

FILED
HARDIN COUNTY
COMMON PLEAS COURT

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LORI J. STEVENSON
CLERK

IN THE HARDIN COUNTY COMMON PLEAS COURT

KENTON, OHIO

STATE OF OHIO, ex. rel. :
MARC DANN, ATTORNEY :
GENERAL OF OHIO, :

PLAINTIFF, :

CASE NO: 20061253 CVH ✓

VS. :

KING-OHIO FORGE, INC, ET AL., :

ENTRY

DEFENDANT. :

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This cause came on for hearing upon the complaint of Plaintiff, The Ohio Environmental Protection Agency, hereinafter EPA, for preliminary and permanent injunctive relief, fines, costs and attorney fees, pursuant to Ohio Revised Code Sections 3734.10 and .13, with Answer in Opposition thereto filed by Defendants, King-Ohio Forge , Inc. hereinafter King-Ohio, and David B. King. Prior to the hearing on the merits the Court heard arguments concerning Defendant's Motion for Partial Dismissal of the complaint as to certain drums of

material identified as groups 1, 1A and 1C, in Defendants' proposed sampling and analysis plan, which are currently subject to an appeal to the Environmental Review Appeal Commission, hereinafter ERAC, and also Plaintiff's Motion in Limine to exclude mention by Defendants of their claim of having Conditionally Exempt Small Quantity Generator Status, hereinafter CESQG. Plaintiff was present and represented by Assistant Attorneys General, Brian B. Ball, Daniel Martin and Amanda K. Sturm, while Defendants were present and represented by Attorneys Ronald S. Kopp and Terrance S. Finn.

The Court Finds that Defendants' Motion for Partial Dismissal is capable of being deferred and the Court hereby defers any ruling on the drums contained in Groups 1, 1A and C until such time as ERAC has ruled on Defendants' appeal. This Court believes that ERAC does have exclusive original jurisdiction over those materials and that this Court cannot rule on same until such time as ERAC surrenders jurisdiction. However, in the interest of judicial economy and to save the time and expense of the parties, the Court allows testimony on those disputed materials at this hearing, with the Court reserving judgment on those issues until a later date. The Court denies Plaintiff's Motion in Limine, as the same goes to Defendants' essential defense of this action and therefore the same is relevant.

Upon the evidence the Court Finds the facts to be that Broderick Co, Inc. sometime prior to February 1991, owned and operated a metal forging operation

at 820 Steiner Avenue in Kenton, Hardin County, Ohio. Sometime after that date Broderick Co. Inc., declared bankruptcy and the Kenton Plant was sold by the bankruptcy trustee to King-Ohio Forge, Inc. on March 10, 1993. Evidence revealed that the property was not operated as a manufacturing facility after the 1991 year. It is undisputed that the bill of sale contained language that transferred any rights or permits of Broderick Co., Inc. to King-Ohio. In 2001 Defendant, David B. King became comptroller of King-Ohio and assumed control over the operations of the King-Ohio facility at 820 Steiner Avenue, Kenton, Ohio.

On or about April 5, 2001, Plaintiff received a complaint regarding the property at 820 Steiner Avenue in Kenton, Ohio. Ohio EPA Officials on May 9, 2001 attempted to gain access to the Steiner Avenue facility in order to conduct an inspection concerning the complaint but they were denied access to same by a representative of King-Ohio and by Defendant David B. King. After securing a search warrant, the EPA Officials conducted a search of the premises and found drums and containers, some of which contained materials classified as hazardous wastes. The results of the inspection and analysis were not communicated to Defendants until March 11, 2002. It is undisputed by Defendants that hazardous wastes were found on the premises on the date of the search.

In a March 11, 2002 letter from EPA to King-Ohio, the EPA demanded

that King-Ohio evaluate the waste stored on the property and submit a sampling and analysis plan. Defendants were also placed on notice of violation of Ohio's hazardous waste laws because of the storage of hazardous waste without a permit. King-Ohio submitted its sampling and analysis plan to the EPA on August 26, 2002 to which EPA responded in December 2002. In January 2003 King-Ohio submitted a revised plan to the EPA who responded with proposed revisions. King-Ohio, in August 2003 submitted yet another proposed plan, which was approved by the EPA by letter dated September 10, 2003 and later modified by the EPA in January 2004. King-Ohio, in accordance with the approved and modified plan, conducted sampling and analysis of the materials at the Steiner Avenue property.

It appears from the evidence that the Parties had little substantive communication from January 2004 until April 2006. The reason for same was not presented at the hearing by either side. In April 2006, prior to a scheduled joint sampling event, EPA Officials conducted an unannounced hazardous waste inspection at the Steiner Avenue facility. Defendants, with their consultant, were found engaged in what the EPA viewed as questionable activity concerning the mixing of materials from various sources. After that inspection, Defendants offered a 2,4-D recovery plan that was rejected by the EPA and that rejection is the subject of the ERAC Appeal. In October 2006 Plaintiff filed the current

action.

