

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM M. SMITH, as President and on behalf of the
NEW YORK METRO AREA POSTAL UNION,
APWU, AFL-CIO and DENNIS O'NEIL,

Plaintiffs,

**COMPLAINT AND JURY
DEMAND**

-against-

_____ Civ. _____

JOHN E. POTTER,
Postmaster General of the United States,

Defendant.

NATURE OF THE ACTION

1. This action is a citizen suit brought under Section 7002 of the Resource Conservation and Recovery Act ("RCRA" or "the Act"), 42 U.S.C. § 6972. Plaintiffs are requesting that the court take strong corrective action to protect the lives of thousands of postal workers, as well the health and safety of the general public, from the failure of the United States Postal Service ("USPS" or "Postal Service") to properly respond to the threats caused by anthrax. Plaintiffs seek a declaratory judgment, injunctive relief, and an award of costs, including attorneys' and expert witness fees, because of the "imminent and substantial endangerment to health or the environment" caused by the USPS' actions or lack thereof in handling, transporting, storing and disposing of anthrax, and because of the USPS' violations of the provisions of RCRA.

JURISDICTION AND VENUE

2. The jurisdiction of this court is predicated on the existence of a federal question, pursuant to 28 U.S.C. §1331. The court also has jurisdiction, under 42 U.S.C. § 6972(a)(1) (A) and (B). The court's supplemental jurisdiction under 28 U.S.C. §1367 is also invoked to adjudicate claims arising under the New York State Environmental Conservation Law, and under New York State common law. The court has the specific power to grant declaratory relief in this action, pursuant to 28 U.S.C. §2201.

3. 42 U.S.C. §6972(a)(1)(B) permits the commencement of an action by a citizen against an "agency. . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment".

4. An action under 42 U.S.C. §6972(a)(1)(B) cannot be commenced until "ninety days after the plaintiff has given notice of the endangerment to (i) the Administrator [of the Environmental Protection Agency]; (ii) the State in which the alleged endangerment may occur; and (iii) any person alleged to have contributed or to be contributing. . . to the endangerment." 42 U.S.C. §6972(b)(2)(A).

5. 42 U.S.C. §6972(a)(1)(A) permits the commencement of an action by a citizen against "any person (including (a) the United States, and (b) any other governmental instrumentality or agency. . .) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this Act".

6. An action under 42 U.S.C. §6972(a)(1)(A) cannot be commenced until "60

days after the plaintiff has given notice of the violation to (i) the Administrator [of the Environmental Protection Agency]; (ii) the State in which the alleged violation occurs; and (iii) to any alleged violator. . .”.

7. However, an action alleging either “an imminent and substantial endangerment” under 42 U.S.C. §6972(a)(1)(B), or a “violation” under 42 U.S.C. §6972(a)(1)(A) “may be brought immediately after such notification in the case of an action under this section respecting a violation of subtitle C of this Act.” (42 U.S.C. §6972(b)(1)(A), repeated in 42 U.S.C. §6972(b)(2)(A)).

8. On October 26, 2001, plaintiffs gave notice to the Administrator of the EPA, to the Regional Administrator of EPA Region No. 2, to the Attorney General of the United States, and to the State of New York, of the intention of plaintiffs to file suit, as required by §7002(b) of the Act (42 U.S.C. 6972(b)), and to the United States Postal Service, by certified mail, return receipt requested, in accordance with the requirements of 40 CFR 254.2. A copy of the notice letter is annexed hereto as Exhibit A and is incorporated by reference.

9. As described in paragraphs 16 to 54 below, plaintiffs allege that the USPS has handled, transported, stored and/or disposed of hazardous waste in violation of RCRA. Therefore, plaintiffs are not required to wait until 60 or 90 days before commencing this action, but may commence it immediately after providing the requisite notice.

10. Furthermore, the Administrator of the EPA has not commenced an action under the Act, nor has she taken any other action that would preclude the commencement of this lawsuit under § 7002 (b)(2)(B) of the Act (42 U.S.C. § 6972 (b)(2)(B)). Nor has the State of New York commenced an action under the Act, or taken any other action that would preclude the

commencement of this lawsuit under § 7002 (b)(2)(C) of the Act (42 U.S.C. § 6972 (b)(2)(C)).

