

Memorandum

To : Ron Pilorin
Alternative Technology Division

Date: March 5, 1993

From : Office of Legal Counsel
(408) 429-0113

Subject: Airco Special Gases

I have attached the background documents I received from Airco's attorney, Jose R. Allen. As we have agreed, you will review this case to decide whether Airco was ever a treatment, storage or disposal facility. Mr. Allen's client is anxious to resolve this outstanding issue. Could you have a response within the next two to three months?

Please let me know if you need any legal assistance. You should feel free to contact Mr. Allen if you need additional information about the facility. Simply keep me advised if you communicate with him.

Thanks for your help.



Susan Bertken
Sr. Staff Attorney

cc: Jo Nelson
Fees Unit

Jose R. Allen, Esq.
Skadden, Arps, Slate, Meacher & Flom
Four Embarcadero Center
San Francisco, CA 94111-4144

(w/o attachments)



SKADDEN, ARPS, SLATE, MEAGHER & FLOM

FOUR EMBARCADERO CENTER
SAN FRANCISCO, CALIFORNIA 94111-4144

(415) 984-6400

FAX: (415) 986-8572

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December 3, 1992

VIA FEDERAL EXPRESS

Ms. Susan Bertken
157 Marine Parade
Santa Cruz, CA 95062

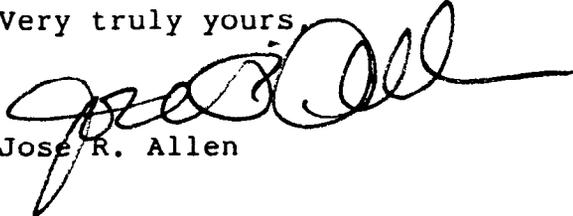
Re: Airco/Santa Clara Facility

Dear Susan:

Per our discussion, enclosed are the background materials relating to Airco's former facility in Santa Clara. The enclosed letter from Lawrence Bierlein to Peter Rogers, dated March 21, 1983, provides a good overview of the jurisdictional issue.

Please let me know whether you require further information and whether it will be possible to meet on December 22 to discuss the issue of facility fees.

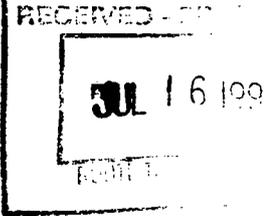
Very truly yours,


Jose R. Allen

Enclosure

DEPARTMENT OF HEALTH SERVICES

714/744 P STREET
P.O. BOX 942732
SACRAMENTO, CA 94234-7320
(916) 322-0477



JUL 10 1991

Mr. James N. Merriam
Airco Industrial Gases
575 Mountain Avenue
Murray Hill, NJ 07974

Dear Mr. Merriam:

AIRCO SPECIAL GASES
3025 STENDER WAY
SANTA CLARA, CA 95054
CAD076311661
HF HQ 38-000492

Per our telephone conversation on July 9, 1991, you indicated that the Santa Clara facility never treated, stored or disposed of hazardous waste and that this facility is and has always operated as a generator only.

I am enclosing an affidavit that must be signed under penalty of perjury and notarized. When I receive the properly completed affidavit, I will initiate the cancellation of your facility fee billing.

If you have any questions, please contact me at (916) 322-0477.

Sincerely,

A handwritten signature in cursive script that reads "Jo Nelson".

Jo Nelson
Fees Unit
Toxic Substances Control Program

Enclosure

DEPARTMENT OF HEALTH SERVICES

714/744 P STREET
P.O. BOX 942732
SACRAMENTO, CA 94234-7320
(916) 322-0448



Mr. James N. Merriam
Airco Industrial Gases
575 Mountain Avenue
Murray Hill, NJ 07974

July 10, 1991

RE: Airco Special Gases
3025 Stender Way
Santa Clara, CA 95054
CAD076311661

Gentlemen:

You recently received a bill for a hazardous waste facility fee imposed on hazardous waste treatment, storage, and disposal facilities by Health and Safety Code #25205.2 for the fiscal year July 1, 1990 to June 30, 1991. You returned the petition for redetermination stating you have never operated as a treatment, storage or disposal facility.

The purpose of this letter is to clarify that facilities that have never been used for hazardous waste treatment, storage, (over 90 days) or disposal, are not subject to the facility fee. The enclosed affidavit may be used to establish that your facility was not so used and, thus, is not subject to a fee. If the fee has already been paid and the facility is not liable for the fee, it will be refunded.

