US EPA RECORDS CENTER REGION 5
466694

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA, Plaintiff v Chemical Recovery Systems and Obitts Chemical Defendants	No. _____

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

The United States of America (hereafter United States) submits this memorandum in support of its Motion for Preliminary Injunction, together with the exhibits and affidavits annexed hereto.

INTRODUCTION

The United States seeks immediate injunctive relief to remedy an imminent and substantial endangerment to public health and the environment. Thousands of gallons of flammable and toxic chemicals are improperly handled and stored at the Chemical Recovery Systems site at 142 Locust Street, Elyria, Ohio. Thousands of drums of flammable and volatile solvent sludge residues are stored at the site. Many of the drums are rusted, deteriorated and leaking. The operation includes distilling machinery which gives off heavy solvent fumes. Leakage and spills from the operation have contaminated soil and are causing a leachate which flows into the Black River. These hazardous conditions and practices constitute an imminent and substantial endangerment to public health and the environment under Section 7003 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6973.

The defendants are the owners and operators of the site, Chemical Recovery Systems, Inc., and the former owner-operators, Obitts Chemical Company, who still own some of the solvent and chemical wastes stored at the site. This motion for a preliminary injunction is directed only against Chemical Recovery System, the present operators of the site.

The Ohio State Fire Marshal's Office has issued orders against Chemical Recovery System on September 22, 1978, and April 10, 1979, requiring them to properly install their outside storage tanks and remove all combustibles and drums from the property (Exhibits). The City of Elyria Health Department issued an Abatement Notice to Chemical Recovery System on June 7, 1979, seeking the removal of illegal solid waste storage containers, rubbish and debris from the premises (Exhibit). No measures have been taken to enforce these orders; the conditions they sought to correct persist (See photographs in exhibit). The Ohio Environmental Protection Agency (OEPA) ordered, , that Chemical Recovery Systems place an oil boom across the Black River to contain the oily slick caused by liquid emissions from the Chemical Recovery Systems site. Although the boom was installed, it has not been kept in proper operation; one end has been completely detached from the river bank.

The preliminary injunction sought herein would prohibit the intake of spent solvents and the generation of new solvent sludge until the defendants can present a plan for safe and lawful disposition of materials now on the site, would require inventory and labeling, and would require the formulation and implementation of plans to store or dispose of the wastes safely and lawfully and to investigate and remedy soil and groundwater contamination. The remedial plans would be subject to the requirements and approval of the EPA.

STATEMENT

The Chemical Recovery System site is 2 1/2 blocks from downtown Elyria, and immediately contiguous to Harshaw Chemical Company. It is across the street from several apartment buildings and a close to at least one domestic well (Exhibit). Over 4,000 drums are stored out of doors, exposed to rain and direct sunlight. Most of the drums are rusted and leaking.

A. Fire Hazard

Aerial photographs of the Chemical Recovery System site (Exhibits) show the general demographics.

Governmental agencies have been to the Chemical Recovery Systems and have taken samples from the site. On April 23-24, 1980, a sampling and investigation team from the United States Environmental Protection Agency took air, liquid and soil samples at the site (See Exhibit). James Freeman, the president of Chemical Recovery Systems, has stated that the chemicals handled by this plant include methyl ethyl ketone, trichloroethylene, methylene chloride and toluene [Exhibit]. United States Environmental Protection Agency sample analyses confirmed the presence of all of these, and indicated in addition

(Exhibit).

These chemicals are flammable to highly flammable, as indicated by their flash point. The flash point is the temperature at which vapors rising above the liquid substance form an ignitable mixture with air. If a spark contacts vapors at temperatures above the flash point, a fire could occur. The flash point for toluene for instance, is 40° Fahrenheit. The flash point for methyl ethyl ketone is 24° Fahrenheit.

Many of these chemicals are also explosive. Methyl ethyl ketone, for instance, presents a danger of explosion in 2-10% mixture with air.