11. Venue is appropriate in the Southern District of New York pursuant to 28 U.S.C. § 1391(b)(2), because "a substantial part of the events or omissions giving rise to the claim occurred" in this District.

THE PARTIES

12. Plaintiff William M. Smith is President of the New York Metro Area Postal Union, APWU, AFL-CIO ("New York Metro"). New York Metro is a labor union whose principal place of business is 350 W. 31st Street, New York, N.Y. 10001. New York Metro represents over 14,000 USPS employees in the New York metropolitan area.

13. As a labor union, New York Metro represents the interests of USPS workers, with respect to the terms and conditions of their employment and with respect to their health and welfare. New York Metro has been actively involved in promoting safety at the workplace, and in taking necessary action to ensure that postal workers do not encounter a dangerous and hazardous working environment. Thousands of postal workers work at the Morgan General Mail Facility ("Morgan") in Manhattan, where the actions of the USPS are contributing to a threat to the health and safety of postal employees, and to the public at large.

14. Plaintiff Dennis O'Neil is a postal worker employed at Morgan. He resides at ~~311 West 31st Street, New York, NY 10001~~. At all relevant times herein O'Neil was employed at Morgan and exposed to the anthrax spores at that facility.

15. Defendant John E. Potter is Postmaster General of the United States of America. The USPS operates a mail distribution system within the entire United States of America. The Postal Service accepts letters and parcels from the general public for delivery in

exchange for a fee. Several letters or parcels accepted by the Postal Service for delivery contained anthrax, and contributed to the contamination of the Morgan facility and possibly other postal facilities in Manhattan and the Bronx.

FACTS UNDERLYING ALL CAUSES OF ACTION

16. Anthrax is a bacteria which causes serious bodily injury up to and including death. It is well known that anthrax can be used as a bio-terrorist weapon.

17. On or about September 18, 2001, letters containing anthrax bacteria were mailed by unknown persons in the Trenton, New Jersey area.

18. On or about September 19, 2001, those letters were sent to the Morgan facility for processing. The Morgan facility is the central processing facility for mail destined for Manhattan and the Bronx.

19. The Morgan facility is located at 30th Street and 9th Avenue in Manhattan. The Morgan facility contains mechanized letter sorting machines, each of which processes approximately 200,000 to 300,000 letters per day. The letter sorting machines include Optical Character Readers ("OCR"), Delivery Point Bar Code Sorters ("DBCS") and Flat Sorting Machines ("FSM").

20. On or about September 20, 2001 the letters containing anthrax were processed at the Morgan facility to be delivered to various addressees, including NBC News, the New York Post and ABC News.

21. The letter sorting process involved shaking and handling of letters by postal workers processing the mail. During that processing anthrax spores were released from the tainted letters onto the postal workers, the postal equipment, other letters and

into the environment.

22. The anthrax spores were further dispersed because the USPS' policy for cleaning the letter sorting machinery required blowing air over the equipment, which further dispersed the anthrax spores.

23. The USPS was well aware that the mails could be a possible delivery vehicle for the dispersal of toxic biological agents, including anthrax. On October 8, 1999, the USPS issued a "Management Instruction" to its supervisory staff titled "Emergency Response to Mail Allegedly Containing Anthrax." Attached hereto as Exhibit B.

24. On or about September 22, 2001, two mailroom employees and a photo editor at the American Media Corporation in Boca Raton, Florida were exposed to anthrax. Two of those employees, Robert Stevens and Ernesto Blanco, were infected and on October 5, 2001 Stevens died.

25. The contamination of American Media Corporation with anthrax was extensively reported in the national press.

26. On or about September 26 and 27, 2001, two postal employees in New Jersey who were exposed to the anthrax tainted letters developed skin lesions because of their exposure to the anthrax.

27. Concurrently, in late September, 2001, employees at the New York Post and NBC News who handled tainted letters developed black skin lesions associated with anthrax exposure. The infection of the employees was widely reported in the national media.

28. On October 3, 2001, one of the New Jersey postal workers, Teresa Heller, was hospitalized as a result of her exposure to anthrax. The USPS was aware of her

hospitalization.

