

RECEIVED

STATE OF WASHINGTON DEPARTMENT OF ECOLOGY

IN THE MATTER OF:

SITE: USG ACOUSTICAL
PRODUCTS COMPANY
PUYALLUP SITE

No. 86-S130

CONSENT ORDER

I.
JURISDICTION

A. This Consent Order is issued pursuant to the authority vested in the State of Washington, Department of Ecology (Ecology) by:

Chapter 90.48 RCW, the Water Pollution Control Act;

Chapter 70.105 RCW, Hazardous Waste Management;

B. In 1982, United States Gypsum Company, the predecessor of the respondent herein, USG Acoustical Products Company ("APCO"), voluntarily approached Ecology with regard to cleaning up two sites owned by the company, the Highway 99 Site in Tacoma and the Puyallup Site in Puyallup. As a result of discussions between Ecology and the company, on August 17, 1984, Ecology issued Order No., DE 84-506 to United States Gypsum Company, the former owner of the site and an affiliate of APCO (both companies are now subsidiaries of a parent USG Corporation due to a corporate reorganization) setting out the terms and conditions governing cleanup of the two sites.

C. On the basis of the results of the testing and analysis described in the Statement of Facts, infra, and Ecology files and records, Ecology has determined the disposal or management practices at the APCO Puyallup site constitute a release of hazardous substances, the release is causing ground water and soil contamination, and the release will continue to cause contamination of ground water and surface water unless the release is abated. Ecology has also determined:

1. APCO is a person responsible for the site within the meaning of Chapter 90.48 RCW;
2. The actions to be taken pursuant to this Order are reasonable and necessary to protect the public health or welfare or the environment;
3. A reasonable time for beginning and completing the actions required by this Order has been provided for; and
4. APCO has agreed to undertake the actions specified in the Order.

II.

PARTIES BOUND

This Consent Order shall apply to and be binding upon APCO and Ecology, their agents, successors, and assignees, APCO's predecessor and affiliate companies, and upon all persons, contractors and consultants acting under or for either APCO or Ecology or both. APCO agrees both to undertake all actions required of them by the terms and conditions of this Consent Order

and not to contest state jurisdiction regarding this Consent Order. Nothing in this consent order is intended to affect the liability of the previous owner of the site, United States Gypsum Company.

III.

STATEMENT OF PURPOSE

A. In entering into this Consent Order, the mutual objective of Ecology and APCO is to provide a framework for insuring decontamination of property owned by APCO near Puyallup, Washington, and to prevent or mitigate the release of hazardous substances from property and/or contamination of the waters of the state.

B. APCO neither admits nor denies the violations of law charged by Ecology but desires to protect its good name in the community and wishes to avoid the time and expense of litigation. To accomplish these objectives and to resolve the matter constructively and without litigation, APCO consents to undertake the actions required by this Order.

IV.

STATEMENT OF FACTS

A. The project area in this matter (the "Site") is known as the USG Acoustical Products Company Puyallup site, and is situated near Puyallup, Washington.

B. RCW 90.48.020 defines underground waters as waters of the state. RCW 90.48.080 provides that it shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharge into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the Director.

On August 17, 1984 the Department of Ecology issued Order No. DE 84-506 to APCO's predecessor, ~~USG Corporation (then U.S. Gypsum Corporation)~~ ^{UNITED STATES GYPSUM COMPANY} in *Whe* order that two (2) sites, the Highway 99 site in Tacoma and the Puyallup site in Puyallup, would be decontaminated and monitored per Departmental approval.

This Order is issued so that the intent of the initial Order, which is hereby incorporated by reference, may be carried to completion with respect to the Puyallup site.

Order DE 84-506 issued to APCO's predecessor, required submission of a post-cleanup site monitoring plan, which is hereby incorporated by reference. This plan, submitted by APCO's predecessor and approved by Ecology, became incorporated into that Order. A provision of the post-cleanup site monitoring plan is that the cleanup level for arsenic in the soil and ground water at the Puyallup site and Highway 99 site was set at 0.5 ppm.

