12/21/89

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

IN THE MATTER OF	
KOPPERS COMPANY, INC.	Docket No. RCRA-V-W-89-R-14
	Judge Greene
Respondent	

ORDER GRANTING IN PART AND DENYING IN PART
RESPONDENT'S MOTION FOR "ACCCELERATED DECISION"
ON THE BASIS OF RES JUDICATA

By complaint filed March 23, 1989, pursuant to §3008(a)(1) [42 U.S.C. §6928(a)(1)] of the Resource Conservation and Recovery Act, (RCRA) the U. S. Environmental Protection Agency (EPA) seeks civil penalties of $50,385.00 from respondent 1/ for violation of RCRA §§ 3004-3005, 42 U.S.C. §§6924-6925, regulations issued pursuant thereto, [40 CFR §§265.91(a)(1), 265.92(a),(c)(1), and 265.94(a)(2)(1)], and applicable regulations of the Ohio Administrative Code. The complaint alleges five violations relating to groundwater monitoring, including failure to maintain an adequate groundwater monitoring system, to keep appropriate records, and to make required analyses and reports. 2/ In addition to civil penalties, complainant seeks a compliance order which would require compliance with regulations alleged to have been violated.

A. History of the Facility

Respondent's Youngstown plant, established in 1915, was an operating coal tar processing facility producing various pitches and tars from coke oven tar before it was closed in 1987. A

1/ The complainant was filed against Koppers. However, a change in ownership of the company occurred in 1988 which resulted in corporate reorganization and a name change. On January 26, 1989, the name of Koppers was changed to Beazer Materials and Services, Inc. Respondent's brief, p. 2, n. 1, sets out the series of events which led to the change. See also affidavit of Michael Helbring.

2/ Complainant's brief, Attachment A.

complete description is set out in Attachment B of complainant's brief as a part of the Comprehensive Ground Water Monitoring Evaluation (CME) conducted by Ohio Environmental Protection Agency (OEPA) on December 10, 1987. The Youngstown plant had three physical units which were identified as hazardous waste sources: (1) a creosote waste storage area, called the "waste pile;" (2) a below-grade concrete tank used as an accumulation area; and (3) a storm water retention pond, or surface impoundment. Respondent achieved "interim status," i.e. statutory authority to operate, 40 CFR §270.70, on November 19, 1980, for the waste pile when the Part A application was submitted. No permit was issued. 3/ The status of the concrete tank and surface impoundment were the subject of discussions and negotiations between respondent and EPA and OEPA which extended over several years, and concluded with both the closing of the plant and the filing of a closure plan by respondent with EPA and OEPA on or about April 1, 1987. 4/ Use of the retention pond, first built in 1979, had been discontinued in 1986.

3/ Respondent's brief, p. 3.

4/ Earlier closure plans had been submitted for parts of the plant (e. g. the waste pile) on September 19, 1983 and September 9, 1985 (see recitation in 1986 complaint, infra, and in complainant's brief, attachment F).

The complaint also alleges that respondent failed to obtain interim status for the surface impoundment and concrete storage tank, but no penalties are sought in this connection.

B. First Complaint: May 30, 1986.

By complaint filed on May 30, 1986 (complainant's brief, Attachment C) EPA sought civil penalties ($82,000) and compliance for violations of RCRA and Ohio regulations uncovered through inspections by OEPA at least once each year during the years 1981, 1982, 1983, 1984, and 1985. The 1986 complaint alleged violations of RCRA interim status standards for the waste pile, concrete tank, and surface impoundment, and further alleged numerous violations of the regulations based upon inspections dating from July 29, 1981 through January 23, 1986. 5/ Paragraph B the compliance order attached to the 1986 complaint provided:

> B. Respondent shall immediately upon this Order becoming final submit to U.S. EPA a groundwater monitoring assessment plan. This plan is to be implemented according to the U.S. EPA approved plan and accompanying schedule.

A Consent Agreement and Final Order (CAFO) between respondent and EPA was executed on February 2, 1987. The agreement provided that the three units would be closed pursuant to a new closure plan. Specifically,

> 5. Respondent shall, within thirty (30) days of this Order becoming effective, submit all existing data for the facility's monitoring wells to U.S. EPA and OEPA.