29. By the first week of October 2001, the USPS was aware that the source of anthrax contamination at American Media Corporation was the delivery of contaminated mail. Despite that knowledge the USPS took no precautionary measures to protect the health and safety of its workforce or the public at large.

30. On October 9, 2001, a letter containing anthrax was mailed from Trenton, New Jersey to United States Senator Tom Daschle. The letter was opened on October 15, 2001 and exposed two dozen Senate staff members to the anthrax spores. All were immediately put on the antibiotic Cipro.

31. On October 12, 2001, Erin O'Connor, the infected NBC employee, tested positive for anthrax. Johanna Huder, the infected New York Post employee, learned of this positive test and began taking Cipro.

32. By October 15, 2001, the news media was widely circulating the aforestated anthrax stories. Despite these reports, the Postal Service did not inform its workers of the anthrax threat and took no precautionary measures to protect the workforce.

33. On October 15, 2001, New York Metro first learned that the Morgan facility had processed the letters containing anthrax. New York Metro immediately demanded that the USPS take all necessary precautions to protect the health of the workers.

34. Despite the union's demands, the USPS did not change its maintenance procedures and continued to clean the letter sorting machinery by blowing out the machines. The USPS did not stop the blowing out of the letter sorting machines until October 22, 2001.

35. Upon learning that two of its employees had tested positive for anthrax,

NBC evacuated its building and began testing all of its employees for anthrax exposure. In contrast, the USPS refused to evacuate the Radio City station employees located in the same building and refused to test any employees for exposure to anthrax.

36. On October 17, 2001, New York Metro demanded that the USPS immediately inform the union of its plans to protect the health and safety of its workers. The USPS ignored this request and continued to insist that its facilities were safe.

37. On October 19, 2001, two postal workers in Washington, D.C. were hospitalized for inhalation anthrax. Both died within a few days of their diagnosis.

38. After repeated demands from New York Metro, on October 21, 2001, the USPS conducted environmental tests at the Morgan facility, but only in parts of the 2nd and 3rd floors.

39. On October 19, 2001, New York Metro officials attended a meeting with representatives of other postal unions, postal management and representatives of the Center for Disease Control and Prevention ("CDC"). When the USPS and CDC were questioned as to contingency plans in the event that a postal facility tested positive for anthrax, the USPS and the CDC were unable to identify a plan.

40. On or about October 24, 2001, Postmaster General John E. Potter met with the national leaders of the postal unions. Postmaster General Potter agreed to the following procedures:

Any work center or office found to be contaminated with anthrax will be closed until it has been cleaned and declared safe for human inhabitants.

41. The USPS complied with this Agreement and closed down the Trenton,

New Jersey (Hamilton) and District of Columbia (Brentwood) facilities after these facilities tested positive for anthrax.

42. The CDC also recommended that various congressional offices be closed and decontaminated after those offices tested positive for anthrax. Employees in those offices were also tested for exposure to anthrax. The United States Supreme Court was also closed when a remote postal facility that delivers mail to the Court tested positive for anthrax.

43. On October 25, 2001, test results from Morgan letter sorting machines were positive for anthrax.

44. The USPS did not inform New York Metro or the workers of these positive tests, but the workers and the union learned of the test results through news reports. Immediately upon learning of the test results, New York Metro demanded that the Morgan facility be closed until the decontamination process was completed.

45. The USPS ignored the union's demand and scheduled workers to work on letter sorting equipment immediately adjacent to the affected equipment.

46. The USPS also conducted operations at the James A. Farley Post Office ("JAF") at 8th Avenue and 31st Street in Manhattan immediately adjacent to the Morgan facility. The JAF facility is attached to the Morgan facility by underground tunnels. Mail and equipment is transferred regularly between the two facilities. Employees regularly travel between the two facilities, including 1000 Morgan employees who were directed to go to JAF to be offered Cipro. The JAF employees were also offered Cipro. The ventilation system in Morgan and JAF is interconnected, and Morgan supplies air conditioning to JAF.

47. On information and belief, the USPS has not conducted any environmental

or employee tests for the presence of anthrax at JAF.

48. As the central processing center, Morgan processes letters for all USPS stations in Manhattan and the Bronx. On information and belief, except for the stations at Radio City and Rockefeller Center, the USPS has not conducted environmental or employee testing for the presence of anthrax at any of its other stations.