Ground water data collected by APCO over the period following APCO's voluntary waste removal (from June 1985 through April 1986) indicate that

the 0.5 ppm arsenic level has not been met at some of monitoring wells at the Puyallup site. In particular, the shallow well at well cluster 3 (well P3-1) has produced 19 ground water samples which average over 30 ppm, a level which exceeds the 5 ppm dangerous waste designation level specified in WAC 173-303-090(8). It is to be noted that the general area surrounding the P3 wells is the area which Ecology granted APCO's petition for approval to forego compliance with the 0.5 ppm arsenic soil removal cleanup level set by the order, since the soil surrounding the P3 wells was heavily infiltrated with ground water, making further excavation difficult.

Based on the above facts, Ecology has determined the release and threat of release of hazardous substances from the Site requires action to protect the public health and welfare and the environment. Ecology has also determined in order to protect public health, welfare and the environment, it is necessary that remedial measures and action be taken to abate the release or threat of release of hazardous substances from the Site into the environment.

V.

WORK TO BE PERFORMED

1. Well cluster P2 (1,2 and 3), P3 (1,2 and 3) shall be sampled monthly for total and dissolved arsenic until arsenic levels have stabilized at all wells below the 0.5 ppm limit during six consecutive monthly sample rounds, at which time sampling may be reduced or halted per Ecology review.

2. Within 20 days of the execution of this Consent Order, APCO shall submit a comprehensive summary of relevant site analyses completed to date.
3. If the above existing data are not sufficient to characterize the three dimensional extent of ground water and soil borne arsenic contamination in the vicinity of well cluster P3 (as decided by APCO or Ecology in conformity with generally accepted hydrogeologic engineering principles) then APCO shall submit, within 30 days of the decision, a sampling plan designed to provide the necessary missing characterization data. The plan shall include a schedule for work to be performed therein, including a schedule for submission of results to Ecology.
4. Work per the above plan (if any) shall commence per the plan's schedule immediately, pending Ecology written approval of the plan.
5. Within 30 days of execution of this Consent Order, APCO shall begin sampling Puyallup River water and sediment. River and sediment samples shall be taken at three locations on each test date; one upstream, one downstream and one adjacent to well cluster P3 at the site. River water sampling will occur twice per month for a period of three months. Sediment samples shall be taken once per month for a period of three months, at the sediment surface and at three feet in depth for each location.
6. APCO shall make the results of all sampling and/or tests or other data generated by APCO, or on APCO's behalf, with respect to the implementation

of this Consent Order available to Ecology and shall submit these results in progress reports as described in Parts IX and X of this Consent Order. Ecology will make available to APCO the results of any sampling and/or tests or other data similarly generated by Ecology.

7. At the request of Ecology, APCO shall collect split or duplicate samples in connection with any testing performed pursuant to the implementation of this Consent Order. APCO shall notify Ecology 48 hours in advance of any sample collection activity.
8. Ecology will review Puyallup River water and sediment sample results, APCO existing data summary and additional sampling plan (if any) and data resulting from execution of the plan. If Ecology determines that an action level of contamination remains in the soil or ground water in the vicinity of well cluster P3 (Action level determination will be based on degree of residual contamination and ability of the site to gain compliance with the original order. River water and sediment arsenic levels will also factor into the action level determination), then APCO will be so notified in writing. Ecology will also notify APCO if no action level exists.
9. Within (60) days of receipt of notification that an action level contamination does exist APCO shall submit a Remedial Action Plan to Ecology which proposes treatment or removal of the residual contamination. The plan shall designate any facilities APCO proposes to use for off-site storage, treatment or disposal of materials from the site.

