

**IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO**

**STATE OF OHIO, ex rel.
LEE FISHER, SUCCEEDED BY
BETTY D. MONTGOMERY
ATTORNEY GENERAL OF OHIO,**

Plaintiff,

vs.

**GENERAL AGGREGATES INC., AND
JOHN FORTUNATO, et al.**

Defendants.

CASE NO. 90-CV-1272

JUDGE WYATT MCKAY

**AGREED INTERIM ORDER
(November 14, 1997)
RE: STATE'S CONTEMPT
PETITION**

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MARGARET R. O'BRIEN
CLERK OF COURTS
TRUMBULL COUNTY**

Pursuant to the State's contempt petition filed March 9, 1997, this matter came on for hearing on November 14, 1997. All parties were present in open court and represented by counsel.

On July 9, 1997, this court **AMENDED** its April 25, 1997, interim order such that Defendants, acting through Defendant Fortunato, were **ORDERED** to have their environmental consulting firm, Richmond Analytical Labs Inc., conduct the sampling and soil analysis called for by the April 23, 1992, consent decree so that Ohio EPA would be given 10 days prior written notice of the date, time and place of the sampling event AND Ohio EPA would be provided a written report of the results of said sampling and analysis not later than September 11, 1997. On November 12, 1997, the Attorney General filed a *Memorandum in Support of State's Contempt Petition*. In it, the State reiterates the contempt allegations set forth in its March 9, 1997, contempt petition, but adds that Defendants, and in particular Defendant Fortunato, violated this Court's July 9, 1997, interim order. Specifically, at no time prior to, or after September 11, 1997, did a sampling event occur, or was a lab report provided to Ohio EPA. This happened, claims the

State, because Defendant Fortunato, despite the competency and willingness of Richmond Analytical Labs Inc. to do the sampling and analysis, refused to cooperate and/or pay Richmond Analytical. Therefore that company declined to do the work or provide a report regarding same.

For purposes of the instant contempt hearing, the parties have stipulated the relevant facts are contained in the "Factual Summary" portion of the *Memorandum in Support of State's Contempt Petition* and the *Offer of Proof* made by the Attorney General *instanter*, that: 1) Dr. Michael Zehe, owner the Richmond Analytical Labs Inc., is qualified to conduct the sampling and analysis required by the court herein; 2) The State's Combined Exhibits 15 and 20 attached hereto, reflect Mr. Fortunato's failure to reply to phone calls or correspondence from Dr. Zehe pertinent to testing, analysis and his failure to pay the prices quoted for those services; and 3) Dr. Zehe/ Richmond Analytical Labs Inc., if paid, is still willing and available to perform the sampling and analysis required by the court herein. **WHEREFORE**, this court being advised of all the relevant premises, including the parties' negotiations, stipulations, and consent to the following Agreed Interim Order, hereby **ORDERS, ADJUDGES AND DECREES** that:

Defendant Fortunato is in contempt of the Court's April 23, 1992, consent decree for failure to conduct the sampling and analysis required by decree, and promised by him to Ohio EPA for the "end of April [1993]" (See "Factual Summary"- *Memorandum in Support of State's Contempt Petition*, Exb 4).

The Court further **ADJUDGES** Defendant Fortunato to be in contempt of the Court's Agreed Interim Order of July 9, 1997, for failing to sample, analyze, and report to Ohio EPA by September 11, 1997.

As sanction for the two contempts involving failure to sample, analyze, and report the court hereby **ORDERS** that Defendant Fortunato shall forthwith be incarcerated in the Trumbull county jail UNLESS by 4:00 PM on November 14, 1997, he delivers to Plaintiff's counsel a certified check for nine-thousand eight-hundred and fifteen (\$9815.00) dollars payable to Richland Analytical Labs Inc. This amount, per stipulation, covers the fees and costs quoted by Dr. Zehe to Defendant Fortunato to perform the sampling, analysis, and reports mandated by the consent decree (See, State's Combined Exhibits 15 and 20 attached hereto).