49. To date the USPS has not remediated the known anthrax contamination on the letter sorting machines at Morgan.

50. To date the USPS has refused to extend its testing to other possible contaminated sites at Morgan, including the ventilation system.

51. To date the USPS has refused to test for the presence of anthrax at the other stations that receive mail from Morgan for delivery.

52. On information and belief, the USPS has not applied for or been granted a permit to handle, transport, store or dispose of anthrax.

AS AND FOR A FIRST CAUSE OF ACTION
(Imminent and Substantial Endangerment, 42 U.S.C. §6972(a)(1)(B))

53. Plaintiffs repeat and reallege each and every allegation set forth in the paragraphs above with the same force and effect as if set forth in full herein.

54. The term "solid waste" is defined in the Act to include "discarded material, including . . . material resulting from industrial, commercial, mining, and agricultural operations, and from community activities" (SWDA §1004(27), 42 USC §6903 (27)).

55. The term "hazardous waste" is defined in the Act as a solid waste "which because of its quantity, concentration, or physical, chemical or infectious characteristics may (A)

cause or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating and reversible illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." (SWDA §1004(5), 42 USC §6903 (5)).

56. Anthrax is a "solid waste" because it has been "discarded" and it is "material resulting" from the "activities" described in the Act.

57. Anthrax is a "hazardous waste" because of its "infectious characteristics" and because it has recently killed two postal workers.

58. The USPS has been, and upon information and belief, is continuing to "transport" anthrax.

59. The USPS has been, and, upon information and belief, is continuing to be an "owner or operator of a . . . storage or disposal facility" for anthrax.

60. The actions of the United States Postal Service, as particularly described in paragraphs 16 to 54 above, have contributed and are continuing to contribute to the handling, storage, treatment, transportation, or disposal of a hazardous waste in such manner as to "present an imminent and substantial endangerment to health or the environment".

AS AND FOR A SECOND CAUSE OF ACTION
(Transporting Hazardous Waste Without a Permit, 42 U.S.C. §6972(a)(1)(A))

61. Plaintiffs repeat and reallege each and every allegation set forth in the paragraphs above with the same force and effect as if set forth in full herein.

62. Section 3003 of the Act (42 U.S.C. § 6923), captioned "Standards applicable to transporters of hazardous waste," sets forth requirements for transporters of

hazardous waste. This section requires that anyone engaged in the transportation of hazardous waste obtain a permit from either the EPA or from a State.

63. The USPS does not have a permit for the transportation of anthrax.

64. The USPS has been transporting hazardous waste (anthrax) without a permit since late September 2001, and upon information and belief, is continuing to do so.

65. The USPS is therefore "in violation" of the requirements of §3003 of the Act pertaining to transporters of hazardous waste.

AS AND FOR A THIRD CAUSE OF ACTION
(Storage and Disposal of Hazardous Waste Without a Permit,
42 U.S.C. §6972(a)(1)(A))

66. Plaintiffs repeat and reallege each and every allegation set forth in the paragraphs above with the same force and effect as if set forth in full herein.

67. Section 3005 of the Act (42 U.S.C. § 6925), captioned "Permits for treatment, storage, or disposal of hazardous waste," requires that anyone engaged in the storage and disposal of hazardous waste obtain a permit from either the Environmental Protection Agency or from a State.

68. "Storage" is defined as the "containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste." §1004(33) of the Act (42 U.S.C. § 6903(33)).

69. The USPS has been "storing" hazardous waste (anthrax) by containing it in envelopes and parcels that it has accepted for delivery, without a permit since late September 2001, and upon information and belief, is continuing to do so.

70. "Disposal" is defined as the discharge, deposit, injection, dumping,

spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air. . ." §1004(3) of the Act (42 U.S.C. § 6903(3)).

71. Upon information and belief, the contamination of mail sorting machines and the air within the Morgan facility by anthrax occurred as the result of the "disposal" of anthrax from envelopes and parcels within the custody of the USPS.

72. The USPS does not have a permit for the storage or disposal of anthrax.

73. The USPS is therefore "in violation" of the requirements of §3005 of the Act pertaining to the storage and disposal of hazardous waste.

