TELEFAX

(7)

BLANK, RIGSBY & MEENAN, P.A.
204 South Monroe Street
Tallahassee, Florida 32301
Fax: (904) 681-6713

TO: Carlos Rivero-deAguilar CLIENT: 82.00

FROM: Geoff Smith

DATE: August 5, 1996 TIME: _____

FAX NO. (561) 681-6755 PHONE NO. _____

OPERATOR: Becky

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BLANK, RIGSBY & MEENAN, P.A.
ATTORNEYS AT LAW

Office Address:
204 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 681-6710

Mailing Address:
POST OFFICE BOX 11068
TALLAHASSEE, FLORIDA 32302-3068
FACSIMILE (904) 681-6713

F. PHILIP BLANK*
WENDY A. DELVECCHIO
A. KENNETH LEVINE
THOMAS R. McSWAIN
TIMOTHY J. MEENAN
R. TERRY RIGSBY
TIMOTHY G. SCHOENWALDER
GEOFFREY D. SMITH

LEGAL ASSISTANT
JOHN A. DICKSON, J.D.

*Florida Bar Certified in Health Law

August 5, 1996

Carlos Rivero-deAguilar
Director of District Management
Florida Department of Environmental Protection
Southeast Florida District
Post Office Box 15425
West Palm Beach, Florida 33416

Via Facsimile
(561) 681-6755

Re: Proposed Settlement of Rinker Materials Corporation, Soil Thermal Treatment Facility, OGC File No. 96-2058

Dear Mr. Rivero-deAguilar:

I have been retained by Rinker Materials Corporation ("Rinker") concerning the issues raised in a proposed "short form Consent Order" and settlement offer from the Department dated July 23, 1996. The Department proposes a civil penalty plus costs totaling $8,180.00 for a minor clerical paperwork mistake which was self reported by Rinker to the Department and was promptly corrected when discovered. While Rinker's long standing company policy is to work cooperatively with the Department, we strongly believe that a civil penalty under the circumstances of this case is entirely inappropriate and will serve no useful regulatory purpose. The proposed penalty is inconsistent with the Department's published permit modification rules, the civil penalty policy, and the "Incentives for Self-Evaluation by the Regulated Community" issued by Secretary Wetherell earlier this year. In light of the unique and extenuating circumstances of this case, we request that the proposed civil penalty be withdrawn.

The Underlying Facts

This case concerns Rinker's soil thermal treatment facility which is operated in conjunction with the company's cement mill in Dade County. In accordance with Chapter 62-775, Florida Administrative Code, Rinker notified the Department in 1991 that it would operate its soil thermal treatment facility in compliance with the General Permit requirements. The department approved the use of the General Permit for a five year duration commending April 1991.

In the fall of 1993, Rinker sought Department approval for a modification of its soil thermal treatment operations. A new General Permit fee of $500 was submitted along with the required General Permit notice and modification documents. On November 22, 1993, the Department approved the requested modifications and re-issued the General Permit. Rinker's personnel assumed that the re-issued General Permit would remain in effect for the full 5 years, and the information was accordingly entered into the company's permit and regulatory tracking system to renew the General Permit again in 1998.

In late May 1996, Rinker, through its own due diligence, discovered that the expiration date of the General Permit was April 4, 1996, rather than 1998, as previously believed. Rinker promptly self-reported this to the Department, assembled the necessary documentation to submit a new notice for use of General Permit, and subsequently received the new General Permit, June 7, 1996.

At all times, Rinker has maintained compliance with General Permit requirements. The Department's proposed civil penalty is for the temporary lapse in the General Permit notification due to the clerical mistake described above. Rinker's operations were subject to Department inspections during this time and no violations of General Permit requirements were identified. Rinker received no economic benefit from the temporary lapse in the General Permit notification.

The Permit Modification Rule: Rinker's General Permit Should Have Been Extended as Effective Through 1988

When Rinker modified its General Permit in 1993, it paid a full permit application fee, and assumed that the request would be processed by the Department for a new 5-year permit term. The Department's permit rules support Rinker's interpretation. Rule 62-4.050(7), Florida Administrative Code, provides:

> Modifications to existing permits proposed by the permittee which require substantial changes to the existing permit or require substantial evaluation by the Department of potential impacts of the proposed modification ***shall require the same fee as a new application for the same time duration . . . .***

Rule 62-4.080(3), Florida Administrative Code, also supports Rinker's assumption that the modification request in 1993 would act as an extension of the General Permit for the full five year period. If the permit was to remain in effect for only two years, Rinker would have requested a lesser "minor modification" permit fee in accordance with Rule 62-4.050(4)(r), Florida Administrative Code.

