



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

ELECTRONIC MAIL
EMAIL DELIVERY RECEIPT REQUESTED

Mr. William S. "Buddy" Cox
Partner
Bradley Arant Boult Cummings LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, Alabama 35203

Re: RCRA 7003 Administrative Order, Docket No. RCRA-04-2022-2101
Response to TAV Respondents' January 21, 2022 Letter

Dear Mr. Cox:

Thank you for your January 21, 2022 letter documenting your clients' (the TAV Respondents¹) response to the U.S. Environmental Protection Agency's January 10, 2022 RCRA 7003 Order, Docket No. RCRA-04-2022-2101 (hereinafter, "7003 Order" or "Order"). Per your request, the EPA will add your January 21, 2022 submission to the Administrative Record for the Order, as well as this response to your submission. After adding these two documents, the Administrative Record for this Order will be closed, and no additional documents will be added.

As a threshold matter, the 7003 Order was issued on January 10, 2022 and became effective on January 18, 2022. Under the terms of the Order, Respondents' notice of intent to comply (whether in whole or in part) was due on January 21, 2022. Much of your January 21, 2022 submission either disputes the underlying facts upon which the Order was based, rejects the legal conclusions of the Order, or proposes alternative work and/or timeframes for the activities specified in the Order. That said, it appears that you intended for your January 21, 2022 submission to be documentation of your clients' intent to comply "in part" with the Order and therefore fulfills the requirement of Paragraph 77. Please be advised that at this time, the EPA is not amenable to modifying the existing Order or its requirements, nor is the Agency amenable to negotiating a new, alternate consent order. The January 10, 2022 Order is currently effective and enforceable against the named Respondents, including all deadlines for actions and deliverables, with the only exception being Paragraph 83, which the EPA has temporarily stayed.

The EPA does not see any merit in responding point by point to every statement made in your January 21, 2022 letter. We will, however, address some of the more significant items discussed in the letter.

¹ Per your letter, the "TAV Respondents" include TAV Holdings, Inc., TAV Hollow Tree Lane LLC, and Empire Development LLC.

Status of Auto Shredder Residue (ASR) Waste

As discussed during our weekly progress report meeting on January 25, 2022, and as documented in the allegations of the Order, it is the EPA's position, in consultation with the Georgia Environmental Protection Division (GAEPD), that the entirety of the ASR materials being received, stored, processed, disposed of, or otherwise managed at the TAV Empire Facility (hereinafter, "the Facility") are waste, whether they can be processed further to recover "valuable metals" or not. Your letter correctly notes that a material must first be a solid waste before it can be a hazardous waste. Here, we have both. Notwithstanding TAV's cursory attempt to cite and summarize RCRA's definition of "solid waste" to conclude that the ASR waste is somehow exempt from all regulation, the fact that the material is stored on the ground, not contained, allowed to run off the property, and accumulating at a rate much greater than TAV can process, further negates any argument that this material is not a waste. Although the EPA recognizes the benefit of "recycling," it cannot be at the expense of creating a de facto landfill that does not meet any of the regulatory requirements associated with this type of facility. Both the state and federal solid and hazardous waste regulatory schemes require the proper management of both solid and hazardous waste destined for recycling or reclamation. TAV has followed none of these regulations.

Aside from the regulatory status of these materials, be advised that RCRA's jurisdiction under Section 7003 extends to any *solid or hazardous waste*, as defined broadly in the statute (not the regulations) that may present an imminent and substantial endangerment to health or the environment. TAV's management of the ASR waste on site is creating such an endangerment.

Removal of 3311 and 3405 Empire Boulevard Properties from the Order

As mentioned during our January 25, 2022 call, the 3311 and 3405 Empire Boulevard parcels are properly included within the scope of the Order. Both the signage and fencing requirements apply to these properties. In addition, the EPA has reason to believe that ASR waste may have historically been stored on these properties, or may have migrated onto these properties, during TAV's operations. Further evaluation and assessment to determine the extent of contamination at these properties may be needed. As a result, the EPA denies TAV's request to limit the scope of the Order to exclude these properties.