AS AND FOR A FOURTH CAUSE OF ACTION
(Violation of Permits, Standards, Laws and Regulations under
New York State law, 42 U.S.C. §6972(a)(1)(A))

74. Plaintiffs repeat and reallege each and every allegation set forth in the paragraphs above with the same force and effect as if set forth in full herein.

75. The Environmental Protection Agency has authorized the State of New York, pursuant to §3006 of the Act, 42 USC §6926, to administer and enforce its own hazardous waste program.

76. The New York State program is codified in the New York State Environmental Conservation Law ("ECL") and its implementing regulations.

77. In particular, Title 9 of Article 27 of the ECL, captioned "Industrial Hazardous Waste Management," sets forth New York State's program to regulate hazardous wastes "in a manner consistent with the Federal Solid Waste Disposal Act, as amended by. . . 'RCRA'. Nothing in this title shall authorize the department [of Environmental Conservation] to

adopt or amend any rule or regulation in a manner less stringent than provided in RCRA.” (ECL §27-0900).

78. ECL §27-0913(1) mandates that “no person shall engage in storage, . . . or disposal . . . of hazardous wastes without first having obtained a permit. . .”

79. ECL §27-0913(2) mandates that “no person shall engage in the transportation of hazardous wastes without first” obtaining a permit pursuant to ECL §27-0305.

80. The USPS has never obtained any permit from the New York State DEC for the storage, disposal or transportation of anthrax.

81. The actions of the USPS in handling, storing, disposing and transporting anthrax without a permit from the New York State DEC are therefore in violation of the ECL.

82. The requirements of ECL §27-0913 have “become effective pursuant to” the Act as a result of approval of New York State’s program by the United States EPA, and are therefore enforceable pursuant to §7002(a)(1)(A) of the Act.

AS AND FOR A FIFTH CAUSE OF ACTION
(Public Nuisance)

83. Plaintiffs repeat and reallege each and every allegation set forth in the paragraphs above with the same force and effect as if set forth in full herein.

84. The actions and omissions of the USPS with respect to the handling of anthrax have created a public nuisance because of the potential exposure of the general public to a deadly bacterial agent.

85. New York Metro, as the representative of over 14,000 postal workers in the New York metropolitan area, asserts that postal workers who have or may come

into especially close contact with anthrax have suffered special injuries.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request this court to grant the following relief:

A. Issue a declaratory judgment that the USPS has contributed and is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment;

B. Issue a declaratory judgment that the USPS is in violation of §§3003 and 3005 of the Solid Waste Disposal Act, (42 USC §6923 and §6925), and in violation of §27-0913 of the New York State Environmental Conservation Law;

C. Enjoin the USPS from operating any mail facility that has been found to contain anthrax spores, including but not limited to the Morgan General Mail Facility, until such time as the facility has been conclusively determined to be free of anthrax;

D. Require testing for anthrax of all mail facilities that have received mail that was processed and/or sorted at the Morgan facility, including but not limited to all mail facilities in Manhattan and the Bronx, and to close any facility that tests positive for anthrax;

E. Order the USPS to provide plaintiffs with copies of all test results, health warnings from public health agencies or law enforcement agencies, and any other information received pertaining to actual or potential anthrax exposure or contamination;

F. Authorize plaintiffs to inspect any area under the control of the USPS suspected of being contaminated with anthrax, with the cost of such inspections to be borne by the USPS;

G. Award plaintiffs compensatory and punitive damages on their Fifth Cause of Action.

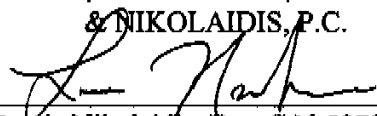
H. Award plaintiffs their costs, including reasonable attorneys' fees, technical consultant fees, and expert witness fees, as authorized by §7002(e) of the Act, 42 USC §6972(e), said fees to include all fees and expenses incurred by plaintiffs to insure compliance with the terms and conditions of any settlement or judgment in this action;

I. Retain jurisdiction in this action until two years after the USPS achieves compliance with all of the terms and conditions of any settlement or judgment in this action;

J. Award such other relief as to the court may seem just, proper and equitable.

Date: October 29, 2001
New York, N.Y.

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