In addition, this site is located near residences and a downtown area, and is accessible to the public, since it is only partially fenced in. The Ohio Fire Marshal's Office, as a result of all these conditions, has characterized this site as posing one of the worst fire hazards in the state (Exhibit).

B. Health Effects

In addition to the fire hazard created by Chemical Recovery System, its operations release into the air, water, and soil many chemicals which can cause serious health effects. The chemicals found on the site and their health effects are described in the complaint, paragraph . The effects of the chemicals are summarized below:

- Fatigue, nervous system disorder (toluene, xylene)
- Eye irritation (methylene chloride)
- Cardiac failure (trichloroethylene)
- Impairment of coordination and reflex time (toluene, xylene)

The distilling machinery at the site emits large (250 ppm) quantites of hydrocarbon vapors including toluene, xylene, methyl ethyl ketone and the other solvents Chemical Recovery System processes. The Brighton distiller is in a state of disintegration; the soil around it is contaminated by spilled solvent, and James Freeman, the president of Chemical Recovery System, states that it is now shut down, because it cannot be operated except at high expense.

The site smells strongly of solvents (Exhibit), and anyone on the site for any length of time (possibly including, since the site is not completely fenced or secured, members of the general public) will be exposed to all of these vapors and the concomitant health hazards indicated.

The storage of the solvent drums is also a hazard to health and safety in that they are stacked unstably, and could topple over, possibly causing injury, as the result of a slight jostling or even a moderate wind.

The chemicals which have spilled or leaked onto the ground are susceptible to being washed into the Black River or the local sewers. The lack of adequate diking around drums and storage tanks also increases the likelihood of storm runoff of chemicals into sewers or the river.

Moreover, the accretion of debris and the large number of open containers in which water can collect, make this site a breeding ground for mosquitos, as well as rats and other vermin. These are the conditions which led to the Order issued by the Elyria City Health Department on June 7, 1979, to remove all drums and debris and fence the area to secure it from public access. (Exhibit).

C. Environmental Effects

In March of 1979, Chemical Recovery System emitted an oily spill into the Black River. Upon sampling, the spilled material, estimated at about 200 gallons, was found to contain xylene, toluene and methyl ethyl ketone. Analysis showed a flashpoint of less than 34° Fahrenheit. In addition, there has been constant contamination of ground and river by leakage from drums and machinery, and leaching of chemicals. (Exhibit). The Black River bears a virtually constant oily slick in the area of the Chemical Recovery Systems site.

Among the chemicals found in the soil around the drums and machinery at the Chemical Recovery System site, in addition to the above-listed solvents, were polychlorinated biphenyls (PCB), in proportions of 500-600 parts per million. (Exhibit)

PCB's are specifically regulated by Section 6(e) of the Toxic Substances Control Act, (TSCA), 15 U.S.C. 2605 (e), which forbids the use (except in a totally enclosed manner), the sale or the disposal (except as authorized by the TSCA regulations or 40 CFR 761.10 et seq.), of any item or substance containing more than 50 ppm PCB's.

Liquid wastes leaching through the soil are likely to enter groundwater as well as the Black River. We do not have full information as to the hydrogeological conformation of the site and its vicinity, but there is at least one domestic well nearby.

These toxic chemicals can cause the death of aquatic life in the river, and may threaten drinking water supplies as a result of contaminated groundwater. Therefore, the actual and potential runoff and leaching threatens imminent and substantial endangerment to the environment.

Argument

The Court should enter a preliminary injunction against the defendant Chemical Recovery System.

The issuance of a Preliminary Injunction in this case is governed by the provisions of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901, 6973, 6901, 6973, by the Rule 65 of the Federal Rules of Civil Procedure, and by common law principles regarding the issuance of injunctions as modified by the statutory scheme. The applicable statutory provision and common law equitable principles are noted below.

Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. §6973, authorizes injunctive relief and such other relief as may be necessary when, among others, the hauling, storage, treatment or disposal of any solid or hazardous waste presents an imminent and substantial endangerment to the health or the environment. The section provides:

> Notwithstanding any other provisions of this Act, upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste is presenting 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 the alleged 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 four common law criteria to be considered in determining whether a preliminary injunction should issue are (1) substantial likelihood that the applicant will prevail on the merits, (2) substantial threat of irreparable injury unless the injunction is granted, (3) balancing of injuries to the parties (threatened injury to applicant outweighs the threatened damage the injunction may do to the defendant) requires preliminary injunctive relief and (4) the public interest would be served by such relief. See, SEC v. Senex Corp., 534 F. 2d 1240, 1241 (6th Cir. 1976); see also Plain Dealer Pub. Co. v. Cleveland Typo Union, 520 F. 2d 1220, 1223 (6th Cir. 1975) cert. den. 428 U.S. 909.

In the argument that follows, it will be shown that a preliminary injunction should be entered because there is a substantial likelihood that the government will prevail on the merits of its claim under the Resource Conservation and Recovery Act, the requisite showing of harm is present, and consideration of the interests at stake warrants the issuance of injunction.

1. There is a Substantial Likelihood that the Government will Prevail on the Merits.

The first of the elements of a claim under Section 7003 of the Resource Conservation and Recovery Act, which is set forth above, is the activity of handling, treatment, storage, transportation or disposal. This case involves handling, as well as storage, treatment and disposal, which are defined in the Act as follows (Section 1004, 42 U.S.C. §6903):

> (33) The term "storage", when used in connection with hazardous waste, means the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste.
>
> (3) The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

(34) The term "treatment", when used in connection with hazardous waste, means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume ....

The Chemical Recovery System site has thousands of drums of solvent sludge stacked up. James Freeman, the president of Chemical Recovery System, has stated that the drums are being kept at the site because Chemical Recovery System has been unable to find any disposal service or site which will accept them (Exhibit). Thus, the materials are being "stored" pending disposal. The dilapidated condition of the drums and still operations also results in "disposal" by leaking. The distilling operation for reclamation of spent solvents constitutes "treatment", and the whole procedure of receiving and reclaiming spent solvents and generating sludge constitutes "handling." Thus the statutory element has been met.

The second element under Section 7003 of the Act is that the substances must be solid or hazardous wastes. Both of these terms are defined in the Act. (Section 1004, 42 U.S.C. §6903):

(27) The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commerical, mining, and agricultural operations and from community activities, but does not include solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under Section 402 of the Federal Water Pollution Control Act, as amended (36 Stat. 880), or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat, 923).

(5) The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physcial, 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.

At the Chemical Recovery Systems site, both the substances in the drums and the spent solvents brought in and processed are "liquid .... material resulting from ... industrial operations." The wastes in and of themselves when improperly handled create a potential hazard to health from fire and fumes. When improperly handled and released to the environment in an uncontrolled manner, they present a hazard to ground water and aquatic life. Thus, this second element is present.

The third element which must be established under Section 7003 of the Act is an imminent and substantial endangerment to the health or environment. This element of harm, which is presented here by the risk or injury from fumes, fire and the potential of water pollution, will be set forth below in the argument showing that the common law standard of irreparable injury for injunctive relief has been relaxed to require only imminent and substantial endangerment.

Once these three statutory elements are established, the Act makes clear that actions may be brought not only to restrain the hazardous activities but also "to take such other action as may be necessary." The general equitable powers of the court to fashion appropriate relief also remain available. In this case, the Government seeks short term relief in the form of halting activities at the site, which will reduce the probability of personal injury and accidental fire, and the long term relief of site clean-up. In particular, the plaintiff seeks a preliminary injunction to restrain the shipment of wastes to the site and disposal and treatment of wastes at the site. It would also require the defendants to place the wastes into proper containers and to formulate a plan acceptable to the U.S. Environmental Protection Agency for the restoration of the site including proper transportation and disposal of waste chemicals and contaminated soil and, following plan approval, to implement the plan expeditiously. In addition, it would require defendants to set up and implement a record-keeping system to 'track' wastes through their operation. These remedies are reasonably related to the problem and should be ordered.

