UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

FILED

APR 13 1987

ENVIRONMENTAL PROTECTION AGENCY
REGION IX
HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
ENVIRONMENTAL PROTECTION CORPORATION (EAST SIDE DISPOSAL FACILITY)	)	Docket No. RCRA-09-86-0001
	)	
Respondent	)	

Resources Conservation and Recovery Act, 42 U.S.C. §6901, et. seq. Respondent found in violation of Section 3007(a), 42 U.S.C. §6927(a) for failure to provide information to complainant in connection with its enforcement responsibilities.

APPEARANCES:

For Complainant:

David M. Jones, Esquire
Assistant Regional Counsel
Office of Regional Counsel
United States Environmental Protection Agency
Region IX
215 Fremont Street
San Francisco, California 94105

For Respondent:

William C. Kuhs, Esquire
Kuhs & Parker
P. O. Box 2205
Bakersfield, California 93303

ACCELEREATED DECISION AND ORDER

Introduction

This proceeding was commenced under the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. §6928 (sometimes RCRA or Act), by the issuance of a determination of violation, compliance order and notice of right to request a hearing (complaint) by Region IX of the Environmental Protection Agency (sometimes complainant or EPA). The complaint charges respondent Environmental Protection Corporation with violation of Section 3007(a) of the Act, 42 U.S.C. §6927(a), by failing and refusing to submit information pertaining to 14 of 18 generator waste streams at respondent's facility. Pursuant to Section 3008(a)(1), 1/ 42 U.S.C. §6928(a)(1), complainant seeks a compliance order requiring respondent to submit the requested information. Also sought is a civil penalty of $14,000.00 and an additional assessment of up to $25,000.00 per day for failure to comply with the compliance order pursuant to Section 3008(a)(3). For reasons stated in its answer, respondent denied the violation and requested a public hearing. Subsequently, com-

1/ Hereinafter, "Act" will be deleted when referring to a section thereof. Pertinent provisions of Section 3008 are: Section 3008(a)(1): ". . . whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period. . . ."

plainant moved for an accelerated decision pursuant to 40 C.F.R. §26.16(a) and §22.20(a). Pursuant to an order of the Administrative Law Judge (ALJ) a stipulation of undisputed material facts (stipulation) was submitted by the parties.

The respective arguments of the parties are well known to them and they will not be repeated here except to the extent deemed necessary for this decision. Questions not discussed specifically are either rejected or viewed as not being of sufficient import for the resolution of the principal issues presented.

FINDING OF FACT

The stipulation is set out verbatim here.

1. Environmental Protection Corporation is a California corporation and a "person" as defined in Section 1004(15) of the Resource Conservation and Recovery Act (RCRA), as amended, [42 U.S.C. §6903(15)].

2. Until on or about November 8, 1985, Environmental Protection Corporation owned and operated the Eastside Disposal Facility located in portions of Section 24, T28S, R28E and MDM&M Section 30, T28S, R29E, Kern County, California, EPA Identification Number CAT 080 384 276.

3. Environmental Protection Corporation submitted a Notice of Hazardous Waste Activity, EPA Form 3510-1 (5-80) to the United States Environmental Protection Agency as required by Section 3010(a) of RCRA [42 U.S. C. §6930(a)] on or about August 18, 1980.

4. Environmental Protection Corporation fully complied with the requirements of Section 3005(e) of RCRA [42 U.S.C. §6925(e)] by the submission of a Part A permit application on or about November 17, 1980.

5. Environmental Protection Corporation subsequently submitted revised Part A applications on September 14, 1982 and on August 14, 1984.

6. The United States Environmental Protection Agency, Region 9 conducted an establishment and records inspection of the Eastside Disposal Facility on or about May 29, 1985.

7. On or about August 12, 1985, the United States Environmental Protection Agency, Region 9 issued a request for information including information relative to eighteen generator waste streams and certain operating records at the Eastside Disposal Facility.

8. Environmental Protection Corporation responded to the United States Environmental Protection Agency's request on or about August 22, 1985, with all information requested except information pertaining to fourteen of the eighteen generator waste streams.

9. Environmental Protection Corporation refused and continues its refusal to submit information pertaining to the fourteen generator waste streams on the basis that the generators thereof had certified to and Environmental Protection Corporation had confirmed that the waste streams were nonhazardous and, therefore, not subject to RCRA.