Zero Discharge and Stormwater Issues

There is no question that water discharges are an issue at the TAV facility. However, it is disingenuous to assert that the failure of the City of Atlanta during the COVID-19 pandemic to maintain a storm sewer is the predominant cause of the releases at the Facility. As described by TAV, and as observed by the EPA and GAEPD on multiple site visits, the TAV process utilizes a significant amount of water. TAV appears to have no adequate means to manage not just stormwater run-on and run-off, but process water, and resultant wastes and sediment as well. Mismanagement has resulted in hazardous metal-contaminated materials running off site. Notwithstanding TAV's assertion that it has constructed and is attempting to operate a "zero discharge system," TAV has not submitted a work plan for EPA approval (or any design drawings after the fact as promised in your January 21, 2022 letter) for these activities. Pursuant to Paragraph 84, TAV is required to submit work plans as necessary to "prevent further releases of materials into the environment." In addition, further evaluation is required as to what regulatory requirements might apply to wastewater and/or stormwater management activities at the Facility.

Consultants/Contractors

We are reviewing the information provided on January 31, 2022 regarding the qualifications of Industrial Environmental Consultants, LLC. Please note that because this submission was a required deliverable under the Order, it should have been submitted to the Project Coordinators for the Facility (Brooke York and David Champagne), with a copy to Araceli Chavez, Chief of the RCRA Enforcement Section, per Paragraph 79 of the Order. Be advised that any contractor submitted for approval to the EPA must have the “technical expertise sufficient to adequately perform all aspects of the Work” (see Paragraph 80 of the Order). In this case, the EPA requires that the selected contractors show demonstrated expertise in solid and hazardous waste characterization and disposal, RCRA and/or CERCLA site investigation, assessment and large-scale cleanup, and stormwater and wastewater discharge compliance and permitting.

Employee Exposure

As you know, the EPA has referred employee health and safety matters to the Occupational Safety and Health Administration (OSHA). Please be sure to share your sampling results with OSHA as you work with that agency to resolve any worker health and safety issues.

Response to Specific Points

- To the extent TAV continues to manage ASR waste directly on the ground, whether in a settling basin, waste pile, or other land-based unit, it is continuing to create the possibility of further releases to the environment. Under the terms of Paragraphs 82 and 84 of the Order, TAV must prepare a work plan to address how it is going to manage its materials to prevent further releases.
- Because all the material at the Facility is waste in the first instance, and because the EPA has verified sampling data indicating that multiple samples failed the Toxicity Characteristic Leaching Procedure (TCLP) for lead, TAV is, at the very least, a generator of hazardous waste and must notify the GAEPD of such waste activities and obtain an EPA Identification Number. In addition, TAV is currently storing, treating, and/or disposing of such hazardous waste directly on the ground, which is a violation of state and federal RCRA requirements.
- Although the EPA appreciates that TAV plans to submit a work plan to identify further work to meet its “zero discharge goal,” this work plan alone is not sufficient to comply with Paragraph 84 of the Order. Paragraph 84 of the Order requires submission of work plans to address “Site stabilization, material management, business practices, and solid and hazardous waste disposal procedures.”
- As we discussed during our weekly progress report meeting on January 25, 2022, TAV’s proposal to submit a “Site access and Site restriction workplan” within forty-five (45) days of the Effective Date of the Order is not acceptable to the EPA and does not comply with the requirements of Paragraphs 87 and 88 of the Order. TAV is out of compliance with the Order and must submit a site security plan as soon as possible. Please note that the “imminent and substantial endangerment” signage required by Paragraph 88 is a statutory requirement of RCRA Section 7003(c) and must be included in any signage proposal submitted under the Order.
- TAV proposes to submit a work plan to “identify and characterize any drainage ditches or other areas downstream of the NPDES outfalls or downgradient of the Empire Boulevard Complex for the presence of in-process materials within 45 days of the effective date of this order.” As we

discussed during our January 25, 2022 weekly progress report meeting, the EPA has not triggered this work plan requirement. The work contained in the 7003 Order was phased such that actions needed to address the situation on-site would be taken first to prevent re-contamination of the drainage ditches, outfalls, and creek. The EPA appreciates that TAV acknowledges the significance of the contamination it has caused in these areas. The Order requires fencing and signage as preventative measures to reduce possible exposure in these areas and to protect human health while the actions under the Order are proceeding. Once TAV has addressed all possible sources of releases from the production and storage areas at the Facility, it can begin to assess the scope of the contamination remaining at the Facility, including in the drainage ditches and outfalls.

