UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| In the Matter of | ) | |
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| Ashland Chemical Company, Division of Ashland Oil, Inc., | ) | Docket No. RCRA-V-W-86-R-13 |
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| Respondent | ) | |

OPINION AND ORDER DENYING
MOTION TO REOPEN HEARING

In an initial decision, issued June 22, 1987, Ashland was found to have violated the Act and applicable regulations, 40 CFR Parts 262, 265, 270 and corresponding provisions of the Ohio Administrative Code as charged in the complaint. Ashland was assessed a penalty of $48,375 for the violations found.

The decision held that Ashland had failed to sustain its burden of demonstrating that materials in underground tanks at Losantiville, acknowledged to be hazardous wastes after having been determined to be contaminated with water in May 1984, were being stored for beneficial use or reuse, i.e., use as fuel, and, that accordingly, Ashland was not entitled to the exemption from RCRA regulation specified by 40 CFR § 261.6 (1984) for materials which are recycled or reclaimed. The decision further found that, although Complainant had not established its charge

that the tanks leaked prior to November 1984, discharges, and thus dispositions, of hazardous wastes occurred when the tanks were removed from the site in November 1984.

Ashland received the initial decision on June 26, 1987, and on July 16, 1987, filed a motion to reopen the hearing in accordance with 40 CFR § 22.28. Evidence to be introduced, if the hearing were reopened, consisted of oral testimony and documentation establishing that the materials stored in the underground tanks, which had been determined to be hazardous wastes, and removed from the site by SRR, were, in fact, beneficially reused as fuel and thus, excluded from regulation in accordance with 40 CFR § 261.6. Ashland also proposed to introduce testimony to the effect that material, which the initial decision found had been released to the environment at or about the time of an OEPA inspection on November 13, 1984, was, in fact, generalized area surface or subsurface drainage that had accumulated in the pits resulting from removal of the tanks and not discharges from the tanks. It was alleged that the issues addressed by the additional evidence were dispositive of the proceeding and that reopening the hearing to consider the additional evidence would promote a just and equitable resolution of this matter. Ashland further alleged that the evidence to be adduced was not cumulative and was not known by Respondent to be available or because the critical nature of the evidence became clear only in the light of the findings and conclusions of the

initial decision. Ashland argued that the requirements for granting a motion set forth in § 22.28 had been met and that its motion should be granted.

In further support of the motion, Ashland emphasizes the crucial nature of evidence concerning the question of whether the contents of the tanks had been beneficially reused as fuel (Respondent's Memorandum In Support Of Motion To Reopen Hearing at 5, 6). It asserts that inquiries of SRR have produced additional evidence in the form of oral testimony and written documentation, which was not previously available, and which will establish that the materials were beneficially reused as fuel, because of the high BTU value of the materials. Ashland argues that an issue critical to the outcome of the case should not be decided by default, i.e., the absence of evidence, if such evidence can possibly be obtained. Regarding the alleged releases of hazardous waste to the evironment on November 13, 1984, Ashland argues that the initial decision was based on the erroneous assumption that the material being released to the environment observed by OEPA's Mr. Hines on that date, had been removed from the tanks. In fact, Ashland asserts that the material was surface and subsurface drainage that had accumulated in the pits resulting from removal of the tanks and was part of the chemically-saturated environment resulting from 20 years of plant operations. Ashland contends that it should be permitted to introduce evidence to establish that fact.

Unsurprisingly, Complainant opposes the motion (Complainant's Memorandum In Opposition, dated August 10, 1987). Complainant points out that Ashland has not offered any reasons or facts why the evidence it now proposes to offer was not available previously and argues that, accordingly, Ashland cannot meet the requirement of § 22.28 that good cause be shown for failure to introduce the evidence at the hearing (Opposition at 2). Complainant contends that Ashland, having lost the first time around, is seeking a "second bite at the apple" and that to allow it a second hearing in the absence of compelling circumstances would undermine the system of adjudication for civil penalty matters.

Complainant notes that Ashland's contractors, Spade Pipeline, Inc. and SRR, removed the tanks and materials contained therein from the site almost two years prior to the hearing and that, if the evidence as to the ultimate disposition of the material was not previously available, Ashland has only itself to blame. Complainant makes a similar argument with regard to drainage conditions at the site, pointing out that these conditions existed for years and that Ashland could have developed evidence in this regard in the seven months between the filing of the complaint and the hearing (Opposition at 5, 6). Complainant reiterates its position that Ashland has failed to show good cause for failing to adduce the evidence now proposed

to be offered and asserts that the motion to reopen should be denied.

## D I S C U S S I O N

It is well settled that motions to reopen a hearing are not lightly to be granted and that the fundamental requirements of Rule 22.28, i.e., that the motion to reopen show that the evidence proposed to be introduced is not cumulative and demonstrate good cause for failure to produce the evidence at the hearing, will be strictly enforced.1/ It is evident that Ashland has not demonstrated good cause for failing to produce at the hearing the evidence now proposed to be offered. While the complexity of RCRA regulations makes the preparation for the trial of such a proceeding a formidable task, Ashland's statement (Motion at 2) that "the critical nature of the evidence became clear only in the light of the findings and conclusions contained in the Initial Decision" simply will not do. Ashland acknowledged that the materials in the tanks at Losantiville were hazardous wastes after the materials were determined to be contaminated with water and was bound to know that evidence as to the ultimate disposition of the materials was crucial to its contention the materials were not subject

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1/ See F & K Plating Company, Docket No. RCRA-VI-427-H (Opinion and Order Denying Motion To Reopen Hearing, June 13, 1986) and Ashland Chemical Company, Division of Ashland Oil, Inc., Docket Nos. RCRA-IX-86-10 and 83-40 (Opinion and Order Denying Motion To Reopen Record, January 10, 1985).

to RCRA regulation, because of the exemption for beneficial use in 40 CFR § 261.6. Moreover, the fact that Ashland's principal witness, Mr. Robert Sterrett, had not personally visited the SRR site (finding 16) makes it evident that he was relying on the BTU content of the materials (not all of the materials had a high BTU content) and possible secondary sources for his testimony that the materials were used as fuel in three cement plants in Ohio. Accordingly, normal pretrial preparation should have included inquiries to SRR, which, for all that appears, would have elicited the evidence now sought to be offered to prove the materials were, in fact, used as fuel.

Ashland fares no better with its motion concerning the sources of contamination at the site. Again Ashland knew, or should have known, that during his visit to the site on November 13, 1984, Mr. Hines observed discharges from the separator or coalescer and drew samples from the coalescer return line, from a pit resulting from removal of two tanks and from surface ponding (finding 12). Ashland should have realized that, even if Complainant failed to establish its contention contamination at the site resulted from leaks from the tanks, sources of the contamination would be crucial to its defense of the charge of violating 40 CFR § 265.31, failure to prevent releases of hazardous wastes to the environment. Again, for all that appears, normal pretrial preparation would have produced the evidence now proposed to be offered.

For the above reasons, Ashland has failed to demonstrate good cause for failing to produce at the hearing the evidence now proposed to be offered and its motion to reopen the hearing will be denied.

ORDER

Ashland's motion to reopen the hearing is denied.2/

Dated this 29th day of September 1987.

Spencer T. Nissen
Administrative Law Judge

2/ In accordance with § 22.28, service of this order will restart the running of the 20-day appeal period specified by § 22.30.