10. The United States Environmental Protection Agency, Region 9, has no information that leads it to conclude or suspect that any of the fourteen generator waste streams either do or do not constitute hazardous waste subject to RCRA.

11. This proceeding was commenced on October 21, 1985. On such date, the State of California was authorized to carry out a hazardous waste program under Section 3006 of RCRA. The United States Environmental Protection Agency gave no notice to the State of California prior to the commencement of this proceeding.

12. The United States Environmental Protection Agency, Region 9, has not purported to comply with 40 C.F.R. §22.37(b) since, in its judgment, is of no force or effect.

DISCUSSION AND CONCLUSIONS OF LAW

Whether or not the subject matter is amenable to an accelerated decision depends upon an interpretation of the Consolidated Rules of Practice, 40 CFR §22.20 (Rule).

In pertinent part, the Rule provides:

> §22.20 Accelerated decision; decision to dismiss.
>
> (a) General. The Presiding Officer, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding. . . .
>
> (b) Effect. (1) If an accelerated decision . . . is issued as to all the issues and claims in the proceeding, the decision constitutes an initial decision of the Presiding Officer, and shall be filed with the Regional Hearing Clerk.

It is firmly rooted in common sense that oral hearings are to be used for the resolution issues of material facts. The Rule, in part, exemplifies this. 2/ The concept of an accelerated decision is similar to that of summary judgment, and not every fac-

2/ See generally, 3 Davis, Administrative Law Treatise, §12.1 2d Ed. (1980).

tual issue is a bar. The existence of minor factual disputes would not preclude an accelerated decision. To have such an effect, the disputed issues must involve "material facts" or those which have legal probative force as to the controlling issue. Stated otherwise, a "material fact" is one that makes a difference in litigation. Genuine issues involving such facts are absent in this proceeding.

1. INSPECTION ISSUE

The principal question in this proceeding is the scope of complainant's investigative powers under Section 3007(a).

In pertinent part, that Section reads:

> (a) Access Entry.
> For purposes of . . . enforcing the provision of this title, any person who generates, stores, treats, transports, disposes of, or otherwise handles or has handled hazardous wastes shall, upon request of any officer, employee or representative of the Environmental Protection Agency, duly designated by the Administrator . . . furnish information relating to such wastes. . . .

Complainant argues that respondent has violated Section 3007(a) by its refusal and failure to supply the information requested and sought by it; that the information sought concerning the nature of fourteen waste streams at respondent's facility is relevant to the determination by EPA regarding the extent of the regulations required by the presence of hazardous waste streams at the facility. Respondent maintains that the information complainant seeks does not relate to wastes which are hazardous wastes and is therefore beyond the scope of Section 3007(a).

Respondent claims that complainant has failed to establish that its request is relevant to a proper investigative purpose and that the proceeding should therefore be dismissed.

In United States v. Liviola, 605 F. Supp. 96 (N.D. Ohio), the EPA sought information under Section 3007(a) from a transporter and disposer of hazarous waste. It filed a civil action seeking penalties and injunctive relief when the operator of the facility failed to provide the requested information. The court held that an administrative agency's request for information will be enforced where: (1) the investigation is within the agency's authority, (2) the request is not too indefinite and (3) the information requested is reasonably relevant.

It is utterly convincing, based on the criteria set forth in Liviola, that complainant is entitled to the information it seeks from respondent under Section 3007(a). The regulatory scheme set out in the Act, exemplified in part by Section 3007(a) authorizes EPA to request and obtain information relating to hazardous wastes from those, like respondent, who have handled or handle such wastes. Complainant has specifically sought information relating to the nature of 14 hazardous waste streams. Finally, the requested information is relevant to the determination by complainant concerning the extent of regulation required by the existence of hazardous waste streams at the facility; a right which even respondent concedes belongs to the complainant.

