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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
841 Chestnut Building
Philadelphia, Pennsylvania 19107

SUBJECT: United States v. General Battery Corp. (E.D. Pa. 85-1372) (Brown's Battery Breaking Superfund Site)--Explanation of Proposed De Minimis Settlement

DATE: AUG 3 0 1994

FROM: Marcia E. Mulkey
Regional Counsel

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Director Hazardous Waste Management Division

TO: Peter H. Kostmayer
Regional Administrator

This memorandum concerns a proposed de minimis settlement in this litigation involving eleven third- and fourth-party generator defendants associated with the Brown's Battery Breaking Site in Tilden Township, Berks County, Pennsylvania ("Site"), and documents the factors the Region used to determine that the settlement meets certain statutory requirements.

Section 122(g) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9622(g), authorizes EPA to enter into de minimis settlements with parties which arranged for disposal of wastes at a site when: (1) both the volume and toxicity of those wastes are minimal in comparison with that of other PRPs; (2) the settlement involves only a minor portion the response costs; and (3) the settlement is practicable and in the public interest.

Based on applicable EPA guidances, the Region has the discretion to set the de minimis cut-off at any percentage or volume the Region believes is reasonable provided the Region complies with the protocols set forth in the above-referenced de minimis guidances.[1] The De Minimis Guidance clarifies the criteria for such settlements as follows:

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[1] Those guidances include EPA's June 2, 1992, "Methodology for Early De Minimis Waste Contributor Settlements Under CERCLA Section 122(g)(1)(A)", and the December 20, 1989, "Methodologies for Implementation of CERCLA Section 122(g)(1)(A) De Minimis Waste Contributor Settlements" ("De Minimis Guidance").

1) The settlement involves only a minor portion of the site response costs;

2) The amount of hazardous substances contributed by each individual party is minimal (2.0% of total waste at the site);

3) The toxic or other hazardous effects of the substances contributed by the parties is minimal in comparison to the remaining parties; and

4) The settlement is practicable and in the public interest.

I. BACKGROUND

The Operational History of the Site and EPA's Past and Planned Remediation

The Brown's Battery Breaking Superfund Site ("Site" or "Brown's Battery") is located in Tilden Township, Berks County, Pennsylvania. The Site is currently owned by Terry Shaner, Sr., Susan Shaner, Terry Shaner, Jr., Richard Strausser, and the Reading, Blue Mountain and Northern Railroad.

The Site is a 14-acre rectangular property bordering the Schuylkill River in Berks County, Pennsylvania. From the early 1960s until 1971, Robert Brown ("Brown") ran a battery breaking operation at the Site for car and truck batteries. In the process, the tops of the batteries were chopped off by a hydraulic guillotine, the liquids and lead plates were processed for recycling, and the casings and solid components were washed, crushed, and disposed of on-site. The operation resulted in enormous amounts of lead being spilled and disposed of on the ground.

General Battery Corporation ("GBC") and its predecessor Price Battery Corporation were the largest contributors of used batteries sent to Brown's Battery, where the lead was recycled and sent back to GBC. In addition, a number of other parties, including the De Minimis Settlors, sold batteries outright to Brown without reclaiming the recovered lead.

In 1983 the Commonwealth of Pennsylvania Department of Health found lead contamination in the blood of children living in homes on the Site. EPA conducted a first removal action at the Site from the fall of 1983 to the summer of 1984. That removal action temporarily relocated the residents at the Site, cleaned the residents' homes, and excavated large quantities of contaminated soil and battery casings. EPA then placed and capped the excavated materials at the rear of the Site in a containment area. Since 1984 EPA placed the Site on the National Priorities List, conducted a second removal action in which EPA relocated a family from the Site, and conducted a remedial

investigation and feasibility study ("RI/FS") of the Site, which it completed in 1991.

Based on the results of the RI/FS, EPA decided to address the Site remedy in two operable units: Operable Unit One ("OU1") calls for relocation of the remaining Site residents and business, the construction of a fence around the Site, and the imposition of institutional controls to restrict Site use; and Operable Unit Two ("OU2") will clean up the Site soils and groundwater. Except for construction of the fence, EPA has completed OU1. OU2, which EPA believes is likely to be performed by other PRPs at the Site, selects an innovative approach as the preferred alternative for soil remediation, with a preferred contingent alternative should the innovative alternative prove infeasible. The preferred alternative is off-site thermal treatment of lead-contaminated soil at Exide Corporation, GBC's parent company.