Since the hazardous waste facility fee is based on use of a facility, the status of any variance you may have requested or closure plan you may have filed is irrelevant. The test is whether your facility was used for hazardous waste treatment, storage or disposal.

Please note that the enclosed affidavit must be signed under penalty of perjury and notarized. If, during any future inspection of your facility, it is determined that the information in the affidavit is false, the fee will be collected retroactively and the person who signed the affidavit will be liable for criminal prosecution.

If you have any questions, please contact Jo Nelson of the Fees Unit at (916) 322-0477.

Sincerely,

Walter J. Larson, Chief
Fees Unit
Toxic Substances Control Program

Enclosure

Return to: Department of Health Services
Toxic Substances Control Division
714/744 P Street
P.O. Box 942732
Sacramento, CA 94234-7320
Attn: Dink Mather

AFFIDAVIT

I. _____, declare that:

1. I am _____ (owner or, if a corporation, title of corporate officer) of _____ (name of business) located at _____.
EPA # _____.

2. I declare that none of the facilities of said business, including all the business' structures, appurtenances, improvements, and contiguous land, were ever used to treat, store (over 90 days) or dispose of any hazardous waste.

3. I understand that the term "dispose of," as used in this affidavit, includes both depositing hazardous waste on the site and the continuing presence of hazardous waste on the site from prior years, unless the department has certified a disposal facility as closed.

I declare under penalty of perjury that the foregoing is true and correct. Signed this _____ day of _____, 19____, at _____, California.

(Signature)

Subscribed and sworn to before
me this ___ day of _____, 19____.

Notary Public



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 3 1980

OFFICE OF WATER
AND WASTE MANAGEMENT

Lawrence W. Bierlein, Esq.
Compressed Gas Association
Suite 701
910 Seventeenth St., N.W.
Washington, D.C. 20006

Dear Mr. Bierlein:

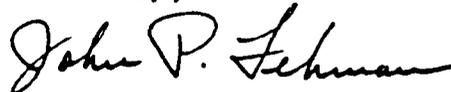
This is in response to your inquiry regarding applicability of the Resource Conservation and Recovery Act, and hazardous waste management regulations issued thereunder, to the practice in the compressed gas industry of repetitive transportation of cylinders by gas manufacturers and their customers.

As described to us during your meeting here on October 15, all cylinders are owned by or are under the equivalent control of the gas supplier. When the customer has completed his use of the gas, the cylinder is returned to the supplier. As a matter of safety, there is residual pressure in the cylinder when it is returned. (The return transportation is extensively regulated by the Department of Transportation under the federal Hazardous Materials Regulations, 49 CFR 170-189.) The customer's purpose in making the shipment is to return the supplier's property, not to discard the remaining contents. The customer does not make the decision on the final disposition of the residue in the cylinder; this is the exclusive prerogative of the gas supplier. Further, the decision whether or not to discard the contents of the container is not made until the container is returned to the supplier.

Under these circumstances, the customer is not generating a waste by merely returning the cylinder and, neither the returned container nor the contained residue is a "solid waste" as that term is defined in the Resource Conservation and Recovery Act and Part 261 of the EPA regulations of May 19, 1980. Under §261.3(b)(1), a material must be "discarded" before it can be a solid waste. The description you have provided indicates that residual gases are not discarded until the cylinders are returned to the supplier, that no decision is made to discard

the residual gases until the cylinders are returned, and that the customer plays no part in this decision. Therefore, the material is not discarded until the cylinder reaches the supplier and a decision is made whether to discard the residual gas. Consequently, the customer's return of the supplier's cylinders that may hold some residue is not the shipment of a solid (or hazardous) waste. Simply returning such cylinders does not make the customer a generator, and the shipment need not be manifested to an EPA-permitted facility or be carried by a hazardous waste transporter.

Sincerely,

A handwritten signature in cursive script that reads "John P. Lehman".

John P. Lehman, Director
Hazardous and Industrial Waste Division
Office of Solid Waste (WH-565)



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

NOV 6 1981

Lawrence W. Bierlein, Esq.
Compressed Gas Association
910 Seventeenth Street, N.W.
Washington, D.C. 20006

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

Dear Mr. Bierlein:

This is in response to your inquiry on the Resource Conservation and Recovery Act (RCRA) requirements to handle residues removed from compressed gas cylinders.