2. The site Presents an imminent and substantial endangerment to the health and environment which warrants injunctive relief.

When, as in the instance of the Resource Conservation and Recovery Act, a public law provides for injunctive relief, such relief may be granted to the United States upon a showing that the activity or conditions do not comply with the statutory standard. In sharp contrast to private litigation, it is not necessary to demonstrate irreparable injury. United States v. San Francisco, 310 U.S. 16, 30-31 (1940); Federal Trade Commission v. Rhodes Pharmacal Co., 191 F. 2d 744, 746-747 (7th Cir. 1951). The provision for relief in the statute is itself a legislative conclusion that noncompliance is to be corrected. Id., United States v. Nutrition Service, Inc. 227 F. Supp. 375, 388-380 (W.D. Penn. 1964) aff'd 347 F. 2d 233 (3rd Cir. 1965). As stated by the Seventh Circuit in Walling v. Panther Creek Mines, 148 F. 2d 604, 605 (7th Cir. 1945).

> The question boils down to whether the practices are illegal, for if they are, since the standard of the public interest, not the requirements of private litigation, measures the need for injunctive relief, an injunction should be issued.

Therefore, in order to obtain an injunction in this cause under Section 7003 of the Act, the United States need only show that the activities or conditions in question present an "imminent and substantial endangerment to health or the environment."

The key to a proper interpretation of the "imminent and substantial endangeremnt" provision in this Act is the word "endangerment." Although not defined in the Resource Conservation and Recovery Act, judicial interpretation of "endangerment" in the context of other environmental laws has established that it means a threatened harm or potential harm and that it does not require an actual harm.

In Ethyl Corp. v. Environmental Protection Agency 541 F.2d 1 (D.C. Cir.) cert. den., 426 U.S. 941 (1976), the court construed a provision in the Clean Air Act which authorized the Administrator of the U.S. Environmental Protection Agency to regulate gasoline additives whose emission products "will endanger the public health or welfare...." (42 U.S.C. §1857f-6) (1970), as

amended and recodified, 42 U.S.C. S7545 (1977). In upholding the Administrator's interpretation of the "will endanger" standard and the regulations promulgated consistent with interpretation, the court construed "endanger" to require only evidence of potential harm. The court stated at page 13:

> The meaning of "endanger" is not disputed. Case law and dictionary definition agree that endanger means something less than actual harm. When one is endangered, harm is threatened; no actual injury need ever occur. Thus, for example, a town may be 'endangered' by a threatening plague or hurricane and yet emerge from the danger completely unscratched.

The conditions and activities at the site clearly constitute an "imminent and substantial endangerment to health or the environment" proscribed by Section 7003 of the Resource Conservation and Recovery Act. In fact, the endangerment of risk of harm to health and the environment is not only imminent, it is actual as well. The endangerment to health posed by the fire hazard is clear given the large amount of flammable material on site, the location of the site adjacent to a chemical industrial facility and its storage tanks (Exhibit), and the leaching of chemicals, including high concentrations of highly toxic PCB's into the Black River. The fact that the site is accessible to the general public, which may include careless smokers who could drop smoking materials into a collection of flammable substances, and small children who might put contaminated items near their mouths, eyes, etc., makes the danger even more acute.

3. Consideration of the equities and interests at stake warrants the issuance of an injunction.

The hazardous conditions at the site are the result of the activities and business dealings of the defendants. If an injunction issues, the conditions will be rectified, defendants' potential private liabilities will be reduced and the public interest will be served. Such an injunction can require defendants to defray the costs of investigating the hazards on the site, and even to undertake some of the investigative work and expenses (such as the groundwater study) themselves. If, on the other hand, an injunction does not issue, the chemical time bombs will continue to tick, with potentially disastrous results.

The defendant cannot assert any legal rights or valid equities to the continued existence of the hazard or to their not cleaning it up. Consequently an injunction should issue.

Conclusion

For the foregoing reasons, this court should enter a temporary restraining order and a preliminary injunction.