Given the fact that a full permit fee was paid and the fact that Rinker's operations were subject to a complete General Permit review in November 1993, the Department's rules would seem

to authorize the full 5 year duration for the modified permit. Had Rinker noticed the shorter duration specified on the General Permit letter issued by the Department at the time, a request would likely have been made for the permit to be extended to the full 5 years. In any event, imposition of civil penalties does not seem appropriate under these circumstances.

The Department's Civil Penalty Policy Does Not Support Imposition of Civil Penalties Under the Circumstances of this Case

The legislative purpose of the Department's authority to seek civil penalties is set forth in Section 403.161(6), Florida Statutes, which provides:

> It is the intent of the legislature that the civil penalties and criminal fines ... be of such amount as to ensure immediate and continued compliance with this section.

In implementing this statutory authority, the Department's "Settlement Guidelines for Civil Penalties" provide the prosecutorial discretion to waive civil penalties where the statutory purpose ("ensuring compliance") would not be served. This is certainly a situation where an imposition of an $8,180 settlement is not necessary to "ensure immediate and continued compliance". Rinker voluntarily ***self reported*** the clerical mistake in its tracking of the General Permit expiration date. Rinker needed no prompting or punitive measures to ensure compliance with the Department's requirements: as soon as the problem was discovered, it was immediately reported to the Department and was corrected.

The Department's civil penalty policy is designed to calculate consistent penalty settlements which are appropriate for the magnitude and seriousness of the alleged violation of law. The civil penalty matrix categorizes violations according to "the potential for environmental harm" and "the extent of deviation from requirements." (Major- Moderate-Minor) In calculating a penalty in this case, the Department staff correctly identified this as a situation which warranted only a "Minor/ Minor" penalty assessment. Under the civil penalty matrix such a minor, paperwork type violation, should yield a penalty of no more than $100 to $199. By contrast a "Major/Major" violation would yield a penalty of $8,000 to $10,000. However, because of the staff's decision to use "multi-day penalties", the end result in this case is an $8,000 penalty which would fall into the most serious matrix range for a single day "Major/Major" violation. Surely, this result is not warranted under the circumstances.

Assessment of multi-day penalties is not appropriate in this case. The use of multi-day penalty calculations is entirely discretionary, and is normally applied only where the amount of penalty under the matrix range is considered too low to achieve the goal of ensuring immediate and continued compliance. The Department's civil penalty policy provides:

> *Multi-day penalties are appropriate when daily advantage is being gained by the violator for an ongoing egregious violation; or where the violator knew or should have known of the violation after the first day it occurred and either failed to take action to mitigate or eliminate the violation or took action that resulted in the violation continuing; or when economic benefit is being gained on a daily basis.*

None of these stated reasons for using a multi-day penalty assessment applies in this case. Rinker gained no daily advantage from the clerical oversight; the clerical mistake cannot be characterized as an "ongoing egregious violation;" the clerical lapse in the General Permit was discovered and immediately self reported by Rinker; and Rinker gained absolutely no economic benefit.

For the reasons discussed throughout this letter, we request that the Department exercise its discretion and seek no penalties in this matter. However, if the Department determines that some penalty assessment should be made, then the magnitude and seriousness of an honest paperwork/ clerical error should be categorized in the "Minor/Minor" matrix range with a penalty of no more than $199.

The Proposed Civil Penalty Assessment is Not Consistent with the Department's Policy on Incentives for Self-Evaluation by the Regulated Community"

In March 1996, Secretary Wetherell approved the Department's policy statement entitled "Incentives for Self Evaluation by the Regulated Community." (Copy enclosed) This policy is designed to *"enhance protection of human health and the environment by encouraging regulated entities to voluntarily disclose, correct and prevent violations of Florida's environmental requirements"*. The policy specifically provides that civil penalties should not be imposed in situations where a company, through exercise of due diligence, discovers that a violation of environmental requirements has occurred, and voluntarily self reports and corrects the problem. The situation in this case falls squarely within the spirit of this policy to encourage self reporting and voluntary compliance efforts by regulated industry.