The Court further **ADJUDGES** Defendant Fortunato to be in contempt of the April 23,

1992, consent decree and the Agreed Interim Order of July 9, 1997, because Defendant Fortunato's contemptuous failure to sample, analyze, and report necessitated the instant contempt action by the Attorney General on behalf of the Ohio EPA (See *Brown v. Executive 200, Inc.* (1980) 64 Ohio St. 2d 250, 254). To compensate the Plaintiff, State of Ohio for fees, costs, and extraordinary enforcement expenses incurred by the Attorney General and the Ohio EPA, Defendant Fortunato is hereby **ORDERED** to pay the State of Ohio the sum of the one-thousand (\$1,000.00) dollars. Said payment shall be made on or before June 1, 1998, and shall be by certified check payable to _____.

As sanction for the contempt involving failure to pay stipulated penalties, the court defers imposition of such sanction to ascertain Defendant Fortunato's performance of the other terms pertinent to him outlined in this order.

The Court further **ADJUDGES** that Defendants James and Gale Burn are in contempt of the April 23, 1992, consent decree for failure to conduct the sampling and analysis required by that decree and for failure to pay the stipulated penalties mandated by that consent decree. Each of them is also in contempt of the Agreed Interim Order of July 9, 1997, for failing to sample, analyze, and report to Ohio EPA by September 11, 1997. The Court is not unmindful that Defendant Fortunato said he would (on behalf of all Defendants) implement the soil sampling and analysis plan, but failed to do so. Or, that at relevant times, the Burns' were without *sufficient* funds to pay for said testing and analysis or stipulated penalties. Nonetheless, each of them approved the April 23, 1992, consent decree and the Agreed Interim Order of July 9, 1997. As such, they are in contempt of those orders. Contempt, however, is different from its sanctions.

The court is informed by the Plaintiff's counsel and counsel for the Burns' that they recently paid one-hundred \$100.00 dollars (\$50.00 each) on their separate \$5,000.00 civil penalties, and can each pay \$12.50 per month (jointly \$25.00 per month) on those respective civil penalties until each penalty is paid.

Accordingly, the court hereby **MODIFIES** its May 22, 1992, order finding that each of the Burn's is indigent and unable to pay *any part* of their civil penalty and **ORDERS** each of them to pay \$12.50 per month on their respective \$5,000.00 civil penalty until those penalties are

paid. Said monthly payments shall commence on or before February 1, 1998, and shall be payable to _____. Sanctions for failure to sample, analyze, and report, failure to pay stipulated penalties, and causing the Plaintiff to incur expenses and related costs arising from this contempt action shall be deferred by the court to ascertain performance by James and Gale Burn of the other terms pertinent to each of them outlined in this order.

To implement the sampling, analysis, and reporting plan previously ordered twice by this court, Defendants John Fortunato, James and Gale Burn, and General Aggregates are **HEREBY ORDERED AND ENJOINED:**

- 1) By June 1, 1998, to provide Ohio EPA, through its counsel, with at least ten (10) days prior written notice of the date Richmond Analytical Labs Inc., will conduct the sampling event called for by the Consent Decree;
- 2) By July 1, 1998, ensure that Richmond Analytical Labs Inc., completes the sampling event just mentioned at Item # 1;
- 3) On July 8, 1998 at 9:30 AM., to attend a telephonic status conference between the parties and the Court for the court to ascertain Defendants performance of the terms outlined in this order; that call to be initiated by the Attorney General;
- 4) By July 15, 1998, to provide Ohio EPA through its counsel with a written report of the results of the soil sampling and laboratory analysis conducted by Richmond Analytical Labs Inc., prior to July 15, 1998 at the former General Aggregates facility.

IT IS SO ORDERED.

