wastes at the site?

5. If Respondents have the monitoring data requested by EPA, when was this data acquired or accumulated?

6. What information within the scope of the April 1 letter have Respondents supplied EPA?

7. What were the precise terms of the agreement between counsel as to the sharing of information obtained by the FIT contractor?

8. What is the status of the CERCLA litigation in the First Circuit?

CERTIFICATE OF SERVICE

to certify that the original of this Decision and Order on
miss or For Partial Summary Judgment, dated November 7, 1983,
) the Regional Hearing Clerk, Reg. I, and a copy was mailed
y in the proceeding as follows:

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Helen F. Handon
Secretary

r 7, 1983