However, if the innovative technology alternative for soil remediation proves infeasible, the ROD for OU2 selects as the contingent preferred alternative the more traditional method of on-site stabilization and solidification, with off-site disposal in a landfill.

The ROD for OU2 also selected installation of a vertical limestone barrier to remediate the shallow aquifer, as well as construction and operation of an on-site pump-and-treat system for the bedrock aquifer.

The Litigation

On March 12, 1985 the United States brought a civil cost recovery action, pursuant to Sections 104 and 107 of CERCLA, 42 U.S.C. §§ 9604 and 9607, against GBC and Terry Shaner, Sr. In the action the United States sought its past costs and all subsequent costs associated with the United States' response work at the Site. GBC subsequently filed an action for contribution in August of 1985 against eighteen third-party defendants, of whom Levene's Son, Inc. is a De Minimis Settlor.[2] In July of 1991, one of the third-party defendants, M. Glosser and Sons, Inc., filed a contribution action against eighteen fourth-party defendants, the following seven of whom are De Minimis Settlors:

1. H. Shakespeare & Sons, Inc.
2. Larami Metal Co., Inc.
3. Barney Millens Scrap & Iron Co., Inc. (t/a Charles Effron and Son)
4. Frantz Sigafoos
5. Walter Levin

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[2] GBC also sued Decker Brothers, whose successor, Decker Scrap Iron and Metal, Inc. is a De Minimis Settlor.

6. Midway Truck Service, Inc.
7. RSM Company

Only De Minimis Settlors Andrew Muller, Sr. and B. Millens Sons, Inc. have never been sued in the civil action.

In June of 1990, the court granted the United States' motion against GBC and Terry Shaner, Sr. for summary judgment for liability. In October of 1991, the court also granted GBC's summary judgment motion against four third-party defendants for liability, of whom Levene's Son, Inc. is a De Minimis Settlor.

II. DISCUSSION

As discussed earlier, EPA's proposed de minimis settlement meets all four criteria set forth in Section 122(g) of CERCLA.

1. The settlement involves only a minor portion of the site response costs.

The De Minimis Settlors would pay $554,304.44 (1.59%) of the $34,847,989.00 past and estimated future costs.

2. The amount of hazardous substances contributed by each individual party is minimal.

None of the De Minimis Settlors contributed more than a half of one percent of the total volume of batteries sent to the Site. In order to calculate a formula for a de minimis settlement, EPA gathered information about the volume of batteries sent by each Potentially Responsible Party ("PRP") to the Site through responses to CERCLA Section 104(e) information request letters and responses to discovery requests in the ongoing cost recovery litigation. During the information-gathering process, the PRPs identified the volume of batteries that they sent to the Site and provided supporting documentation. EPA also obtained invoices and receipts from the Brown's Battery Breaking Company and other sources that identified the parties and the volume of spent batteries those parties sold to Brown's Battery.

Despite EPA's efforts to collect as much information as possible, the documentation remained sketchy, given the passage of time and the destruction of Brown's Battery invoices by Hurricane Agnes. In addition, the person best able to explain the meaning of some of the documentation, Robert Brown, died in 1971. Accordingly, although Brown's Battery operated for ten years, only incomplete allocation information was available for a limited three- to five-year period.

Moreover, given the rather complicated nature of the dealings between GBC and Brown, EPA had some difficulty determining what transactions certain Brown's Battery--GBC receipts represented and, thus, how those transactions affected the volumetric estimate. Based upon interviews with former

Brown's Battery employees and comments from the PRPs, EPA revised the volumetric calculations with respect to the following documentation:

1. 1968 Schaeffer Coal Yard (a business owned by Brown) receipts referencing transactions between Brown's Battery and Price Battery Corporation ("Price"), GBC's predecessor: Confusion about the significance of these receipts arose over the fact that the receipt referenced Brown's Battery as the seller, rather than Brown's usual practice of listing the generator of the batteries as the seller. EPA did not include the battery volumes contained in these receipts because two former Brown's Battery employees contradicted each other on whether the receipt volumes represented batteries sent by GBC or Price to Brown's Battery or recovered lead sent from Brown's Battery back to GBC or Price.

