UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
726 MINNESOTA AVENUE
KANSAS CITY, KANSAS 66101

OFFICE OF
THE REGIONAL ADMINISTRATOR

AUG 27 1991

Mr. Raymond A. Guehne, President
National Electric Service Company
321 Lombard Street
St. Louis, Missouri 63102

Dear Mr. Guehne:

The letter you wrote to President George Bush regarding the Missouri Electric Works (MEW) superfund site has been referred to this office for response.

The MEW has been in operation since approximately 1954 and it has repaired, remanufactured and resold oil-filled electrical equipment containing polychlorinated biphenyls (PCBs), engaging in more than 23,000 transactions that potentially involved PCBs. The soil and groundwater are extensively contaminated with PCBs. The Environmental Protection Agency (EPA) notified customers of MEW that sent electrical equipment to the site for repair or resale of their potential liability for cleanup costs. A group of approximately 200 potentially responsible parties (PRPs) formed a steering committee and voluntarily agreed to perform the Remedial Investigation and Feasibility Study which was completed in 1990. EPA issued a Record of Decision and in December 1990, issued Special Notice Letters to all the PRPs to initiate negotiations for conducting or financing the implementation of the remedial action at the site.

During this time, in an effort to address concerns raised by PRPs, EPA has reviewed documentary evidence submitted by PRPs purporting to show that equipment they sent to the site could not have contributed to the contamination. Those parties who clearly showed, for example, that the transformers contained no oil or that the oil did not have detectable levels of PCBs, were removed from the PRP list. Approximately, 250 parties have been removed from the PRP list as a result of this process.

Other PRPs have presented legal arguments as to why they are not liable for the contamination at the site. Briefly stated, these arguments are (1) that the repair transactions were authorized under the Toxic Substances Control Act (TSCA), and accordingly, could not have constituted "arranging for disposal," within the meaning of Section 107 of the Comprehensive Environmental Response Compensation and Liability Act of 1980 (Superfund) (CERCLA), 42 U.S.C. 9607; and (2) that sending equipment to the site for "resale" could not have constituted "arranging for disposal." This letter will address both these issues.

A primary purpose of the PCB regulatory program under TSCA is to minimize or prevent the risk of future PCB contamination that would otherwise require remediation under CERCLA. With this purpose in mind, EPA first promulgated regulations pursuant to TSCA in 1979. These regulations were further enhanced in 1990, by the establishment of a "cradle to grave" tracking system for PCB waste similar to the tracking system under the Resource Conservation and Recovery Act (RCRA) for hazardous wastes. Under this regulatory scheme, the question of whether a particular piece of oil-filled electrical equipment is in "use" is relevant only to the applicability of the TSCA recordkeeping, storage, disposal and other management requirements for that piece of equipment.

The question of whether equipment is still in "use" has no bearing on whether a person has "arranged for disposal" of a hazardous substance under Section 107 of CERCLA and is thus liable for cleanup costs. "Disposal" is defined in Section 101(29) of CERCLA, 42 U.S.C. 9601(29) to include the "discharge, deposit, injection, dumping, spilling, leaking, or placing" of a hazardous substance into the environment. The PCB contamination found at MEW resulted from such "discharges, deposits, injection, dumping, spilling, leaking or placing" of oil contaminated with PCBs into the environment during the process of repairing oil-filled electrical equipment. Because such disposal was a foreseeable and inherent part of the repair process, liability under CERCLA attaches (see U.S. v. Aceto Agricultural Chemical Corp., 72 F.2d 1373 (8th Cir. 1989).

The fact that TSCA regulations apply only to equipment containing greater that 50 parts per million PCBs is also immaterial to establishing liability under CERCLA. PCBs are a hazardous substance pursuant to Section 101(14) of CERCLA, regardless of their concentration (see Amoco Oil Co. v. Borden, Inc., 889 F.2d 664 (5th Cir. 1989). One reason for this is that even relatively low levels of PCBs can contribute to the contamination due to the tendency of PCBs to adhere to soils and thus accumulate in the environment with repeated spills.

Under CERCLA, EPA must address contamination resulting from past spills. In contrast, under TSCA, EPA is attempting to minimize the potential for future contamination. With these different objectives in mind, EPA's position with regard to "disposal" as it relates to the repair of electrical equipment is entirely consistent with the remedial purpose behind CERCLA and is not inconsistent with the possibility that the transaction may have been authorized under TSCA. It must also be noted that most of the repair activity at the MEW site occurred before 1976, when TSCA was enacted, and before the regulations discussed above were promulgated in 1979 and 1990.

With regard to the resale issue, EPA believes that transactions involving the sale of transformers to MEW for resale can constitute arranging for disposal. In response to previous inquiries, EPA has stated that this is a fact-specific question. During our informal review process discussed above, the Agency looked at several factors in an effort to determine whether "disposal" may have occurred, including whether the equipment needed repair, whether repairs were in fact performed and the price of the equipment. The facts surrounding each transaction vary substantially. In many cases, disposal occurred during the performance of necessary repairs. In other cases, the equipment was junked because it was beyond repair while other pieces of equipment which could not be sold were stored, many of them leaking, in an open field. We are still working toward a settlement for performance of the Remedial Design/Remedial Action at the site. Accordingly, no cost recovery or other enforcement action has been filed by EPA against these PRPs.

The EPA recognizes that the contamination at this site may result in financial hardship for many of the PRPs. In an effort to address this, the Region has been negotiating and will recommend to EPA Headquarters and the Department of Justice that EPA provide mixed funding for the performance of the Remedial Design/Remedial Action pursuant to Section 122(b). The Region is also recommending a de minimis settlement pursuant to Section 122(g) for which a significant majority of the PRPs will be eligible. All PRPs will be provided the opportunity to participate in this settlement.

Sincerely,

Morris Kay
Regional Administrator