5/ Complainant's brief, Attachment C. The complaint also alleged failure to obtain interim status for the storage tank and surface impoundments.

Respondent alsc agreed to pay $66,000.00 in civil penalties. 6/

C. Closure

EPA approved respondent's closure plan, submitted in April, 1987, on January 20, 1989. 7/ Provisional approval had been given by OEPA to a plan to close the facility on September 19, 1983, wherein OEPA wrote respondent:

> Thank you for your September 19, 1983, reply regarding the July 20, 1983, RCRA inspection of the Koppers Company facility located at 1359 Logan Avenue, Youngstown, Ohio. The revised Closure Plan adequately addresses the noted deficiencies. The Koppers Company facility now appears to be in general compliance with the applicable Ohio Hazardous Waste Regulations OAC 3745-50 through 68.

OEPA did not respond to the 1987 closure plan until March 7, 1989, about two years after submission. OEPA effectively refused to respond to the revised plan approved by EPA. 8/ Apparently due to OEPA's not having approved the closure plans entered into by EPA, a completed final closure plan has not been entered. Respondent states in its brief, at page 10, that only since this complaint

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6/ Complainant's brief, Attachment E. The CAFO was signed by a vice president of Koppers, and by the EPA Regional Administrator.

7/ Complainant's brief, Attachment I.

8/ Respondent's brief, Attachment R. The letter specifically states, at page 2, that OEPA lacked authority to "conduct the federal hazardous waste program in Ohio, [and] your closure plan also must be reviewed by U.S. EPA."

was filed has EPA submitted a draft order for closure, and subsequently entered into discussions to effect implementation. 9/

D. Comprehensive GroundWater Monitoring Evaluation (CME)

On December 10, 1987, about ten months after the CAFO was executed by respondent and EPA, OEPA conducted a Comprehensive Groundwater Monitoring Evaluation (CME) of the Youngstown facility. 10/ The CME determined, basically, that respondent's groundwater monitoring program, including reporting, was deficient. As a result of this inspection, the current complaint was filed. $33,135 of the $50,385 penalty sought was for "failure to maintain a groundwater monitoring system capable of determining groundwater quality." A computer printout of the computation of the penalty obtained by respondent disclosed that the dates used in setting the penalty were November 19, 1980, to December 10, 1987. 11/ In response to respondent's assertions that the current complaint covers the same ground as the 1986 complaint, complainant states (p. 13 of its brief) that the CME:

9/ Complainant in its brief states, without explanation, that respondent has "refused to perform the order which it agreed to comply with in the CAFO".

10/ Complainant's brief, Attachment A, page 5.

11/ Respondent's brief, Attachment S. Complainant proposes penalties based upon the alleged economic benefit of noncompliance. Complainant, in its brief (page 9), admits using November, 1980, for penalty calculations on the first five penalties "which was a failure to maintain a groundwater monitoring system capable of determining groundwater quality".

> . . . . could not have been conducted prior to the filing of the complaint in the first matter [complaint of May 30, 1986] due to a lack of adequate staff at U.S. EPA with the expertise in groundwater matters to conduct such an inspection.

While three shallow monitoring wells were in place in 1979, thirty-four additional wells were constructed between March and December, 1985. 12/

Conclusion and Findings

This case turns upon whether respondent is correct in its assertion that where a judgment, or, in this case, a Consent Agreement and Final Order (CAFO) has been entered into, the doctrine of res judicata applies. Respondent relies upon Nathan v. Rowan, 651 F. 2d 1223 (6th Cir., 1981) in making its argument.

Complainant does not seek to enforce the February 2, 1987, CAFO, but rather to redress violations said to be distinct from those addressed by the CAFO. 13/ As has been noted, the compliance order attached to the 1986 complaint required respondent to submit a groundwater monitoring assessment plan "to be implemented according to the U.S. EPA approved plan and accompanying schedule." The CAFO provided for compliance with groundwater monitoring regulations. Complainant does not claim noncompliance. The only question is whether the facts of this case permit assessment of penalties

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12/ These are described in complainant's brief, Attachment B, table 4 and page 32 ff.

