

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA, ex rel.,)	
JIM MACY, Director,)	Case No. _____
NEBRASKA DEPARTMENT OF)	
ENVIRONMENT AND ENERGY,)	
)	
Plaintiff,)	COMPLAINT
)	
v.)	
)	
ALEGENT HEALTH – BERGAN)	
MERCY HEALTH SYSTEM d/b/a)	
CHI HEALTH CREIGHTON)	
UNIVERSITY MEDICAL CENTER –)	
BERGAN MERCY,)	
)	
Defendant.)	

COMES NOW Jim Macy, Director of the Nebraska Department of Environment and Energy, who initiates this action through Douglas J. Peterson, Nebraska Attorney General, on behalf of the State of Nebraska, as Plaintiff, and alleges as follows:

PARTIES AND INTERESTS

1. Plaintiff Nebraska Department of Environment and Energy (“Department”) is the agency of the State of Nebraska charged with the duty, pursuant to Neb. Rev. Stat. § 81-1504, to administer and enforce the Nebraska Environmental Protection Act (“NEPA”), Neb. Rev. Stat. § 81-1501 *et seq.*, and all rules, regulations, orders, and permits issued pursuant to NEPA.

2. Under NEPA, the Department is further charged with the duty to act as the state solid and hazardous waste pollution control agency for all purposes of the Resource Conservation and Recovery Act (“RCRA”), as amended, 42 U.S.C. § 6901 *et seq.* Neb. Rev. Stat. § 81-1504(4).

3. Defendant Alegent Health – Bergan Mercy Health System d/b/a CHI Health Creighton University Medical Center – Bergan Mercy (“Bergan Mercy”) is a 400-bed full care hospital and academic medical center affiliated with Creighton University and located in Omaha, Douglas County, Nebraska.

4. Bergan Mercy provides a full range of medical services and operates an on-site pharmacy and laboratory.

5. Bergan Mercy is considered a “person” for purpose of NEPA. Neb. Rev. Stat. § 81-1502(10).

JURISDICTION AND VENUE

6. The District Court has jurisdiction over the subject matter of this action, pursuant to Neb. Rev. Stat. § 24-302, and over the parties to this action.

7. Venue is proper pursuant to Neb. Rev. Stat. § 25-403.02, as Bergan Mercy’s facility is located in Douglas County and the events at issue took place in Douglas County.

LEGAL BACKGROUND

8. NEPA was enacted in 1971 to protect the water, land, and air of this State. Neb. Rev. Stat. § 81-1501.

9. NEPA provides the Department with the power to act as the state solid waste pollution control agency for all purposes of RCRA. Neb. Rev. Stat. § 81-1504(4). The main purpose of RCRA is to ensure proper management of hazardous wastes from the point of generation until final disposal, also known as cradle to grave regulation. *See* 42 U.S.C. § 6902.

10. Pursuant to its authority under Neb. Rev. Stat. § 81-1505, the Nebraska Environmental Quality Council (“council”) promulgated Title 128 – *Nebraska Hazardous Waste Regulations*, to regulate hazardous waste management, storage, transport, and disposal for purposes of RCRA.

11. Hazardous waste means “a solid waste, or combination of solid wastes, 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 reversible, illness or (b) pose a substantial present or potential hazard to human or animal health or the environment when improperly treated, stored, transported, disposed of, or otherwise managed.” Neb. Rev. Stat. § 81-1502(25). Chapters 2 and 3 of Title 128 – *Nebraska Hazardous Waste Regulations* further identify or list solid wastes that are hazardous wastes, including those solid wastes that have characteristics of ignitability, corrosivity, reactivity, and toxicity.