10. Ecology shall review and approve the Remedial Action Plan. APCO shall submit a revised plan within 20 days of Ecology's written request for such revision. APCO shall commence execution of the plan, per the plan's schedule, immediately upon receipt of Ecology's written request the plan be executed.

VI.

DESIGNATED PROJECT COORDINATORS

- A. APCO has designated as its "owner's Representative" with respect to the subject matter of this Consent Order the following:

Frank P. May, Manager, Corporate Environmental Services
USG Corporation
101 S. Wacker Drive
Chicago, IL 60606
(312) 321-3770

The Owner's Representative shall have general responsibility for overseeing the implementation of this Consent Order for APCO.

- B. In addition, the parties have each designated a Project Coordinator who shall be responsible for overseeing the implementation of this Consent Order. The Ecology Project Coordinator will be Ecology's designated representative for the project.

The Project Coordinator for Ecology shall be:

Dom Reale
Commencement Bay Project Engineer
State of Washington
Department of Ecology
7272 Cleanwater Lane, LU-11
Olympia, Washington 98504-6811
(206) 753-2353

The Project Coordinator for APCO shall be:

Stanley J. Oleksy
Technical Manager
Corporation Environmental Services
USG Corporation
101 S. Wacker Drive
Chicago, IL 60606
(312) 321-3769

C. To the maximum extent possible, communications between APCO and Ecology and all documents, including reports, approvals and other correspondence concerning activities performed pursuant to the terms and conditions of this Consent Order shall be directed to the Project Coordinator for Ecology and to both the Owner's Representative and the Project Coordinator for APCO.

D. Either party may change their respective Project Coordinators and APCO may change its Owner's Representative by notifying the other party, in writing, at least ten calendar days prior to the change.

VII.

ACCESS

Ecology or any state authorized representative shall have the authority to enter and freely move about all property at the Site at all reasonable times for the purposes of, inter alia: inspecting records, operation logs, and contracts related to the Site; reviewing the progress in carrying out the terms of this Consent Order; conducting such tests as the state or the project coordinator may deem necessary; using a camera, sound recording, or other documentary type equipment; and verifying the data submitted to Ecology by APCO. APCO shall permit such persons to inspect and copy all records, files, photographs, documents, and other writings, including all sampling and monitoring data, in any way pertaining to work undertaken pursuant to this Consent Order.

VIII.

PERFORMANCE

All response work performed pursuant to this Order shall be under the direction and supervision of a qualified professional engineer or certified geologist with experience and expertise in hazardous waste site cleanup. APCO shall notify Ecology as to such engineer(s) or geologist(s), and of

any contractors and subcontractors to be used in carrying out the terms of this Order, in advance of their involvement at the Site.

IX.

DATA REPORTING/AVAILABILITY, SAMPLING

APCO shall submit reports summarizing the data for requirements cited in the "Work to be Performed" section above to Dom Reale at Southwest Regional Office of Ecology.

APCO shall make the results of all sampling and/or tests or other data generated by APCO, or on APCO's behalf, with respect to the implementation of this Consent Order available to Ecology and shall submit these results in progress reports as described in paragraph X of this Consent Order. Ecology will make available to APCO the results of any sampling and/or tests or other data similarly generated by Ecology.

At the request of Ecology, APCO shall allow split or duplicate samples to be taken by Ecology and/or its authorized representatives, or any samples collected by APCO pursuant to the implementation of this Consent Order. APCO shall notify Ecology 48 hours in advance of any sample collection activity.

X.

PROGRESS REPORTS

APCO shall submit to Ecology written monthly progress reports which describe the actions they have taken during the previous month to implement the requirements of this Order. Progress reports shall also describe the activities scheduled to be taken during the next month. All progress reports shall be submitted by the tenth day of the month after the effective date of this Order. The progress reports shall include a detailed statement of the manner and extent to which the requirement and time schedules set out in the Order are being met. Unless otherwise specified, progress reports and any other documents submitted pursuant to this Order shall be sent by certified mail, return receipt requested, and addressed to:

Dom Reale
Department of Ecology
7272 Cleanwater Lane, LU-11
Olympia, Washington 98504-6811

XI.

