1/18/95

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
GENERAL MOTORS CORPORATION	)	
GENERAL MOTORS TECHNICAL CENTER,	)	DOCKET NO. RUST-002-93
	)	
Respondent	)	

ORDER GRANTING RESPONDENT'S PARTIAL ACCELERATED DECISION AND DENYING COMPLAINANT'S PARTIAL ACCELERATED DECISION

An administrative complaint initiating this proceeding was filed c March 26, 1993, by the United States Environmental Protection Agency, Region 5 (sometimes complainant or Agency), charging General Motors Corporation, General Motors Technical Center (respondent) with violations of the Resource Conservation Recovery Act (RCRA), Subchapter

IX, 42 U.S.C. 6991 et. seq., governing Underground Storage Tanks (USTs). Respondent served its answer on May 20, 1993. An amended complaint was filed on March 16, 1994 /1/, which reduced the proposed penalty from $403,237 to $267,447. An answer was served to the amended complaint on April 4.

/1/ Unless otherwise indicated, all dates are for the year 1994.

Pursuant to 40 C.F.R. 22.20, complainant filed a motion for partial accelerated decision (PAD) dated November 1. Respondent responded in opposition to complainant's motion, as well as filing its own PAD motion on November 15. Complainant served its response in opposition to respondent's motion on November 28. On

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December 8, respondent filed a sur-reply to complainant's response, and on December 19, complainant filed its sur-response.

Some threshold thoughts are appropriate here. Common garden intelligence dictates that evidentiary hearings are designed for the resolution of material facts. An oral evidentiary hearing is not required on those issues where the only dispute involves questions of law. /2/ As stated, in pertinent part, under 22.20(a), an accelerate

decision is the appropriate device when no genuine issue of material fact exists, and the party is entitled to judgment as a matter of law.

/2/ 1 Davis and Pierce, Administrative Law Treatise, 8.3, (3d ed. 1994). See, e.g., Martin v. Yellow Freight System, Inc., 793 F. Supp. 461, 470 (S.D.N.Y. 1992), aff'd, 983 F.2d 1201 (2d Cir. 1993).

With this backdrop, the Administrative Law Judge (ALJ) now turns to the specific motions. Both respondent's and complainant's PAD motions seek a determination on whether certain piping connected to USTs CPC-FV-1 to 4; DS-1 to 7; CPC-EL-4, 6, 8(1) and 8(2); and APE-13 and 14 is "underground," and thus, subject to Section 9003 of RCRA, 42 U.S.C. 6991b, and the regulatory requirements found at 40 C.F.R. Part 280. The pipes at issue are all located in concrete-lined trenches, having dimensions of three- feet in width by three-feet in depth. The layer of concrete is roughly six-inches thick. (Resp't Mot., Aff. of Douglas Wechter, 3.) On the side walls of the trenches, there are pipe racks and supports upon which the pipes are situated. Thus, the pipes are elevated above the trench floor. (Aff. Wechter, 4.) Moreover,

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for protection purposes, the pipes are covered from above by removable metal grating. This grating lays flush with the surface of the ground

adjacent to the trenches. (Aff. Wechter, 5.)

The issue here is to ascertain the meaning of "underground" under the UST regulations. In construing regulations, as with statutes, we look first to the plain meaning of the language used. U.S. v. Heller, 726 F.2d 756, 762 (Temp. Emer. Ct. App. 1983). In this case, the language "underground piping" appears in the statutory definition of a UST. Under Section 9001(1), a UST is defined as follows:

> [A]ny one or combination of tanks (including underground pipes connected thereto) which is used to contain an accumulation of regulated substances, and the volume of which (including the volume of the underground pipes connected thereto) is 10 per centum or more beneath the surface of the ground.

42 U.S.C. 6991(1). The regulatory definition is the same as the statutory one. See 40 C.F.R. 280.12 (1994). However, under the statute and the regulations, "underground" or "underground piping" is undefined. A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. Perrin v. U.S., 444 U.S. 37, 42 (1979). To support its position that the pipes are underground, complainant refers to the ordinary meaning of the word in Webster's New World Dictionary (3d College ed. 1988). Underground is defined there as occurring, working, placed or used beneath the surface of the ground. (Complainant's Mot. at 3.) Using this definition, the pipes are underground because they were

placed in trenches and beneath metal grating, which is flush with the ground level. Therefore, the pipes at issue are subject to Section 900 of RCRA, 42 U.S.C. 6991b, and the regulatory requirements for USTs in 40 C.F.R. Part 280.