12. A generator is “any person, by site, whose act or process produces hazardous waste identified or listed in Chapter 3 [of Title 128] or whose act first causes a hazardous waste to become subject to regulation.” 128 Neb. Admin. Code § 1-060. A generator may be considered a small quantity generator or large quantity generator, depending on the quantity of hazardous waste generated in a calendar month. *See* Neb. Admin. Code §§ 1-085 & 1-120. A small quantity generator generates more than 100 kilograms and less than 1,000 kilograms of hazardous waste in a calendar month and a large quantity generator generates more than or equal to 1,000 kilograms of hazardous waste in a calendar month. *Id.*

13. It is unlawful for a generator to offer hazardous waste for transport or disposal if the transporter or disposal facility is not authorized for such hazardous waste activities. *See* 128 Neb. Admin. Code §§ 1-035, 1-043, 1-136, & 4-004. Manifests must be prepared by generators to identify the “quantity, composition, origin, routing, and destination of hazardous waste during its transportation from the point of generation to the point of disposal, treatment, or storage.” Neb. Rev. Stat. § 81-1502(28) & 128 Neb. Admin. Code §§ 1-089, 10-001, & 10-002.

14. A transporter or disposal facility is authorized to transport or dispose of hazardous waste if it provides proper notice under 128 Neb. Admin. Code. § 4-003. 128 Neb. Admin. Code. § 4-003 requires any person transporting or any owner or operator of a treatment, storage, or disposal facility of hazardous waste to file a notification with the Department stating the location and general description of the activity and the identified or listed hazardous wastes handled by such person, unless notification has previously been filed with the U.S. Environmental Protection Agency.

15. A disposal facility is “a facility or part of a facility at which hazardous waste is intentionally placed into or on any land or water, and at which waste will remain after closure.” 128 Neb. Admin. Code § 1-043.

16. A transporter is “a person engaged in the off-site transportation of hazardous waste by air, rail, highway, or water.” 128 Neb. Admin. Code. § 1-136. “Transportation” is “the movement of hazardous waste by air, rail, highway, or water.” *Id.* § 1-135.

17. Under NEPA, the Department, through the Attorney General's Office, is empowered to file an enforcement action seeking civil penalties and/or injunctive relief. *See* Neb. Rev. Stat. §§ 81-1508 & 81-1508.02.

18. Each violation of NEPA subjects "a person to a civil penalty of no more than ten thousand dollars per day. In the case of a continuing violation, each day shall constitute a separate offense. In assessing the amount of the fine, the court shall consider the degree and extent of the violation, the size of the operation, and any economic benefit derived from noncompliance." Neb. Rev. Stat. § 81-1508.02(2).

FACTUAL BACKGROUND

19. At all times relevant to this Complaint, Bergan Mercy operated a full care hospital in Douglas County, Nebraska, which provided a full range of medical services. Bergan Mercy also operated an on-site pharmacy and laboratory.

20. As part of its operations, Bergan Mercy generates both solid wastes and hazardous wastes subject to regulation by the Department. These wastes include but are not limited to pharmaceutical wastes and biohazardous wastes. Hazardous wastes generated by Bergan Mercy come from its pathology laboratory and unused pharmaceuticals. Specifically, the hazardous wastes generated by Bergan Mercy have the following waste codes: D001, D007, D009, D010, D011, D022, D024, P001, P075, U010, and U189 as set forth in Title 128, Chapter 3.

21. Bergan Mercy stores wastes generated at its facility in designated waste accumulation areas throughout the hospital. Wastes are placed in containers throughout the hospital and stored in waste accumulation areas until disposal.

22. Bergan Mercy would offer the wastes generated at its facility to several different transporters for pick up and disposal. Generally, Bergan Mercy offers its biohazardous waste to Stericycle, Inc. ("Stericycle"). Generally, Bergan Mercy would offer its pharmaceutical hazardous wastes to a Clean Harbors facility in Arkansas for disposal.

23. Stericycle manages, transports, and disposes of non-hazardous medical wastes, including biohazardous wastes, and has a facility in Lincoln, Nebraska.

24. At all times relevant to this Complaint, Stericycle picked up biohazardous wastes offered by Bergan Mercy for transport and disposal. Stericycle transported the biohazardous wastes from the Bergan Mercy facility to its Lincoln facility, where it would process the wastes for disposal or transfer wastes to another location for disposal.

25. On October 29, 2018, Bergan Mercy offered waste to Stericycle for transport and disposal at Stericycle's facility.

26. On November 1, 2018, Stericycle reported to the Department that it had received a shipment of hazardous waste from Bergan Mercy.