CONFIDENTIAL INFORMATION

APCO may assert documents or information provided pursuant to this Order are confidential, if appropriate, pursuant to RCW 43.21A.160. Such an assertion shall be adequately substantiated when the confidentiality claim is made. Analytical data shall not be claimed as confidential by APCO.

Information determined to be confidential by Ecology will be afforded the protection specified by law. If no such claim accompanies the information

submitted to Ecology, it may be made available to the public by Ecology without further notice to APCO.

XII.

RETENTION OF RECORDS

APCO shall preserve, during the pendency of this Order and for ten (10) years from the date of issuance of this Order, all records and documents in their possession, or in the possession of their employees, agents, or contractors relevant to the implementation of this Order despite any document retention policy to the contrary. Upon request of Ecology, APCO shall make all non-archived records available to Ecology within 24 hours and allow access for review. All archived records shall be made available to Ecology within a reasonable period of time.

XIII.

INDEMNIFICATION

APCO agrees to indemnify and save and hold Ecology, its agents and employees harmless from any and all claims or causes of action arising from or on account of acts or omissions of APCO, its officers, employees, agents, or contractors in entering into and implementing this Order; provided, however, that APCO shall not indemnify Ecology nor save nor hold its employees and agents harmless from any claims or causes of action arising out of the acts or omissions of Ecology, or the employees and agents of Ecology in implementing the activities pursuant to this Order.

XIV.

RESOLUTION OF DISPUTES

If APCO objects to any Ecology notice of disapproval, proposed modification, or any other decision made pursuant to this Consent Order, it shall notify Ecology in writing of its objections within fourteen (14) days of receipt of such notice. Thereafter the parties shall confer in an effort to resolve the dispute. If agreement cannot be reached on the dispute within fourteen (14) days of receipt by Ecology of such objections, the state shall promptly provide a written statement of its decision and the reasons therefor to APCO.

The decision of Ecology pursuant to this dispute resolution procedure shall not be appealable pursuant to Chapter. 43.21B RCW to the Pollution Control Hearings Board. However, either party may commence action in Superior Court of the State of Washington, to enforce the terms of this Order. The parties stipulate venue for any such action shall lie in Thurston County Superior Court, Olympia, Washington.

XV.

ENDANGERMENT

In the event Ecology determines or concurs in a determination by another local, state, or federal agency that APCO's activities implementing or in noncompliance with this Order, or any other circumstances or activities, are creating or have the potential to create a danger to the health or welfare of the people on the Site or in the surrounding area or to the

environment, Ecology may order APCO to stop further implementation of this Order for such a period of time as needed to abate the danger or may petition a court of competent jurisdiction for such an Order. During any stoppage of work under this part, APCO's obligations with respect to the work ordered to be stopped shall be suspended and the time periods for performance of work, as well as the time period for any other work dependent upon the work which stopped, shall be extended, pursuant to Part XVI of this Order, for such a period of time as Ecology determines is reasonable under the circumstances.

In the event APCO determines activities undertaken in furtherance of this Order or any other circumstances or activities are creating an imminent and substantial endangerment to the people on the Site or in the surrounding area or to the environment, APCO may stop implementation of this Order for such a period of time necessary for Ecology to evaluate the situation and determine whether APCO should proceed with implementation of the Order or whether the work stoppage should be continued until the danger is abated. APCO shall notify either Ecology field personnel on-site or the project manager as soon as is possible but no later than twenty-four hours after such stoppage and provide Ecology with documentation of its analysis in reaching this determination. If Ecology disagrees with APCO's determination, it may order resumption of this Order. If Ecology concurs in the work stoppage, APCO's obligations shall be suspended and the time periods for performance of work, as well as the time period for any other work dependent upon the work which was stopped, shall be extended, pursuant to Part XVI of this Order, for such a period of time as Ecology determines is reasonable

under the circumstances. Any disagreements pursuant to this clause shall be resolved through the dispute resolution procedures.