We understand that cylinders (defined generally under Department of Transportation regulations, 49 CFR 171.8, as pressure vessels having a water capacity not exceeding 1000 pounds and constructed in accordance with DOT requirements) are typically returned to gas suppliers containing gaseous residues. We further understand that these returned cylinders often are "topped off" without discard of the residues, and with reclamation of the residues by the gas supplier. In these situations, the residues are not solid wastes under §261.2, and thus, do not entail consideration of compliance with the hazardous waste regulations. (See letter from John P. Lehman to you dated November 3, 1980.)

If the gas supplier, however, decides to discard cylinders containing gaseous, liquid, or physically solid residues (i.e., non-empty containers) that meet the definitions in 40 CFR Part 261, the residues in the cylinders become hazardous wastes because they are being discarded, and these residues (and the cylinders) must be handled in compliance with the regulations. Any shipment of these contained gaseous or other wastes off-site must be in compliance with all generator and transporter requirements under 40 CFR Parts 262 and 263. Additionally, any such gas cylinders which are discarded or intended to be discarded must be managed in accordance with the requirements under 40 CFR Parts 264 to 267. Furthermore, any liquid or physically solid wastes removed from the cylinders or derived from the treatment of the contained gases, such as scrubber residues or waste neutralizing solutions, that are hazardous must be managed in accordance with the Subtitle C waste regulations.

The primary question raised by the Compressed Gas Association relates to the handling of gaseous residues removed from cylinders and neutralized, scrubbed, flared, or vented to the atmosphere, and specifically whether this activity constitutes the management of hazardous waste under the RCRA regulations. EPA does not construe the present regulations as applying to these practices. EPA has prioritized its regulatory efforts regarding hazardous wastes, and concluded that the flaring and venting of hazardous compressed gases or gases that are neutralized or scrubbed prior to their release to the environment does not demand immediate regulatory attention under the hazardous waste regulations. Accordingly, it is the position of the Agency that any gas cylinder handling facility is not subject presently to regulations promulgated under the Resource Conservation and Recovery Act, in the handling, neutralization, scrubbing, flaring or venting of gaseous residues removed from compressed gas cylinders.

The Compressed Gas Association has contended that the Agency lacks jurisdiction under RCRA to regulate the neutralization, scrubbing, flaring or venting of gases removed from cylinders, based on the definition of "solid waste" in section 1004 of RCRA and the legislative history of the statute. In light of the Agency's determination expressed in this letter, that such activities are not covered by today's RCRA regulations, we see no need to resolve the jurisdictional issue at this time. The Compressed Gas Association possesses the right to petition the Court of Appeals for review if and when the Agency asserts jurisdiction under RCRA over these activities in the future.

Sincerely yours,



Christopher J. Capper
Acting Assistant Administrator
for Solid Waste and Emergency Response



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

215 Fremont Street
San Francisco, Ca. 94105

February 25, 1982

Mr. Frank J. Dux
Regulatory Compliance Coordinator
Airco Industrial Gases
575 Mountain Avenue
Murray Hill, NJ 07974

RE: Santa Clara Facility (EPA ID # CAD076311661)

Dear Mr. Dux:

We have reviewed your request for withdrawal of your permit application for the facility referenced above, submitted pursuant to Section 3005 of the Resource Conservation and Recovery Act. In accordance with your request, we are returning the documents which you submitted.

Should it be necessary for you to re-apply for a hazardous waste facility permit, you should contact us for the procedures to be followed.

Sincerely,

A handwritten signature in black ink, appearing to read "William D. Wilson".

William D. Wilson
Toxics & Waste Management Division

Enclosure

DEPARTMENT OF HEALTH SERVICES

2151 BERKELEY WAY
BERKELEY, CA 94704
(415) 540-2043



RECEIVED

CERTIFIED # 295 262 792

OCT 7 1982

October 4 , 1982

Industrial Relations

Mr. Frank J. Dux
Regulatory Compliance Coordinator
Airco Industrial Gases
575 Mountain Avenue
Murray Hill, New Jersey 07974

Dear Mr. Dux:

We are in receipt of your May 24, 1982 response to our May 7, 1982 letter to Mr. Alan Bartholemew of your Santa Clara, CA plant. Please forgive the delay in this response.