27. The hazardous waste reported by Stericycle was over packaged in biohazard boxes offered by Bergan Mercy to Stericycle for pick up, transport, and disposal on October 29, 2018.

28. Stericycle is not permitted to transport or dispose of hazardous waste. At all times relevant to this Complaint, Stericycle had not notified the Department in accordance with state law as a hazardous waste transporter, or transport, storage, and disposal ("TSD") facility.

29. On May 16, 2019, the Department sent Bergan Mercy a Letter of Warning ("LOW"), which notified Bergan Mercy that it failed to offer hazardous waste to transporters or to TSD facilities that have notified in accordance with 128 Neb. Admin. Code § 4-003.

30. On March 30, 2020, Stericycle again reported to the Department that it had received a shipment of hazardous waste from Bergan Mercy. The hazardous waste offered by Bergan Mercy to Stericycle for pick up, transport, and disposal was over packaged in biohazard boxes.

31. On May 14, 2020, the Department sent Bergan Mercy another LOW, notifying it of the same violation as set forth in the previous LOW. This LOW requested a response from Bergan Mercy addressing how the problem would be prevented in the future.

32. Bergan Mercy responded to the May 14, 2020 LOW on June 15, 2020 with a corrective action to prevent the problem from happening again. The

Department responded that the corrective action was adequate in addressing the outlined violations.

33. The corrective action outlined by Bergan Mercy, however, was ineffective as repeat violations occurred.

34. On February 3, 2021, Stericycle reported it received a third shipment of hazardous waste from Bergan Mercy. The hazardous waste was over packaged in biohazard boxes offered by Bergan Mercy to Stericycle for pickup, transport, and disposal.

35. The Department conducted an inspection at the Bergan Mercy facility on March 4, 2021, after the third reported shipment of hazardous waste.

36. The Department conducted a visual inspection of the hospital consisting of the waste accumulation areas, laboratories, facilities areas, old morgue, and the pharmacy.

37. At the time of inspection, the old morgue was being used as a temporary hazardous waste accumulation area for pharmaceutical wastes as the main hazardous waste accumulation area was undergoing renovations.

38. On March 30, 2021, the Department sent a Letter of Non-Compliance (LNC) to Bergan Mercy. The LNC outlined four violations it found during the March 4, 2021 inspection and required corrective action to be taken by the hospital. The four violations were: (1) failure to offer hazardous waste to transporters who have notified in accordance with Title 12, Chapter 4, 004.02; (2) failure to post the name of the emergency coordinator; (3) failure to post “No Smoking” signs where there is a hazard from ignitable wastes; and (4) failure to retain copies of hazardous waste manifests signed by the designated facility.

39. On March 16, 2021, Stericycle reported that it received a fourth shipment of hazardous waste from Bergan Mercy.

40. The Department conducted a site visit at Stericycle’s facility on March 19, 2021. During the visit, the Department observed seven black hazardous waste storage and transport containers labeled “RCRA Hazardous Waste Container” containing hazardous waste that had been offered by Bergan Mercy to Stericycle for transport and disposal. The hazardous waste was over packaged in cardboard biohazard waste boxes.

41. On April 23, 2021, Bergan Mercy responded to the March 30, 2021 LNC. Bergan Mercy described the corrective action steps it would take to prevent future hazardous waste violations from occurring. The Department responded that the corrective action was adequate in addressing the outlined violations.

42. As of the filing of this Complaint, the Department has not received notice of any additional shipments of hazardous wastes by Bergan Mercy to a transporter or TSD facility that has not notified in accordance with 128 Neb. Admin. Code § 4-003.

FIRST CAUSE OF ACTION

OFFERING HAZARDOUS WASTE TO A TRANSPORTER THAT HAS NOT NOTIFIED IN ACCORDANCE WITH 128 NEB. ADMIN. CODE § 4-003 IN VIOLATION OF 128 NEB. ADMIN. CODE § 4-004.02.

43. Plaintiff hereby realleges and incorporates by reference the allegations contained in Paragraphs 1–42 as though fully set forth herein.

