

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF PUERTO RICO

3 JORGE FRANCISCO SANCHEZ,
4 et al.,

5 Plaintiffs,

6 v.

7 ESSO STANDARD OIL DE PUERTO
8 RICO, INC.,

9 Defendant.

Civil No. 08-2151 (JAF)

10 **PRELIMINARY INJUNCTION FINDINGS**
11 **AND CONCLUSIONS**

12
13 **I.**

14 This is a civil action filed pursuant to the Solid Waste
15 Disposal Act, as amended, 42 U.S.C. § 6972, seeking the imposition of
16 civil penalties and the granting of injunctive relief. Notice
17 requirements have been met under 42 U.S.C. § 6972. The amending
18 dispositions to the Solid Waste Disposal Act by the Resource
19 Conservation and Recovery Act (RCRA), 42 U.S.C. § 6991e, are also
20 invoked. Jurisdiction is present under 28 U.S.C. §§ 1331 and 1337.

21 Plaintiffs Jorge Francisco Sánchez and a family-held corporation
22 own a parcel of land with a gasoline-dispensing service station
23 located in a populated area, Road No. 3, Km. 14, Canóvanas, Puerto
24 Rico. The gasoline station has been in operation since the early
25 1960s. Originally, Shell Company operated the station. Esso Standard
26 Oil Company (Puerto Rico) admits that they took over the service
27 station in or around the year 1982. It is clear from the record that
28 from 1982 to approximately 1988, gasoline dispensed in Puerto Rico

1 was leaded gasoline. The currently-used unleaded gasoline product
2 became available in the years 1988 to 1989.

3 Since 1982, Defendant Esso has operated the Dolores Service
4 Station and has installed and owned the service station's underground
5 storage tanks, related pumps and pipelines, and the servicing
6 equipment for the storage and dispensing of gasoline, diesel, and new
7 and used oils. The underground tanks were originally steel tanks, and
8 the evidence received at the preliminary injunction hearing confirms
9 that the service station facility and equipment discharged hazardous
10 petroleum-related products and discarded hazardous waste and related
11 contaminants into the soils and groundwater below the Dolores Service
12 Station. The record sustains the finding that at least since 1993,
13 Defendant Esso knew of this condition.

14 Hazardous waste and hazardous constituents or substances related
15 to petroleum-based gasoline, diesel fuel, and used oils have left
16 concentrations beyond allowable limits at the site's soils and
17 groundwater. The presence of these contaminants causes damages to
18 Plaintiffs' property, and creates a substantial health hazard to
19 navigable waters of the United States, including the adjoining Río
20 Grande de Loíza.

21 II.

22 Contaminated sites are a national problem in the United States,
23 including the island of Puerto Rico. As a response to precisely those
24 evils, Congress adopted a comprehensive federal regulatory program
25 for the safe management of underground storage tanks as part of the
26 RCRA. This regulatory program is managed in Puerto Rico by the local

1 Environmental Quality Board (EQB). The EQB is the agency responsible
2 for the implementation of the federally-sponsored Underground Storage
3 Tank Program (USTP). Actually, the November 7, 1990 current Puerto
4 Rico Underground Storage Tank Control Regulation (USTCR) was enacted
5 by the EQB following the letter and spirit of the federal regulation
6 that appears published in 40 C.F.R. Part 280. Its purpose is to
7 ensure the protection of Puerto Rico's surface and groundwater
8 resources. The regulation also protects the public health, the safety
9 of underground tank systems, and the overall environment.

10 To coordinate the federal/state efforts of protecting the public
11 health and the environment, in March 1997 the government of Puerto
12 Rico and the U.S. Environmental Protection Agency (EPA) entered into
13 a Memorandum of Agreement setting forth the roles, policies,
14 responsibilities, and procedures for the sound management of the
15 program by the EPA Region II and the EQB with respect to the USTP for
16 the Commonwealth of Puerto Rico. This was done pursuant to section
17 9004 of RCRA, 42 U.S.C. § 6991c, as amended. This working agreement
18 establishes the manner in which the government of Puerto Rico and the
19 EPA will coordinate the implementation and administration of the
20 USTCR. The government of Puerto Rico, through the EQB, assumed
21 primary responsibility for the implementation of the RCRA Underground
22 Storage Tank Program within the territorial boundaries of Puerto
23 Rico. The EPA retained the authority to make certain that the law
24 and regulation would be followed, including direct federal
25 implementation in the event that Puerto Rico was unable or failed to
26 act.

1 After the tank substitution that took place in January 1998, and
2 since there existed documented contamination since at least 1993,
3 Esso proceeded to perform a subsoils evaluation of the facility in
4 November 2001, through Environmental Resource Technologies (ERTEC).
5 ERTEC is the sole environmental contractor used by Esso in Puerto
6 Rico since the year 2001.

7 The subsoils evaluation results were provided to Esso in
8 February 2003, fifteen months after conducting the sampling. The
9 subsoils evaluation results revealed the presence of Total Petroleum
10 Hydrocarbon (TPH) in the diesel range. TPH was found in
11 concentrations of 3,290 mg/kg in the soils above the groundwater
12 surrounding the diesel underground storage tank. The concentration
13 found was above the acceptable 100 mg/kg level set by the EQB. The
14 subsoils evaluation report recommended that the facility's diesel
15 underground tank and pipeline be tested as required by EQB UST Rule
16 503(A). The tank and pipelines were not tested.