In the situation presented here, the ordinary meaning supplied by complainant still does not clarify the meaning of underground. Respondent points out the ambiguity that exists, depending on whether the pipes are described in relation to the adjacent ground, or in relation to the ground directly below the pipes. Although the pipes a below the ground level of the adjacent terrain, the pipes are not located beneath any soil. In fact, there is nothing above the pipes except the removable metal grating. Thus, the pipes are actually abov the surface of the ground where they lay. /3/ (Resp't Mot. at 6.)

/3/ Similarly, geographical areas are located below sea-level but the same are not situated like Atlantis.

If the plain meaning of the word remains ambiguous, the next ste is to construe the meaning in light of its administrative interpretation. In the absence of administrative guidance, a court

applies the usual rules of statutory construction, considering the purpose behind the statute and its regulations, and the consequences of the suggested interpretations in order to determine the intent of the enacting body. Heller, 726 F.2d at 762 (Temp. Emer. Ct. App. 1983); Thriftway Co. v. U.S. Dept. of Energy, 920 F.2d 23, 26 (Temp. Emer. Ct. App. 1990) (citing Heller).

Standing alone, neither party has brought forth an administrative interpretation of the words "underground" or "underground piping." Complainant concedes in its motion that no administration interpretation of the word underground exists. (Complainant's Mot. at 4.) Nevertheless, complainant cites to N. Am. Fund Management Corp. v. F.D.I.C., 991 F.2d 873, 875 (D.C. Cir. 1993), for the proposition that an agency's interpretation of its own regulations is entitled to substantial deference, unless it is plainly erroneous or inconsistent with the regulations. (Complainant's Mot. in opposition at 1-3.) Under F.D.I.C., complainant attempts to argue that its interpretation, construing these pipes as being underground, is entitled to substantial deference because it is neither plainly erroneous nor inconsistent with the regulations.

Complainant's argument, however, is misplaced. The rule cited by complainant is dependent upon an agency's interpretation of its regulations and not the interpretation of enforcement counsel. /4/ Agency litigating positions are not entitled to deference when they are merely post-hoc rationalizations of government lawyers attempting to explain ambiguity in the regulations. Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 156 (1991). It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463

/4/ In F.D.I.C., there existed several instances of the agency's interpretation regarding the ambiguous regulation. See 991 F.2d at 876.

U.S. 29, 50 (1983)(emphasis added). Because no interpretation of "underground" has been delineated by EPA, its meaning still lurks in an abyss. Accordingly, to dig ourselves out of this hole, the meaning of underground must be construed in light of the purpose of the UST regulations and analogous agency definitions.

The starting point is the definition of a UST, supra, at 3, in

order to determine whether these pipes fall within the ambit of the UST regulations. Although respondent does not dispute that the pipes in question are connected to USTs, issues remain concerning whether these pipes are within the scope of the statutory definition. First, once the 10 percent threshold is met, as indicated here, there is the issue of whether all pipes connected to the UST are subject to the regulation or only underground pipes. The other issue involves whether the pipes here are considered underground if only underground pipes are regulated.

The regulatory definition of a UST incorporates the statutory definition above. EPA's comments on the regulatory definition in both the proposed rule and final rule provide guidance on whether all pipes connected to a UST are regulated. Under the proposed rule, EPA expressly indicated that the phrase "underground pipes connected thereto" means that only underground piping is encompassed within the definition of a UST. 52 Fed. Reg. 12690 (April 17, 1987). The final rule did not change this explicit limitation. See 53 Fed. Reg. 37114 (Sept. 23, 1988). Hence, if the pipes here are not found to be underground, then they are not regulated, even though the same may be connected to a UST system.