It should be noted that the Department's policy for "self reporting" would waive civil penalties in many instances where far more egregious violations of environmental protection standards have occurred (even violations which have resulted in violation of air or water quality standards). In this case, Rinker at all times maintained full substantive compliance with the requirements of Chapter 62-775, Florida Administrative Code, and no violation of air or water quality occurred. The only "violation" was the clerical lapse of a General Permit for a short period due to an honest, good faith, mistake in tracking.

Conclusion

Rinker strongly urges that the decision to seek a civil penalty assessment in this matter be reconsidered. Under the circumstances, no useful purpose would be served by the imposition of civil penalties; particularly the excessive penalty amount presently proposed. In addition to the purely monetary considerations, Rinker is also deeply concerned with the stigma attached to being identified as a "violator" of the state's environmental protection requirements. Rinker strives to maintain its reputation as a responsible corporate citizen that voluntarily complies with environmental regulations. This reputation is undeservedly tarnished when the company is deemed a "violator" who must pay punitive fines in order to ensure compliance with the law.

As always Rinker pledges its full cooperation with Department to bring this matter to a close. Please consider our request and let me know your response. I am available to discuss any questions, comments or concerns you may have. Thank you for your consideration.

Sincerely,

Geoffrey D. Smith

GDS\bss

cc: Mike Vardeman, Rinker Materials Corp.
Katherine Anderson, DEP-OGC

Enclosure

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State of Florida
Department of Environmental Protection
Administrative Directive

DEP
Effective:
March 31, 1996
Approved

INCENTIVES FOR SELF-EVALUATION BY THE REGULATED COMMUNITY

A. PURPOSE

This policy is designed to enhance protection of human health and the environment by encouraging regulated entities to discover voluntarily, disclose, correct and prevent violations of Florida environmental requirements.

B. DEFINITIONS

For purposes of this policy, the following definitions apply:

"Environmental Audit" is a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements.

"Due Diligence" encompasses the regulated entity's systematic efforts, appropriate to the size and nature of its business, to prevent, detect and correct violations through al of the following:

a) Compliance policies, standards and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits and other sources of authority for environmental requirements;

b) Assignment of overall responsibility for overseeing compliance with policies, standards, and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation;

c) Mechanisms for systematically assuring that compliance policies, standards and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluation of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;

d) Efforts to communicate effectively the regulated entity's standards and procedures to all employees and other agents;

Received from Larry Morgan, DEP, on March 1, 1996

e) Appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards and procedures, including consistent enforcement through appropriate disciplinary mechanisms; and

f) Procedures for the prompt and appropriate correction of any violations, and any necessary modifications to the regulated entity's program to prevent future violations.

"Environmental audit report" means the analysis, conclusions, and recommendations resulting from an environmental audit, but does not include data obtained in, or testimonial evidence concerning, the environmental audit.

"Gravity-based penalties" are that portion of a penalty over and above the economic benefit., i.e., the punitive portion of the penalty, rather than that portion representing a defendant's economic gain from non-compliance.

"Regulated entity" means any entity, including a federal, state or municipal agency or facility, regulated under federal environmental laws.

C. INCENTIVES

1) No Gravity-Based Penalties: Where it is established that all of the conditions of Section D of the policy have been satisfied, DEP will not seek gravity-based penalties for violations of Florida environmental requirements.

(2) No Routine Request for Audits: DEP will not request or use an environmental audit report to initiate a civil or criminal investigation of the entity. For example, DEP will not request an environmental audit report in routine inspections. If the Agency has independent reason to believe that a violation has occurred, however, DEP may seek any information relevant to identifying violations or determining liability or extent of harm.

D. CONDITIONS

1) Systematic Discovery: The violation was discovered through:

a) an environmental audit; or

b) an objective, documented, systematic procedure or practice reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations. The regulated entity must provide accurate and complete documentation to the Agency as to how it exercises due diligence to prevent, detect and correct violations according to the criteria for due diligence outlined in Section B. DEP may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made publicly available.