2. Brown's Battery receipts listing cash in the customer space and GBC credit to vendor receipts: While evaluating the evidence, GBC argued that the credit to vendor receipts represented payment by GBC and Price to Brown for lead returned to GBC or Price and not batteries sent to Brown's Battery. However, the cash receipts listed "junks" (a term commonly used in the scrap metal business for spent batteries) as the product sold. In addition, the price per pound of the junks was not at all close to the price per pound at the time for pure lead. Moreover, the credit to vendor receipts memorialized GBC's reimbursement to Brown's Battery when the former directed the latter to procure batteries on the open market in order to supply the GBC smelter with enough lead. Accordingly, EPA determined that the receipts memorialized the sale of batteries from Price and GBC to Brown's Battery. EPA was also able to match the volumes and price set forth in about half of such cash receipts with Price and GBC's credit to vendor invoices for the same period of time. Accordingly, EPA assumed that the volumes set forth in all of the cash receipts were already included in the credit to vendor invoices and, consequently, eliminated the volumes set forth in all such receipts.

3. Weekly receipts reflecting the number of batteries broken: Based on PRP comments, EPA determined that the numbers stated in these receipts represented the number, not the volume, of batteries broken during that period of time. Accordingly, EPA multiplied the numbers in the receipts by the weight of a typical battery. The volumetric estimate was adjusted accordingly.

Although the Region attempted to estimate the total volume of batteries broken at the Site by calculating the volume of battery casings buried on the Site, the sum of the volume of batteries from the Brown's Battery receipts and other waste-in receipts (49,268,643 pounds), exceeded EPA's calculation of the volume of batteries at the Site (41,178,000 pounds). This discrepancy likely resulted from Brown's practice of selling battery casings for off-site use as road bed material. Given the

lack of any information to estimate what volume Brown actually sold off-site, EPA decided to use the existing records as the basis for calculating the entire volume of battery casings at the Site and, from that volume, the percentage of each PRP's volumetric contribution.

During its calculation of the de minimis volumetric formula, EPA discovered that a number of PRPs had gone out of business, could not be located, were deceased, or did not have the financial ability to pay their de minimis share. Accordingly, EPA proportionately redistributed those PRPs' volumes among the remaining viable PRPs in order to calculate a revised percentage for each viable PRP.

EPA then applied the revised percentage for each viable PRP to its past and future costs. With respect to estimated future costs, EPA employed the estimated cost of the more expensive contingent remedy for OU2, given the uncertain nature of the preferred innovative remedy and added the estimated value of oversight. Finally, EPA added a 100% premium to the estimated future costs because of the strong possibility of cost overruns during implementation of the contingent remedy.

After reviewing the revised percentages of all PRPs, EPA in conjunction with DOJ determined that a cut-off for those PRPs who would be offered a de minimis settlement would be .8%. This cut-off was chosen for two reasons. First, this percentage is less than two percent of the waste attributable to the PRPs. Second, this amount represents the middle point of the large gap between Minkin Salvage Company, Inc. (527,707 pounds or 1.0711%) and Decker Brothers (294,785 pounds or .5983%).

3. The toxic or other hazardous effects of the substances contributed by the parties is minimal in comparison to the remaining parties.

The hazardous substances contained in the spent batteries sent to the Site by the proposed de minimis Settlors and the other parties were lead and cadmium. These metals are contained in the grids inside of the batteries and contaminated the battery casings Brown deposited at the Site.

4. The settlement is practicable and in the public interest.

A settlement with the proposed de minimis Settlors is also practicable and in the public interest because such a settlement will help replenish the Superfund, provide equitable relief for the smaller waste contributors and narrow the focus of EPA's enforcement action to remediate this Site to the major contributors of batteries at the Site.

Please sign below if you concur with the de minimis analysis outlined in this memo.

I CONCUR WITH THE DE MINIMIS ANALYSIS SET FORTH IN THIS MEMO.

Peter H. Kostmayer
Regional Administrator

5/31/90
Date