13/ Complainant's brief, pp. 11, 15.

for violations which were open and notorious at the time, as it must be assumed the absence of 34 groundwater monitoring wells (prior to their installation in 1985) must have been to investigators of both EPA and OEPA who were on the premises of the Youngstown plant at least once each year from 1981 through 1986, when the complaint leading to the CAFO was filed. Public interest is not the issue, in the sense that the plant is in fact closed even if a final closure order has not been entered by OEPA and the total plan for compliance is not in place. While there may be an argument that public policy is served by imposition of additional penalties after corrective action has been agreed to and presumably put into place, that is not the same as imposing civil penalties to force abatement or cessation of ongoing hazardous waste facilities. (It is noted again that EPA has approved the closure plan, while OEPA, which says it has no authority to enforce RCRA, has not). The dispute here, and respondent's motion for "accelerated decision," go only to the question of whether new penalties can be imposed for violations (1) at least five of which complainant admits fell between 1980 and 1986, (2) were known to complainant and OEPA 14/ and (3) corrections of

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14/ For example, the CME details extensive activity in rehabilitating a creek that flows through the Youngstown facility. In 1984 and 1985 complainant and OEPA personnel were involved when respondent excavated the creek bed and installed a "synthetic liner and ground water collection system beneath Crab Creek to prevent stream contamination." Complainant's brief, Attachment B, p. 5.

which were provided by the CAFO entered into following the 1986 complaint, where no noncompliance with the CAFO is alleged. 15/

In Nathan v. Rowan, supra, the court stated the doctrine of res judicata as (at p. 1226):

> Under the judicially-created doctrine of res judicata, when a court of competent jurisdiction enters a final judgment on the merits in an action, the parties and their privies are barred from relitigating in a subsequent action matters that were actually raised or might have been raised in the prior action. Cromwell v. County of Sac, 94 U.S. 351, 24 L. Ed. 195 (1877); Commissioner v. Sunnen, 333 U.S. 591, 68 S. Ct. 715, 92 L. Ed 898 (1948); Lawlor v. National Screen Service, 349 U.S. 322, 75 S. Ct. 865, 99 L. Ed. 1122 (1955); See also, Montana v. United States, 440 U.S. 147, 99 S. Ct. 970, 59 L. Ed 2d 210 (1979). Res judicata is applied if it does not offend public policy or result in manifest injustice. Hansberry v. Lee, 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22 (1940); United States v. LaFatch, 565 F. 2d 81 (6th Cir. 1977). (Emphasis added).

There is no question that issues relating to whether ground-

15/ Complainant charges that Koppers has not completed the RCRA Facility Investigation and Corrective Measure Study (RFI/CMS). But pending the issuance of an order by OEPA, respondent argues that this RFI/CMS could not be put into place. Be that as it may, complainant states, in its brief at p. 11:

> Respondent also very correctly states that this matter does not and cannot allege noncompliance of a single requirement that is outlined in the 1987 CAFO. As respondent wisely notes, there is no connection with the matter which arose with the 1986 complaint and this matter.

water monitoring wells were in place and functioning could have been raised by EPA in its original 1986 complaint and, under the clear dictates of the Nathan court's statement of the controlling principle, complainant is barred from relitigating these issues. 16/

Complainant admits that the proposed penalty of $33,135 for failure to have the wells in place, $6500 for failure to establish initial background concentrations, and $9500 for failure to prepare a ground water assessment program all relate to failures commencing in 1980 when the EPA groundwater monitoring regulations became effective. Clearly, partial "accelerated decision" on the basis of res judicata must be granted for the period up to and including the date of the CAFO.

Complainant offers only one explanation for EPA not having sought civil penalties for groundwater systems violations in the 1986 complaint. It states that (Brief, page 13):

> Furthermore, the inspection could not have been conducted prior to the filing of the complaint in the first matter due to a lack of adequate staff at U.S. EPA with the expertise in groundwater matters to conduct such an inspection.