We have reviewed the materials which you submitted, including a November 6, 1981 letter to the Compressed Gas Association from Christopher J. Capper, Acting Assistant Administrator for Solid Waste & Emergency Response, U.S. EPA. From Mr. Capper's letter it appears that E.P.A. has approved your request for withdrawal of your RCRA permit application because the activities which you engage in do "not demand immediate regulatory attention under the hazardous waste regulations." The last paragraph of Mr. Capper's letter makes it clear the EPA has chosen to postpone resolution of the question of whether these activities fall within the jurisdiction of RCRA and in the interim period will not assert jurisdiction in this area.

Although E.P.A. has decided to avoid asserting jurisdiction under the RCRA regulations in this area, the activities in question still fall within the jurisdiction of the California Hazardous Waste Control Act & Regulations. Specifically, the operations of the potassium permanganate scrubber (treatment) and the storage of scrubber solution for greater than 60 days (storage).

Please submit a Plan of Correction to this office within 30 days of the date of this letter stating what steps you will take or have taken to address the conditions brought to your attention in our May 7, 1982 Notice of Violation.

Please note that Section 66310 C.A.C. describes the requirements for obtaining a variance from provision of the Hazardous Waste Control Regulations. If you feel that the materials in question would be eligible for such a variance, please complete the enclosed Variance Application and submit it to this office with the Plan of Correction.

Mr. Frank J. Dux
Regulatory Compliance Coordinator
Airco Industrial Gases
Page 2

Please contact Mr. John C. Blasco of this office if you have any questions concerning this matter.

Sincerely,



Charles A. White, P.E.,
Regional Administrator
Hazardous Waste Management Branch

Attachment - Variance Application

cc: Vincent Cancilla, Director
Environmental Health, San Jose

Mr. Paul Blais
RCRA - U.S. EPA

Harold Singer
RWQCB-San Francisco Bay

REQUEST FOR HAZARDOUS WASTE FACILITY PERMIT
VARIANCE OR EXEMPTION

California Department of Health Services
Permits, Surveillance and Enforcement Section
Permit Coordination Unit

I would like to request a variance or exemption from the Hazardous Waste Facility Permit requirements of the California State Department of Health Services.

I am basing my request for a variance on the following checked (X) sections of Title 22, California Administrative Code:

66310(a)(1) The hazardous waste at my facility is insignificant as a potential hazard to humans, domestic livestock or wildlife because of its:

small quantity;

low concentration; and/or

physical or chemical characteristics.

The following is a detailed explanation (including specific names of wastes) of the aforementioned quantities, concentrations and/or characteristics:

The procedures used to handle the aforementioned wastes are as follows:

The specific controls used in handling the wastes to ensure health and environmental protection are as follows:

66310 (a)(2) The hazardous waste at my facility is handled, processed or disposed of pursuant to regulations of another governmental agency:

My firm is regulated by the following agency: _____

The agency's applicable laws and/or regulations may be cited as follows: _____

Please find attached a copy of the applicable laws and regulations, or listed the number and name of the permit issued for my facility by that agency:

I am basing my request for an exemption on the following checked items:

The hazardous waste at my facility is exempt from the permit requirement because:

It is not stored longer than 60 days (on-site facilities only).

It is not stored longer than 72 hours (off-site facilities only).

It is not treated on site.

It is not disposed on site.

The hazardous waste at my facility should be exempt from the permit requirement because my facility is:

A totally enclosed treatment facility.

An elementary neutralization unit.

A Publicly Owned Treatment Works (POTW)

A facility that discharges directly to a POTW.

Other (specify) _____.

I have enclosed a copy of a permit exemption granted for my facility by the U.S. Environmental Protection Agency (mandatory).

I understand that any variance or exemption from the Hazardous Waste Facility Permit requirements of the Department of Health Services, if granted, does not exempt my firm from any other applicable laws and regulations governing the management of hazardous wastes.

I certify that the above information is true, accurate and complete.-

(Signature)

(Title)

(Name of Firm)

(Address of Firm)

(Date)

Interim Status Document No.

(If Applicable)

102-333-9171

LAWRENCE W. BIERLEIN, P.C.