1/6/98
DATE

Wyatt McKay
JUDGE WYATT McKAY
COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

Approved by:

Robert M. Fowler
ROBERT M. FOWLER
Assistant Attorney General
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Counsel for Defendants James & Gale Burn

1/6/98
DATE

W. Wyatt McKay
JUDGE WYATT MCKAY
COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

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Counsel for Defendants James & Gale Burn

State of Ohio, ex rel. Lee Fisher,
succeeded by Betty D. Montgomery,
Attorney General of Ohio,

Plaintiff,

Case No. 90 CV 1272

v.

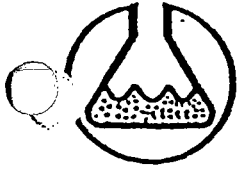
General Aggregates, Inc.,
and John Fortunato, et al.

Defendants.

State of Ohio

Combined Exhibits

Exhibit 15



Richmond
Analytical
Labs, Inc.

24400 Highland Road
Richmond Heights, Ohio
44143-2503
Phone 944-1981
Fax 944-1981

June 10, 1997 Sept. 20, 1997

Mr. Robert M. Fowler
Ohio Attorney General's Office
Environmental Enforcement Section
25th Floor, 30 East Broad Street
Columbus, Ohio 43215

Dear Mr. Fowler:


As you requested, I am herein sending you copies of all written communications between Richmond Analytical Labs and Mr. John Fortunato.

Enclosed are:

1. A copy of the letter which we sent to Ms. Katherina Snyder of the Ohio EPA as requested by Mr. Fortunato.
2. A copy of the letter which we sent to you requesting a modification of the deadline schedule, also requested by Mr. Fortunato.
3. A copy of an invoice for professional services for \$500.00.
4. A copy of a proposal for work outlining all deadlines and procedures necessary to complete the job by September 11, 1997.

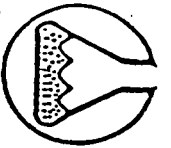
During July and August, we made several unsuccessful attempts to schedule the work, and in our last communication (early August), we pointed out that he had missed the sampling deadline and he would miss the September 11th final deadline unless sampling took place within one week. We asked him to call us when he was ready to schedule sampling. We have not heard from him since.

Sincerely,

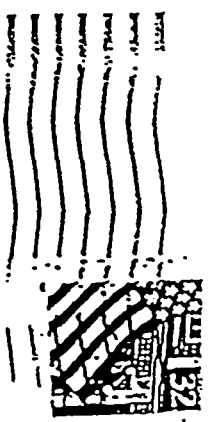

Michael J. Zehe
Richmond Analytical Labs, Inc.

enclosure(s)

STATE'S
EXHIBIT
15



Richmond Analytical Labs, Inc.
 24400 Highland Road
 Highland Heights, Ohio
 44143-2503



Mr. Robert M. Fowler
 Ohio Attorney General's Office
 Environmental Enforcement Section
 25th Floor; 30 East Broad Street
 Columbus, Ohio 43215

43215/2428



QUOTATION FOR SERVICES

July 26, 1997

CLIENT:

Mr. John Fortunato
General Recycling Inc.
P.O. Box 3331
Youngstown, Ohio 44513

JOB SITE:

General Aggregates Inc.
6318 Kinsman-Orangeville Road
Kinsman, Ohio 44428

SCOPE OF WORK:

1. Collect 79 soil samples from three stockpiles.
2. Composite the samples into 19 total.
3. Analyze composite samples for:
 - a) BTEX
 - b) TPH by EPA 418.1
 - c) TCLP RCRA (8) inorganics
 - d) TCLP Ni
4. Plan and schedule with EPA and Ohio Attorney General's office to assure compliance with the court ordered schedule.

TOTAL PRICE:

\$9,815

NOTES:

- a) Sampling must be completed by 08/11/97 to allow reporting before 09/11/97.
- b) A sum of \$9,000 must be received before sampling commences; the remainder is due upon report delivery.

Michael J. Zehe
Richmond Analytical Labs

MJZ/mlp