- TAV requests the opportunity to discuss Paragraph 89 with the EPA. This Paragraph requires the submission of “documentation regarding all inbound material, and the off-site shipment of any materials, products, or wastes from the Facility since its inception, including, but not limited to bills of lading, manifests, waste determinations, and waste analyses from such shipments.” TAV has asserted that it is not managing any wastes, but rather receiving and processing valuable materials and selling marketable metals both nationally and internationally. However, to date, TAV has not provided documentation to support any of these assertions. TAV also asserts that it has properly disposed of all waste materials off-site in accordance with RCRA. Based on information previously provided by TAV, no waste was shipped off-site from 2018 to 2021. The type of information requested by Paragraph 89 has been requested in writing two other times. This Order is the third request. To assess the extent of regulatory noncompliance and to ensure the Facility operates appropriately moving forward, the EPA is requesting this information. Blanket statements that everything is “product” and sold nationally and internationally are not sufficient to support TAV’s assertions that the material on site is product and not waste. Crucial to determining the regulatory status of this material going forward is an understanding of the amount of material coming in, the percentage of metals recovered, and the amount and type of wastes being generated.
- Paragraph 90 of the Order requires the submission of weekly progress reports beginning five (5) days after the Effective Date of the Order, or January 24, 2022. The EPA is amenable to TAV submitting these reports one day after the weekly conference calls, which are currently scheduled for Tuesday afternoons. Therefore, per TAV’s own proposed schedule, the first weekly report would have been due on January 26, 2022. The EPA has not received a weekly progress report as required by the Order.

Going Forward

The EPA reiterates that the stay granted for Paragraph 83 is temporary only and was intended to provide time for TAV to commence the process of applying for the appropriate regulatory approvals. TAV must demonstrate to the EPA that it is actively pursuing regulatory compliance for all aspects of its operations and that, to the extent it negotiates any potential compliance schedule(s) or other enforceable agreements with the appropriate regulatory authorities, any such schedule(s) or agreements should be shared with the EPA to document TAV’s best efforts to come into compliance. Regulatory compliance is essential to ensuring that this Facility is not presenting a potential endangerment to the community or contributing to further and ongoing releases into the environment.

The EPA will send a separate letter to all Respondents documenting this change, but be advised that the maximum statutory penalty for violations of this 7003 Order has increased as a result of the Agency's latest "Civil Monetary Penalty Inflation Adjustment Rule" (87 Fed. Reg. 1676, Jan. 12, 2022). As a result, the statutory maximum penalty per day for penalties assessed after January 12, 2022, has increased from \$15,352 to \$16,307 per day for violations under Section 7003(b).

We would also advise that the solution to TAV's problems at the Facility will not be resolved by simply relocating the equipment and operations to another location. There is vast noncompliance with regulatory requirements at the Empire Boulevard Facility, resulting in the threat of an imminent and substantial endangerment. The situation at the Empire Facility is exacerbated by the presence of the residential community, creek, park, and school. However, any operations involving similar wastes at any other facility, whether in the State of Georgia or in any other state, would require the same type of regulatory compliance and permitting evaluation that is required for this Facility.

If you have any questions regarding the requirements of the Order or request additional guidance in your clients' efforts to comply, please contact Colleen E. Michuda, Senior Attorney, at michuda.colleen@epa.gov, or at (404) 562-9685. Thank you for your cooperation.

Sincerely,

Carol L. Kemker
Director
Enforcement and Compliance Assurance Division

cc: Mr. Rizwan Ullah Khan, Rajpoot Property, Inc. (rkhan@nobledelivery.com)
Mr. Frank W. Virgin for Carolyn Empire LLC (fvirgin@taylorenghish.com)
Mr. Craig Pendergrast for Carolyn Empire LLC (cpendergrast@taylorenghish.com)
Mr. Dale Mullen for TAV Respondents (dmullen@wtplaw.com)
Mr. Chuck Mueller, GAEPD (chuck.mueller@dnr.ga.gov)
Dr. Ania Truszczynski, GAEPD (truszczynski.ania@dnr.ga.gov)
Ms. Faney Foster, GAEPD (faney.foster@dnr.ga.gov)
Mr. Jim McNamara, GAEPD (jim.mcnamara@dnr.ga.gov)
Mr. John Sayer, GAEPD (john.sayer@dnr.ga.gov)