16/ Complainant does not deny that the parties are the same and does not deny finality of the CAFO, i.e. that EPA's agreement to the CAFO is the same as a judgment. Complainant's argument goes only to whether the issues are the same and whether the violations alleged in the 1989 complaint could have been discovered earlier.

But, the December 10, 1987, inspection apparently was conducted by OEPA personnel and EPA is shown in the cover letter as being sent a carbon copy. (CME) Even if there were merit to the claim (that there was a lack of expertise at EPA), there is no allegation that OEPA similarly lacked expertise.

The decision here, however, does not turn upon whether EPA had, or did not have, experts to conduct appppropriate inspection of a groundwater monitoring system. The systems simply did not exist until the end of 1985, except for three shallow pit wells installed in 1979. It required no expertise to determine whether the system was in place. In fact, the CME details four separate hydrological studies performed by OEPA prior to February, 1986 (CME, p. 1). The 1986 complaint could have contained this charge and the related charges flowing from the failure to have a groundwater monitoring system in place.

Inclusion of these charges now unfairly prejudices respondent who negotiated and entered into the CAFO with the understanding that all violations for the covered period, prior to the agreement, were dealt with. See U.S. v. Allegan Metal Finishing Co., 696 F. Supp. 275 at 292 ff. (W. D. Mich. 1988). To the extent that the proposed penalties relate to groundwater monitoring failures before February 2, 1987, "accelerated decision" will be granted.

It is by no means clear, however, that, subsequent to the issuance of the CAFO, respondent has not violated RCRA regula-

tions. The present complaint alleges, on the basis of the December 10, 1987, that one well is contaminated; failures to keep a copy of the plan at the facility and to submit test results within 15 days are also charged. Consequently, accelerated decision on the basis of res judicata is not appropriate for these alleged violations. Complainant is entitled to an opportunity to establish that the proposed penalties for these charges are appropriate. 17/

This case raises many of the issues with which the court in Allegan, supra, dealt. There is a strong public policy in favor of promoting settlements of claims and an even stronger public policy in not permitting either the letter or the spirit of settlements freely negotiated from being lightly set aside. 18/

17/ Such portion of the proposed penalty as may relate to the allegedly contaminated well is not ascertainable from the complaint. The other two proposed penalties are $250 and $1000.

18/ Allegan, supra, at p. 295:

> . . . . I do not believe that [EPA] can, in effect, completely ignore the CAFO and relitigate all of the violations of the original administrative complaint which were "settled" - . . . [I]f the terms of the CAFO had been timely complied with, then the CAFO would have precluded a subsequent enforcement action with respect to any of the same issues contained in the CAFO. To hold otherwise would indeed be to encourage litigation and discourage settlement of administrative disputes under RCRA. Such a ruling would no doubt promote a sense of uncertainty as to the finality of consent agreements . . .[I]t is clear that such a result would be contrary to public policy. See e. g. Thomas v. State of Louisiana, 534 F. 2d 615, (5th Cir. 1976). (". . . . When fairly arrived at and properly entered into, [settlement agreements] are generally viewed as binding, final, and conclusive of rights as a judgment.")

In U.S. v. Allegan, supra, the court commented on the problem of regulatory "overkill," and specifically addressed the difficulties of fairly balancing enforcement of the CAFO in that case while holding respondent liable for RCRA violations under the interim status requirements going back to 1980, 696 F. Supp. at 296. The court concluded, at p. 292:

> While it is clear that this is not a criminal action, it seems . . . that some portion of the potentially substantial civil penalties plaintiff is apparently seeking may be likened to prosecutorial "overcharging." I will necessarily consider this factor in determining the appropriate civil penalty to be assessed -- an issue not presently before me. I find that this is especially true here where it appears -based on the numerous documents and arguments already presented -- that the defendant has apparently acted in good faith at all times relevant to this action, was in substantial compliance with the CAFO, and where the CAFO violations which did occur may well have been de minimus.