17 In September 2006, Esso once again contracted the services of
18 ERTEC to perform an environmental evaluation of the facility to
19 determine the presence of petroleum hydrocarbons in the soils and the
20 groundwater. On November 14, 2006, ERTEC presented Esso with a Phase
21 II Environmental Evaluation of the service station facility. The
22 Phase II Environmental Evaluation revealed that the groundwater below
23 the Esso Dolores Service Station is contaminated with the gasoline
24 constituent Benzene. By reason of the Safe Drinking Water Act, 33
25 U.S.C. §§ 455 *et seq.*, Benzene is a hazardous substance regulated by
26 the EPA. The Maximum Contaminant Level (MCL) of dissolved Benzene in

1 groundwater established by EPA is 5 micrograms per liter of water
2 (5 mg/l). For drinking water, it is 0.5 mg/l. Benzene is a known
3 carcinogen. Water samples obtained in 2006 underneath the Esso
4 Dolores Service Station revealed dissolved concentrations of Benzene
5 as high as 2,800 mg/l.

6 The 2006 Phase II Environmental Evaluation concluded that the
7 facility's Benzene groundwater contamination is "apparently related"
8 to releases from the facility's Southeast area, where the gasoline
9 underground tanks are located, and from the Northeast area, where
10 grease traps are found. The evaluation also reported that the
11 facility's soils are contaminated with gasoline, diesel, and oil.

12 A review of the EQB Quality Division UST Program File number UT-
13 02-86-1255 confirms that Esso never informed the EQB of the soil and
14 water contamination discovered in September 2006. The Dolores Service
15 Station site is not listed in the Leaking Underground Storage Tank
16 facility list (LUST) of the EQB, as required by the EPA, probably as
17 a result of non-reporting.

18 As of today, Esso has minimized the gravity of the contamination
19 and has not performed the necessary tests to properly investigate the
20 amount of hazardous product that has leaked out since 1982 or the
21 vertical or horizontal extent of the leakage. No organic lead
22 analysis has ever been made.

23 As of today, Esso has distanced itself from its duty to confront
24 the contaminated status of the property and has only taken bland
25 mitigation measures, without committing itself to removing the
26 contamination as required.

1 These include, among others, failure to report, investigate or clean
2 up spills from underground gasoline storage tanks; failure to take
3 immediate action to prevent additional spills or to identify and
4 mitigate; failure to undertake initial characterizations of the
5 affected properties and quality of waters; failure to remove the
6 spilled product; failure to consider and sweeping under the rug
7 potential lead contamination accruing from 1982 to 1988; failure to
8 notify closing or modification of operations, and failure to consider
9 the possible contamination of the navigable waters of the Río Grande
10 de Loíza.

11 **V.**

12 There being no doubt that there is a logical possibility of lead
13 contamination at the site, we find that Esso failed to address that
14 aspect of the site contamination at the time it changed tanks at
15 Dolores Service Station in the year 1998. The record reflects that
16 Esso excavation and contaminated soil disposition during the tank
17 change did not consider lead as a contaminant. Soils were disposed of
18 at an industrial waste site in Puerto Rico labeled as contaminated
19 only with unleaded gasoline products. Obviously, lead contamination
20 was an issue, and the willful blindness patent here is indicative of
21 potential violations to the Solid Waste Disposal Act.

22 **VI.**

23 This court has made these findings on the basis of the
24 undisputed evidence presented during the two-day hearing. We are of
25 the opinion that the Plaintiffs confront obvious irreparable harm
26 that imposes upon their property the gravamen of a contaminated site,

1 limiting Plaintiffs' property right and future use of the facility.
2 The costs associated with pre-cleanup studies and actual cleanup can
3 reach astronomical monetary figures, and Esso must bear
4 responsibility as required by law.

5 We find that there is no need to make a boilerplate exposition
6 of irreparable harm and injunction law, because it is patently clear
7 that this case fits the most restrictive measure for that remedy.

8 Therefore, the court **ORDERS** as follows:

9 1. **On or before December 18, 2008**, both parties will submit
10 recommendations as to names of companies and/or entities that can
11 perform a comprehensive site assessment before the court further
12 orders Esso to remediate soil and groundwater contamination at the
13 site originating from leaded gasoline, unleaded gasoline, and related
14 petroleum-based products dispensed at the Esso Dolores Service
15 Station during the period 1982 to October 31, 2008.

16 2. A hearing to consider the implementation of a comprehensive
17 site assessment, at Esso's expense, will be held **on December 22,**
18 **2008, at 9:30 A.M.** On said occasion, the parties are expected to
19 offer testimony from potential participant companies which may be
20 interested in and are capable of performing the assessment study
21 contemplated here.

22 3. Not knowing whether ERTEC has the capability of competing
23 for a court-authorized comprehensive site assessment, the court
24 notifies the parties that ERTEC's close and exclusive working

1 arrangements with Esso may disqualify that company from participating
2 in the study.

3 4. The parties will jointly notify the EQB and the EPA of the
4 issuance of this order, with proof of notice on record **within**
5 **seventy-two (72) hours of issuance.**

6 5. In addition, and subject to the results of the scheduled
7 December 22, 2008 hearing, Esso is not only enjoined and restrained
8 from contributing by action or inaction to further environmental
9 contamination at the site, but Esso will be ordered, depending on the
10 results of the Comprehensive Site Assessment, to pay for all
11 necessary testing, corrective actions, and removal of all pollution
12 and contamination within the site and into adjacent areas as
13 previously described.

14 **IT IS SO ORDERED.**

15 San Juan, Puerto Rico, this 5th day of December, 2008.

16 S/José Antonio Fusté
17 JOSE ANTONIO FUSTE
18 Chief U. S. District Judge