Unless otherwise specified, all other notification of Ecology pursuant to this Order shall be made to Dom Reale.

XVI.

EXTENSIONS OF SCHEDULES

A. Extensions shall be granted only when requests for extensions are submitted in a timely fashion and good cause exists for granting the extension. All extensions shall be requested in writing. The request shall specify the reason(s) the extension is needed. Extensions shall only be granted for such period of time as Ecology determines is reasonable under the circumstances. A requested extension shall not be effective until approved by Ecology in writing.

B. The burden shall be on APCO to demonstrate to the satisfaction of Ecology the request for the extension has been submitted in a timely fashion and good cause exists for granting the extension. Good cause may include, but not be limited to, the following:

1. Circumstances beyond the reasonable control and despite the due diligence of APCO including delays caused by Ecology;
2. Delays which are directly attributable to any changes in permit

terms or conditions or refusal to grant a permit needed to implement the requirements of this Order if APCO filed a timely application for the necessary permit; and

3. Act of God, fire, flood, blizzard, extreme temperatures, or other unavoidable casualty.

However, neither increased costs of performance of the terms of this Order nor changed economic circumstances may be considered circumstances beyond the reasonable control of APCO.

C. Ecology may extend the time schedules contained in this Order for a period not to exceed ninety (90) days, except when an extension is needed as a result of: (1) delays in the issuance of a necessary permit which was timely applied for, or (2) judicial review of the issuance, non-issuance or reissuance of a necessary permit, or (3) other circumstances deemed exceptional or extraordinary by Ecology.

XVII.

AMENDMENT OF ORDER

This Order may only be amended by a written agreement between APCO and Ecology. Such an amendment shall become effective upon signature of both parties.

APCO shall submit any request for modifications to the remedial program or project schedule to Ecology for approval. Ecology shall indicate its

approval or disapproval within ten (10) days after the request for modification is received. Reasons for the disapproval shall be stated.

Other than in paragraph XVI, no guidance, suggestions, or comments by Ecology will be construed as relieving APCO's of their obligation to obtain formal approval as may be required by this Order. No verbal communication by Ecology shall relieve APCO of the obligations specified herein.

Ecology shall notify APCO in writing of any Ecology proposal for modifications to the remedial program or project schedule and the basis for such proposal. APCO shall thereafter comply with such modifications, or if they do not agree with those modifications, the disagreement shall be addressed through the dispute resolution procedures described in paragraph XIV above of this Order.

XVIII.

PENALTIES

Nothing in this Consent Order shall be construed as prohibiting or in any way limiting the ability of Ecology to seek civil penalties available under Chapters 90.48 RCW, 70.105 RCW for any noncompliance with this Order.

Any penalty issued pursuant to this section shall not be appealable pursuant to Chapter 43.21B RCW, to the Pollution Control Hearings Board. Nothing shall waive APCO's right of review of the facts giving rise to a penalty issued hereunder in a court of competent jurisdiction after compliance with the dispute resolution section of this order.

XIX.

OTHER ACTIONS

In the event APCO fails to adhere to any requirement of this Order or; notwithstanding compliance with the terms of this Order, upon the occurrence or discovery of a situation as to which the state would be empowered to take any further response action including but not limited to an immediate removal, planned removal, and/or interim remedial action; or in the event of a release or threatened release not addressed by this Order; or upon the determination action beyond the terms of this Order is necessary to abate an imminent and substantial endangerment to the public health or welfare or the environment that may be posed by this facility; or under any other circumstances authorized by law, the state may, after notice to APCO institute response activities and subsequently pursue cost recovery action available, and/or the state may issue orders to APCO pursuant to available statutory authority.

XX.