The issues presented by this action appear to be far more simple than the Parties believe. The initial question for the Court is whether or not King-Ohio's Steiner Avenue facility in Kenton, Hardin County, Ohio has hazardous waste stored in or upon its premises? The Court believes that the evidence is undisputed that there are hazardous wastes being stored at King-Ohio's facility in Kenton, Ohio. The results of Defendants' own sampling and analysis confirm the presence of materials that are listed as hazardous wastes. Defendants by their admission in their pleadings and testimony want to be treated as a CESQG, which by its very nature reveals that hazardous wastes are being stored at their Kenton facility. Otherwise there would be no reason for Defendants to claim such status as a defense to this action. Therefore the Court Finds that there are hazardous wastes stored on the property owned by King-Ohio Forge, Inc. located at 820 Steiner Avenue, in Kenton, Hardin County, Ohio. This Court does have jurisdiction pursuant to Ohio Revised Code Section 3734.10 over such action, save and except those materials currently subject to the jurisdiction of the Environmental Review Commission as noted above.

Since the Kenton facility has hazardous waste stored in or upon it, our next inquiry is whether or not Defendants are entitled to be exempt from the EPA regulations concerning such activity. In other words whether Defendants have

attained exemption from regulation as a CESQG? Defendants claim that in 1991 Broderick Co., Inc., was granted that status by the EPA. Such action is confirmed by EPA correspondence admitted into evidence herein. In the bill of sale from the bankruptcy trustee there is language that appears to convey any interest that Broderick had in any permits to King-Ohio. Therefore Defendants operated the Kenton facility under what they believed was a valid exemption from EPA regulation pursuant to Ohio Administrative Code Section 3745-51-05. That section states that conditionally exempt small quantity generators (CESQG) are exempt from EPA hazardous waste regulations, except that they do have reporting and disposal requirements placed upon them by other subsections in OAC 3745-51-05.

The EPA argues that King-Ohio did not succeed to the status that Broderick possessed because King-Ohio did not generate the hazardous waste found at its Kenton facility. King-Ohio argues that because the hazardous materials were generated on the site by Broderick that, by succession in interest, King-Ohio is a generator of the hazardous waste. OAC Section 3745-50-10-45 defines a generator as: "...any person, by site, whose act or process produces hazardous waste identified or listed in Chapter 3745-51 of the Administrative Code or whose act first caused a hazardous waste to become subject to the hazardous waste rules". If we accept, for arguments sake, that Defendant's

proposition that they succeeded to CESQG status is correct, then clearly King-Ohio would fit squarely into this definition. However, if we assume that the EPA argument is correct that King-Ohio did not generate the waste, then regardless of the attempted assignment, King-Ohio could not fit the definition.

A review of the plain and ordinary meaning of the word generate reveals that “to generate means to bring into existence, esp. by physical or chemical process.” See Webster’s II, New Revised Dictionary. Clearly King-Ohio did not bring any of the materials located on its Kenton facility “into existence” by any means. This Court does not believe that one can assign their interest in “bringing something into existence” to another. The evidence established that Broderick Co., Inc. was the sole generator of the hazardous waste found at the Kenton facility. At no time did King-Ohio operate this facility as a forging operation or any other type of process that would have produced any hazardous waste. In fact no operation of any kind, save and except the actions of Defendants in dealing with the materials on site, has occurred on this property since 1991, some 16 years. The Steiner Avenue property has been essentially abandoned since that time with all of the hazardous and non-hazardous materials accumulated by Broderick being left to the fate of nature to be cast or dispersed with reckless disregard.

The Court having determined that King-Ohio has stored, and is storing,

hazardous waste on its property and that they are not entitled to claim exemption from EPA regulations by being a CESQG, the Court must determine if they are a permitted hazardous waste storage facility? Plaintiff alleges, and Defendants acknowledge, that King-Ohio does not have a permit, either state or federal, to store hazardous waste at its Kenton, Ohio facility. Without a permit there is no doubt that King-Ohio is maintaining an unpermitted hazardous waste facility on its Steiner Avenue property in violation of Ohio laws.

Therefore, the Court Finds that Defendant King-Ohio Forge, Inc., has violated, and is violating the laws of the State of Ohio, concerning the operation of a hazardous waste storage facility without a permit and the Rules Promulgated pursuant to those laws, by operating and maintaining an unpermitted hazardous waste facility on its property located at 820 Steiner Avenue, Kenton, Hardin County, Ohio. However the Court Finds that King-Ohio has attempted to work with the EPA to solve this situation and that King-Ohio believed that it was exempt from EPA regulations. Such belief is buttressed by the evidence that from 2001 until the present King-Ohio has spent much time and money in an attempt to comply with EPA requests. Plaintiff has also spent time and money to resolve this situation but at times has delayed the process.

Therefore the Court hereby issues a Preliminary Injunction prohibiting Defendants, King-Ohio Forge, Inc., its Comptroller, David B. King, or any other

officer, director, agent or employee of said King-Ohio Forge, Inc., from further violating any provision of the laws of the State of Ohio, or Rules Promulgated pursuant to said laws, pertaining to the operation and disposal of hazardous waste. The Court hereby Orders King-Ohio Forge, Inc. to immediately come into compliance with all such rules and regulations. All other issues are hereby reserved for judgment pending the outcome of the ERAC appeal that the Parties are currently engaged in. Specific Orders as to compliance with EPA regulations are also held in reserve pending the Parties appearing before the Court for a status conference which is hereby scheduled for July 12, 2007 at 1:15 p.m.. The Parties are hereby ordered to appear with counsel at said hearing.

All until further Order of the Court.

ORIGINAL SIGNED

Judge William D. Hart

cc: Assistant Attorney General Daniel J. Martin
Attorney Terrence S. Finn