The meaning of underground can be gleaned from the purpose of the regulations. RCRA authorized EPA to establish a comprehensive regulatory program for USTs containing regulated substances in order to protect human health and the environment from releases of such substances. Id. at 37082-83. After examining various studies, EPA expressed in the preamble to the proposed rule that the nation's health and safety may be directly impacted by the pervasive threat leaking UST systems pose to groundwater resources. 52 Fed. Reg. 12666. The final rule reaffirmed the necessity for UST regulations due to the impact on groundwater and soil from leaking USTs. 53 Fed. Reg. 37088. Hence, th UST regulations were aimed at addressing and establishing preventative measures for the causes of releases.

Of the four listed reasons for releases from USTs, the major cause was reported to be corrosion. 52 Fed. Reg. 12666. EPA explained that corrosion is a phenomenon resulting from unprotected metal breaking dow in the underground environment into its natural form of soft ore (emphasis added). Id. at 12667. Although corrosion can be caused by many conditions, these conditions are almost always present when bare steel is placed underground (emphasis added). Id. Corrosion is also a gradual process, which is more likely to occur the longer unprotected steel tanks or pipes are located in the ground (emphasis added). Id.

Therefore, it is inherent in the corrosion process that the steel tank or piping actually be situated in and interacting with the surrounding earth. However, respondent's pipes are not subject to the same corrosive

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forces of "underground pipes" because they are isolated from any direct contact with the surrounding soil by the concrete-lined trenches.

Another cause of releases from USTs was piping failures. In this section, EPA noted that piping may be more susceptible to corrosion due to its thinner walls and more vulnerable location nearer the ground surface. Id. Further, the preamble to the final rule adds that natural forces, such as frost heavens, can contribute to piping failures when the piping is near the surface of the ground. 53 Fed. Reg. 37089. In both instances, this increased likelihood of pipe failure from the pipe's location "near the surface of the ground" assumes the pipes are covered beneath soil in the subsurface. Once again respondent's pipes fall outside the above concerns because they have nothing atop of them except the metal grating.

For detecting existing releases or problems that could lead to releases, the proposed rule listed inspections as one method. 52 Fed. Reg. 12669. This section provided different options for conducting

inspections of the UST system. However, EPA went on to state that "[n]one of these methods can be applied to underground piping because it is generally covered and inaccessible to inspections" (emphasis added). Id. This pronouncement provides insight into EPA's interpretation of the meaning of underground piping as being piping, which due to its location embedded in the ground, needed to be regulated because it has the risks of undetected releases. However, respondent's pipes are not

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characterized by the same features as EPA described underground piping here. Rather, these pipes are neither covered nor inaccessible to inspection.

The refinement of the phrase "beneath the surface of the ground" /5/ also sheds insight into the meaning of underground. From the scope of this definition, the meaning of underground can be understood. First, EPA's guidance directive (Directive) /6/ classified "beneath the surface of the ground" as being below ground surface or grade. (Directive, at 2.) Hence, the discussion section stated a tank would be a UST where 10 percent or more of its volume was below grade, such as in a ditch or swimming pool. (Directive, at 2.) The proposed rule rejected

the term "beneath the surface of the ground" as including tanks whose volume is 10 percent or more below grade even if not covered with ground material. 52 Fed. Reg. 12690. EPA then professed that tanks of this nature, (e.g., in a ditch or a natural depression), are outside the scope of the proposed regulations because they are not substantially different from an aboveground tank. Id. Thus, this type of tank would not present the risk of leaking directly into the ground undetected. The pipes involved here, being situated in below-grade trenches, represent the kind of situation EPA

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envisioned with below-grade tanks. Accordingly, these pipes in concrete-lined and below-grade trenches would also fall outside the UST regulations because the threat of leaking directly into the ground undetected is absent.

/5/ This phrase appears within the definition of a UST, supra, at 3.

/6/ This directive entitled, "Clarification of the Definition of Underground Storage Tank," OSWER Directive No. 9610.2, April 7, 1986, was designed to alleviate confusion over the applicability of the UST program to persons until the definitions were proposed in the Federal Register.

Beneath the surface of the ground is defined as beneath the ground surface or otherwise covered with earthen materials. 40 C.F.R. 280.12.

Complainant argues that the use of the conjunction "or" establishes a second condition for an item to fall under this rubric without being covered by earthen material. (Complainant's Mot. in opposition at 4-5.)