COMPLIANCE WITH APPLICABLE LAWS

All actions carried out by APCO pursuant to this Order shall be done in accordance with all applicable federal, state and local requirements, including requirements to obtain necessary permits.

All facilities used by APCO for the off-site treatment, storage or disposal of hazardous substances removed from its property at the site must be in compliance with the applicable requirements of the Resource Conservation

and Recovery Act, as amended November 1984. As indicated in the project schedule in the Work to be Performed section V above, APCO must designate in a report to the state any facilities APCO proposes to use for such off-site storage, treatment or disposal, and Ecology must give prior approval for the use of such facilities. Disputes concerning the use of off-site storage, treatment or disposal facilities shall be addressed through the disputes resolution procedures specified in paragraph XIV of this Order.

XXI.

COVENANT NOT TO SUE AND SATISFACTION OF THIS ORDER

In consideration of APCO's performance of the terms and conditions of this order, Ecology agrees that during the period of performance of the terms and conditions of this order, compliance with this order shall stand in lieu of any and all administrative, legal and equitable remedies available to Ecology against APCO arising out of or related to the subject matter of this agreement.

Nothing in this order shall preclude Ecology from exercising any administrative legal or equitable remedies available to it to require additional actions by APCO to be taken in the following circumstances:

1. The presence of hazardous substances or ground water contamination not evident on the effective date of this order;

2. A threat or potential threat to the public health, welfare or the environment not evident on the effective date of this order;
3. Any conditions not present or evident on the effective date of this order.

Nothing in this order precludes Ecology from asserting a cross-claim, third party claim, counterclaim or contribution claim against APCO in the event Ecology is sued over any matter related to this order.

The parties do not intend that this section shall be a release as that term is defined by Washington law. Nothing herein shall be construed to release APCO from any continuing liability at law for its failure to perform the work specified herein. Nothing in this Order shall release APCO from liability arising out of or relating to the transportation, treatment, handling, disposal, storage or release or threatened release of hazardous substances, pollutants or contaminants resulting from performance of the work specified herein.

The parties agree that the successful completion of work pursuant to this Consent Order does not represent full satisfaction of all claims for relief to which Ecology may be entitled.

The provisions of this Order shall be deemed satisfied upon APCO's receipt of written certification from Ecology that the work outlined in this Order, as amended by any modifications made to this Order, has been satisfactorily completed.

Nothing in this Order shall be construed in any way as a waiver of or limitation on Ecology's or USG/APCO's right to seek reimbursement from any responsible party for investigative response and oversight costs incurred by Ecology or APCO in connection with activities conducted at the site.

XXII.

DEED NOTICE, LAND USE AND CONVEYANCE OF TITLE

APCO shall not use any portion of the Site in any manner that would adversely affect the integrity of any containment system, treatment system or monitoring system installed pursuant to this Order.

No conveyance of title, easement or other interest in any portion of the Site owned by APCO shall be consummated without provision for continued operation and maintenance of any containment system, treatment system and monitoring system installed or implementation of such pursuant to this Order. Until the remedial program described in this Order is completed, APCO shall notify Ecology by registered mail, at the address listed in paragraph IX of this Order, at least ninety (90) days prior to any conveyance of any interest in property that in whole or part is located within the Site.

Within thirty days after issuance of this Order by Ecology APCO shall cause to be recorded in the appropriate registry of deeds a notice and a copy of this Order with the deeds for its property at the Site, and to verify to the state such recording has been completed.

XXIII.

SUCCESSORS

This Order shall be binding upon APCO, their successors and assignees.

XXIV.

EFFECTIVE DATE

This Order is effective upon the date Ecology executes this Order.

W B McMANUS
W.B. McManus

W. B. McManus
Vice President, USG
Acoustical Products

(Please print and sign)

4-1-87
Date

Clark Haberman

Clark Haberman
Regional Manager
Southwest Regional Office
Department of Ecology

4/22/87
Date