In this case, it is determined that the parties are the same or in privity with the parties; 19/ that the CAFO was intended to be a full and complete settlement of the 1986 complaint;

19/ As of June 30, 1988, BNS Acquisitions, Inc., an indirect wholly owned subsidiary of Beazer PLC, indirectly acquired more than 90% of the outstanding common stock of Koppers. On November 14, 1988, BNS Acquisitions indirectly acquired the balance of the common shares. On January 20, 1989, BNS Acquisitions merged into Koppers, and on January 26, 1989, the name of Koppers was changed to Beazer Materials and Services, Inc.

and that the CAFO was, in effect, a final judgment "on the merits." 20/ Both complaints and both compliance orders deal with groundwater monitoring for the period November 19, 1980 to May 30, 1986. To the extent that complainant seeks now to assess additional penalties for violations which cannot fail to have been known (or strongly suspected) to have occurred during the period November 19, 1980, to May 30, 1986, and could have been charged in the May 30, 1986, they are barred by the February 2, 1987, CAFO as res judicata. 21/

Res judicata must be held to apply to administrative proceedings, since "the same principles of judicial efficiency which justify application of the doctrine of collateral estoppel in judicial proceedings also justify its application in quasi-

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20/ A judgment on stipulation or agreement is construed as "on the merits" for purposes of res judicata determinations, Moore, Federal Practice, Volume 1 B, §0.409 [1.2] at 307 (Second Edition, 1988).

21/ This holding is not to be construed as requiring EPA to know about and charge every conceivably possible violation or forever be barred from bringing future charges. It should be read as barring future charges of violations that were fully understood to have occurred, even to the point of including remedial measures respecting them in the compliance order attached to the complaint and in the CAFO, and for which, as a consequence, penalties have already in effect been collected.

judicial proceedings . . . " 22/

ORDER

1. Accordingly, "accellerated decision" is granted with respect to such counts of the complaint as charge violations (for which penalties are sought) of RCRA groundwater monitoring regulations for or including the period November 19, 1980, 23/ through February 2, 1987, 24/ which could have been included in the 1986 complaint: Count 10(a), failure to have a groundwater monitoring

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22/ Graybill v. United States Postal Service, 782 F. 2d 1567, 1571 (Fed. Cir. 1986); cert. denied, 479 U.S. 963 (1986). See also United States v. Utah Construction & Mining Co., 384 U.S. 394, 422 (1966); Plaine v. McCabe, 797 F. 2d 712, 718. See also United States v. Athlone Industries, Inc., 746 F. 2d 977 (1984), consent decrees are generally treated as final judgment on the merits and accorded res judicata effect, at note 5, p. 983, except when an express reservation of rights is incorporated in the consent judgment. Here, EPA reserved the right to bring an enforcement action if it determines that "the handling of solid waste at the facility may present an imminent and substantial endangerment to human health or the environment," (CAFO, p. 5; see respondent's brief at Tab M), which has not been alleged and is not apparent here (the facility is closed); and EPA further reserved that ". . . . an Order pursuant to 3008(h) of RCRA may be issued to respondent concerning the identification and remediation of hazardous constituents released at the facility," which has not been alleged and is not apparent here.

23/ The effective date of the regulations.

24/ The date on which the CAFO in settlement of the May 30, 1986, complaint, was executed by respondent Koppers Company and EPA. Until the execution of a CAFO, it is probably still possible to obtain leave to amend the complaint.

system in place after November 19, 1980, except for the last sentence which relates to an allegedly contaminated well; Count 10(b), failure to establish initial background concentrations; and Count 10(c), failure to prepare a groundwater assessment program.

2. "Accellerated decision" is denied with respect to such counts in the complaint as allege violations that had not occurred, and could not have been routinely discovered, before the execution of the February 2, 1987, Consent Agreement and Final Order--specifically, Count 10(b), failure to keep a copy of the groundwater monitoring plan at the facility; Count 10(e), failure to file test results in a timely manner; and the allegation in Count 10(a) regarding the allegedly contaminated well.

And it is FURTHER ORDERED that, no later than January 19, 1990, the parties shall confer for the purpose of determining whether a settlement can be reached with respect to the remaining charges, and shall report to this office upon the results of their effort during the week ending January 27, 1990.

J. F. Greene
Administrative Law Judge

December 21, 1989
Washington, D. C.