This argument is not supported by the final rule's analysis on the changes in the definition. In the proposed rule, the definition read beneath the surface of the ground or otherwise covered with material so that physical inspection is precluded. 52 Fed. Reg. 12690. The final rule added the word "earthen" before material and deleted the phrase "so that physical inspection is precluded." 53 Fed. Reg. 37116. EPA explicitly stated that this definition reflected the intent of the UST regulations to govern tanks which could leak directly into the ground undetected. Id. Additionally, earthen was added to the definition due to its ability to promote corrosion, and thereby, increase the likelihood of leaks. For example, in response to comments, EPA explained that completely aboveground tanks which were surrounded by sand would be within the ambit of these regulations because sand is an earthen material that has the potential to create corrosion. Id. On the other hand, aboveground tanks which were surrounded by vermiculite,

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a non-earthen material, would not be considered USTs because this material would not facilitate corrosion. Id.

From EPA's analysis, the term beneath the surface of the ground requires a UST to be either beneath the ground surface and covered with soil or aboveground and surrounded by earthen materials. It is in such situations that underground pipes are subject to corrosive forces which promote leaks. However, respondent's pipes are neither beneath the ground surface nor covered with any earthen material. Hence, the concerns of leaks from corrosion are not present. Moreover, respondent's pipes, which are located in inspectable, concrete-lined trenches cannot leak directly into the ground. (Resp't Mot. at 7.) Thus, EPA's statement that this definition reflects the intent of the UST regulations to govern USTs which could leak directly into the ground undetected is not present either.

Further revelation of the meaning of underground can be found in the exclusions to USTs. USTs located in "underground areas" or below grade areas, such as a basement or cellar, are excluded from regulation if the UST is situated upon or above the surface of the floor. 53 Fed. Reg. 37121. The rationale for excluding these tanks is that, while they are technically underground, in a practical sense they are no different from above- ground tanks. Id. Like aboveground tanks, these tanks can

also be physically inspected for possible leaks, and thus, this exclusion is consistent with the UST regulation for inspection. Id.

Respondent's pipes are analogous to the underground area exclusion. These pipes are located in below-grade trenches and are above the surface of these areas. As such, respondent's pipes can be inspected for leaks to the same degree as those tanks excluded under this definition. (Resp't Mot. at 10.) Accordingly, the same rationale that excludes storage tanks in underground areas from being regulated as USTs applies to respondent's pipes. Thus, the pipes are akin to aboveground pipes, and need not be regulated in the same manner because the threat of an undetected leak is absent.

Despite a lack of an administrative interpretation for "underground," complainant points to EPA's statement regarding the broad scope of the regulatory definition of tank to bolster its conception of respondent's pipes. EPA professed that in developing the UST regulations, it has been the Agency's policy to define the scope of the regulations broadly and interpret the exclusions narrowly where there has been ambiguity. 53 Fed. Reg. 37114. Utilizing this approach, EPA hoped to avoid eliminating from regulation those tanks which may have

posed an environmental threat. Id. Based upon this statement, complainant seeks to extend the regulations to respondent's pipes. Notwithstanding this statement, complainant pursues an interpretation which goes beyond the purpose of the regulations. The UST regulations were aimed at addressing the causes of undetected releases and preventing future releases into the nation's soil and groundwater. However, as discussed throughout this order, respondent's pipes exhibit none of the traits that warranted the regulations. Therefore, it is

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concluded that respondent's piping connected to USTs CPC-FV-1 to 4; DS-1 to 7; CPC-EL-4, 6, 8(1) and 8(2); and APE-13 and 14 are not subject to Section 9003 of RCRA, 42 U.S.C. 6991b, and the UST regulations for underground pipes found at 40 C.F.R. Part 280.

IT IS ORDERED that:

1. Respondent's motion for partial accelerated decision be GRANTED, and those portions of the complaint regarding the pipes be DISMISSED.

2. Complainant's motion for partial accelerated decision be DENIED.

/s/

Frank W. Vanderheyden
Administrative Law Judge

Dated: January 18, 1995

IN THE MATTER OF GENERAL MOTORS CORPORATION, GENERAL MOTORS TECHNICAL CENTER, Respondent,
Docket No. RUST-002-93

Certificate of Service

I certify that the foregoing Order, dated 1/18/95, was sent this day in the following manner to the below addressees.

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Dated: January 19, 1995