2) Voluntary Discovery: The violation was identified voluntarily, and not through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement. For example, the policy does not apply to:

a) emissions violations detected through a continuous emissions monitor (or alternative monitor established in a permit) where any such monitoring is required;

b) violations of National Pollutant Discharge Elimination System(NPDES) discharge limits detected through required sampling or monitoring;

c) violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement.

3) Prompt Disclosure: The regulated entity fully discloses a specific violation within 10 days (or such shorter period provided by law) after it has discovered that the violation has occurred, or may have occurred, in writing to DEP;

4) Discovery and Disclosure Independent of Government or Third Party Plaintiff. The violation must also be identified and disclosed by the regulated entity prior to:

a) the commencement of a federal, state or local agency inspection or investigation, or the issuance by such agency of an information request to the regulated entity,

b) notice of a citizen suit;

c) legal complaint by a third party;

d) the reporting of the violation to DEP (or other government agency) by a "whistleblower" employee, rather than by one authorized to speak on behalf of the regulated entity; or

e) imminent discovery of the violation by a regulatory agency;

5) Correction and Remediation: The regulated entity corrects the violation as expeditiously as possible, certifies in writing that violations have been corrected, and takes appropriate measures as determined by DEP to remedy any environmental or human harm due to the violation. Where appropriate, DEP may require that to satisfy conditions 5,6 and 8, a regulated entity enter into a written agreement, administrative consent order or judicial consent decree, particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required;

6) Prevent Recurrence: The specific violation (or closely related violation) has not occurred previously within the past three years at the same facility, or is not part of a series of federal, state or local violations by the facility's parent organization (if any), which have occurred within the past five years. For the purpose of this section, a violation is:

a) any violation of federal, state or local environmental law identified in a judicial or administrative order, consent agreement or order, or notice of violation, conviction or plea agreement; or

b) any act of omission for which the regulated entity has previously received a penalty from DEP or a local agency.

8) Other Violations Excluded: The violation is not one which (I) resulted in serious actual harm, or may present imminent and substantial endangerment to, human health or the environment, or (ii) violates the specific terms of any judicial or administrative order, or consent agreement.

9) *Cooperation: The regulated entity cooperates as requested by DEP and provides* such information as is necessary and requested by DEP to determine applicability of this policy. Cooperation includes, at a minimum, providing all requested documents and access to employees and assistance in any further investigations into the violation and other related compliance problems of the regulated entity.

E. ECONOMIC BENEFIT:

DEP will retain its full discretion to recover any economic benefit gained as a result of noncompliance to preserve a "level playing field" in which violators do not gain a competitive advantage over regulated entities that do comply. However, DEP may forgive the entire penalty for violations which meet conditions 1 through 9 in section D and, in the Agency's opinion, do not merit any penalty due to the insignificant amount of any economic benefit.

F. APPLICABILITY

1) This policy applies to violations under all of the Florida environmental statutes that DEP administers, and supersedes any inconsistent provisions in penalty or enforcement policies.

2) To the extent that existing DEP enforcement policies are not inconsistent, they will continue to apply in conjunction with this policy.

3) This policy sets forth factors for consideration that will guide the Agency in the exercise of its prosecutorial discretion. It states the Agency's views as to the proper allocation of its enforcement resources. The policy is not final agency action, and is intended as guidance. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties.

4) This policy should be used whenever applicable in settlement negotiations for both administrative and civil judicial enforcement actions. It is not intended for use in pleading, at hearing or at trial. The policy may be applied at DEP's discretion to the settlement of

administrative and judicial enforcement actions instituted prior to, but not yet resolved, as of the effective date of this policy.

5) This policy does not apply to any deliberate and knowing acts or decisions to violate the law made by any company or individual.

C. PUBLIC ACCOUNTABILITY

1) Within 3 years of the effective date of this policy, DEP will complete a study of the effectiveness of the policy in encouraging:

a) changes in compliance behavior within the regulated community;

b) prompt disclosure and correction of violations, including timely and accurate compliance with reporting requirements;

c) corporate compliance programs that are successful in preventing violations.

2) DEP will make publicly available the terms and conditions of any compliance agreement reached under this policy, including the nature of the violation, the remedy, and the schedule for returning to compliance.

II. EFFECTIVE DATE

This policy is effective thirty days from today.