LAW OFFICES
CANAL SQUARE
1034 THIRTY-FIRST STREET, N.W.
WASHINGTON, D.C. 20007

RECEIVED
MAR 22 1983

(202) 542-3250

March 21, 1983

CABLE: OBJECTIVE
TELEX: 89 2520 (WU)
440297 (ITT)

RECEIVED
MAR 21 1983
PAUL C. KRUEGER

Mr. Peter Rogers, Chief
Hazardous Waste Management Branch
Department of Health Services
714 P Street
Sacramento, California 95814

Dear Mr. Rogers:

The Compressed Gas Association represents the producers of a wide range of gases. Many of these are distributed in cylinders, which are constructed and maintained in accordance with detailed regulations of the U.S. Department of Transportation published in 49 CFR Parts 173 and 178. These regulations have been adopted as California law and are administered by the California Highway Patrol.

Cylinders are strongly built and, with proper care, will last indefinitely. They remain the property of the gas supplier, and are reused many times, being returned to the gas supplier for refilling. Under DOT regulations, a cylinder may only be recharged by or with the permission of the cylinder owner (49 CFR 173.301(b)).

One of the primary concerns of safety regulators and our industry is protection of the interior of cylinders from the entry of air, moisture or other contaminants that might cause corrosion or pitting of the interior. Gases distributed in cylinders are operated in a customer's facility with a regulator, and when they are drawn down to a given pressure the regulator stops the flow through the customer's lines. This maintains positive pressure in the cylinder, even though it has been exhausted for all commercial purposes. This retained positive pressure serves to resist the entry of air, moisture, and the like.

Under DOT regulations, containers that are deemed empty but have residue of their former contents must be shipped as if full, with all closures, markings, and labels in place. They also must be shipped with documentation, called a shipping paper under transportation regulations. See 49 CFR 173.29.

Gases shipped in cylinders in California have many purposes, including use in laboratories, hospitals, schools, the electronics industry, construction industries, and the like. For virtually all these

*Chuck Bigelow
J. K. ...*

purposes, high product purity is essential, and as a production process every cylinder is evacuated before it is recharged.

In the refilling process, the residual contents may be vented to the atmosphere, burned in flare stacks, or in the case of certain gases having properties making venting inappropriate, may be run through scrubbers before being released to the atmosphere.

There are three types of scrubbers in use in California facilities. The gas may pass through sodium hypochlorite, potassium permanganate, or activated charcoal. (See the attached sketches, photograph, and brochures for such scrubbing mechanisms.) Once the effectiveness of the scrubber material has diminished, it is discarded. If this discarded material meets hazardous waste characteristics, the facility complies with all generator requirements for this material, including packaging, marking, manifesting and record keeping.

Gases handled through scrubbers in California include amine mixtures, ammonia, arsine^{al}, boron trichloride^{al}, boron trifluoride^{al}, chlorine^{al}, dichlorosilane, ethylene oxide^{al}, hydrogen chloride^{al}, hydrogen fluoride, hydrogen sulfide^{al}, isocure, nitric oxide^p, nitrogen dioxide^p, nitrous oxide^p, phosphine^p, phosgene^p, silane, silicon tetrafluoride^{al}, and sulfur dioxide.

There are eight cylinder filling facilities in California operating such scrubbers, and we estimate that 65,000 cylinders are recharged in this process annually.

The scrubbers are operated under the jurisdiction of various air quality regulatory agencies in California. A sample permit applicable to one of the scrubbers is attached. Under this permit's requirements, reports must be filed annually regarding scrubber activity and providing emission summaries.

Recharging of cylinders is part of the gas production process. This is a specialized industry and, because it is capital-intensive, there are no amateurs involved. Each filler is handling its own cylinders or those of other similarly qualified companies with which it has written interchange agreements, in accordance with DOT regulations on cylinder recharging.

This scrubber activity is part of the process of cylinder charging, and we do not consider the residues removed to be wastes, as that term is used in hazardous waste legislation. There would seem to be a stronger parallel between these scrubber mechanisms and vent stacks from process equipment, than typical waste streams of material which are discarded or abandoned.

26133(c)

footnote

al = ammonia

p = permitted

al = listed

Furthermore, given the limited number of facilities, their professional capabilities, their safety record, and the applicability of air quality control jurisdiction, we believe hazardous waste treatment facility permits are unnecessary for the scrubbers described above. A policy decision is requested, therefore, to the effect that these are not hazardous waste treatment facilities, and that hazardous waste treatment permitting for scrubbers is not required.

Please let me know if there are any questions on this material or if there is any further information you need to make this policy determination. If a visit to a representative facility is necessary, Mr. Rouse indicated that this can be arranged at one of his company's plants.

Very truly yours,



Lawrence W. Bierlein

Attachments