44. Under NEPA, it is “unlawful for any person to ... [v]iolate any rule or regulation adopted and promulgated by the council pursuant to the [NEPA] ...” Neb. Rev. Stat. § 81-1506(3)(c).

45. 128 Neb. Admin. Code § 4-004.02 provides:

A generator must not offer hazardous waste to transporters or to treatment, storage, or disposal facilities that have not notified in accordance with Section 003 of this Chapter and received a DEQ/EPA identification number, or fulfilled an equivalent requirement of the EPA or an authorized state.

46. Bergan Mercy is a “generator” as defined in 128 Neb. Admin. Code § 1-060 because the services it provides at its facility produce hazardous wastes subject to regulation by the Department.

47. Bergan Mercy offered waste to Stericycle for pick up, transport, and disposal on four separate occasions: October 29, 2018; March 30, 2020; February 3, 2021; and March 16, 2021. The wastes offered by Bergan Mercy to Stericycle on these four occasions included hazardous wastes.

48. Stericycle had not notified the Department in accordance with 128 Neb. Admin. Code. § 4-003 and was not an authorized transporter of hazardous waste at any time between October 2018 and March 2021.

49. Bergan Mercy violated 128 Neb. Admin. Code § 4-004.02 by offering hazardous waste to a transporter that had not notified in accordance with 128 Neb. Admin. Code. § 4-003.

50. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), Bergan Mercy is subject to a civil penalty of not more than \$10,000 per day for each violation.

SECOND CAUSE OF ACTION

OFFERING HAZARDOUS WASTE TO A DISPOSAL FACILITY THAT HAS NOT NOTIFIED IN ACCORDANCE WITH 128 NEB. ADMIN. CODE § 4-003 IN VIOLATION OF 128 NEB. ADMIN. CODE § 4-004.02.

51. Plaintiff hereby realleges and incorporates by reference the allegations contained in Paragraphs 1–42 as though fully set forth herein.

52. Under NEPA, it is “unlawful for any person to ... [v]iolate any rule or regulation adopted and promulgated by the council pursuant to the [NEPA] ...” Neb. Rev. Stat. § 81-1506(3)(c).

53. 128 Neb. Admin. Code § 4-004.02 provides:

A generator must not offer hazardous waste to transporters or to treatment, storage, or disposal facilities that have not notified in accordance with Section 003 of this Chapter and received a DEQ/EPA identification number, or fulfilled an equivalent requirement of the EPA or an authorized state.

54. Bergan Mercy is a “generator” as defined in 128 Neb. Admin. Code § 1-060 because the services it provides at its facility produces hazardous wastes subject to regulation by the Department.

55. Bergan Mercy offered wastes to Stericycle for pick up, transport, and disposal on four separate occasions: October 29, 2018; March 30, 2020; February 3, 2021; and March 16, 2021. The wastes offered by Bergan Mercy to Stericycle on these four occasions included hazardous wastes.

56. Stericycle had not notified the Department in accordance with 128 Neb. Admin. Code. § 4-003 and was not an authorized disposal facility of hazardous waste at any time between October 2018 and March 2021.

57. Bergan Mercy violated 128 Neb. Admin. Code § 4-004.02 by offering hazardous waste to a disposal facility that had not notified in accordance with 128 Neb. Admin. Code. § 4-003.

58. Pursuant to Neb. Rev. Stat. § 81-1508.02(2), Bergan Mercy is subject to a civil penalty of not more than \$10,000 per day for each violation.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff requests this Court to enter judgement on this Complaint in its favor and grant the following relief:

- A. Declare Bergan Mercy violated the Nebraska Environmental Protection Act and/or Title 128 of the Nebraska Administrative Code;
- B. Enter the statutory maximum civil penalty against Bergan Mercy, as provided under Neb. Rev. Stat. § 81-1508.02(2), for each day of each violation;
- C. Tax all court costs herein to Bergan Mercy; and
- D. Grant Plaintiff such additional and further relief as this Court deems just and proper.

DATED this 9th day of September 2022.

STATE OF NEBRASKA, ex rel.,
JIM MACY, Director of the NEBRASKA
DEPARTMENT OF ENVIRONMENT
AND ENERGY, Plaintiff

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