United States v. Charles George Trucking Co., Inc., 624 F. Supp. 1185 (D. Mass 1986), is a case factually similiar to the instant matter. There, defendants, owners of a hazardous waste dump, refused to provide EPA with information concerning the shipment and deliverance of hazardous substances to the landfill, claiming the requests were not "information relating" to hazardous wastes within the meaning of Section 3007(a). The United States government, on behalf of the EPA, brought an action against the defendants and moved for a partial summary judgment on that issue. In granting the government's motion, the court found that "[t]he plain language [of the statute] incicates that the EPA's request need not be confined soley to descriptions of hazardous waste, the information requested must somehow relate to these substances". (at 1187-88). Given EPA's right to investigate and regulate hazardous wastes, complainant's request for records concerning 18 waste streams is "related to" its authority to determine the existence of hazardous wastes. It is for complainant, not respondent, to decide whether a particular waste is hazardous. 50 Fed. Reg. 627 (January 4, 1985). It would show a startling suspension of common sense and be a strange and ineffectual enforcement policy if respondents and possible violators were given the discretion and authority to determine what is and what is not hazardous waste. To accede to such an argument smacks of relying upon a fox to be completely objective concerning the number of hens in a chicken house.

2. Notification Before Issuing Complaint

Respondent maintains that the proceeding should be dismissed because complainant failed to comply with 40 C.F.R. §22.37 (b), hereinafter sometimes regulation, requiring the Administrator to notify alleged violators before issuing a complaint. Respondent acknowledges that the Administrator suspended the notice requirement but argues that the suspension was invalid because it should have been, but was not, implemented in conformity with the Administrative Procedure Act's (APA) public notice and comment requirement, 5.U.S.C. §553.

This same argument was made unsuccessfully by a respondent in American Ecological Recycle Research Corporation and Donald K. Gums, Docket No. RCRA-VIII-82-4, at 3-7. On appeal, the Chief Judicial Officer (CJO) affirmed the initial decision holding that the regulation was effectively suspended and respondents, therefore, were not entitled to any notice. 3/ It was claimed, as does respondent here, that the suspension of the regulation was inconsistent with the notice and comment provisions in the APA. The CJO affirmed the initial decision ruling that the action in question came within the APA exception for agency rules of procedure and practice involving "rules of Agency organization, procedure or practice, or in any situation in which the Agency for good cause finds that notice and public procedure thereon are im-

3/ Final Order, July 18, 1985.

practicable, unnecessary, or contrary to public interest." 5 U.S.C. §553. The CJO distinguished the case from EDF v. Gorsuch, 713 F. 2d 802 (D.C. Cir. 1983), also relied upon by respondent, because Gorsuch did not involve a conflict between the statute and the regulation, the situation here. 4/ The final order held that there was no justification for deviating from the general rule that challenges to rulemaking are rarely entertained in an administrative enforcement proceeding. 5/ Even so, the opinion went on to hold that in view of the statutary amendments, the urgency involved and the procedural nature of the rule (suspension), EPA had "good cause" for suspending the 30 day notice provision without giving prior opportunity for notice and comment. 6/ The CJO reasoned that EPA was obligated to eliminate the conflicting portion of the regulation because the rule was no longer in conformity with the statutory mandate. 7/

4/ Final Order at 7.

5/ Id. at 5.

6/ Final Order at 6. The final order also argued that the statutory amendments immediately and implicitly repealed the 30 day notice rule because Congress would not have wanted EPA to delay taking action against "midnight dumpers" while conducting rulemaking proceedings. Id. at 7.

7/ Id.

EPA suspended the regulation here in order for it to conform to statutory amendments to the Act enacted in late 1980. 8/ Congress eliminated the 30 day notice period primarily to permit accelerated action to prevent so called "midnight dumping." 9/ Before the amendments, compliance orders could not be issued until 30 days after alleged violators were notified. The 1980 amendments eliminated that provision, thus permitting the Administrator to issue a compliance order without 30 day advance notice.

Upon enactment of the 1980 amendments, EPA acted promptly to make the regulation conform to the new procedure. It issued a notice on November 25, 1980, suspending those portions of the regulation requiring 30 day notice before issuance of an order. 10/ The suspension was made effective immediately upon publication in the Federal Register even though EPA did not provide any advance notice or opportunity for public comment on this action.

3. Enforcement and Compliance Orders

Respondent is also of a mind that because complainant failed to notify the State of California (State) before issuing the com-

8/ 94 Stat. 2334 (1980).

9/ 1980 U.S. Code Cong. & Admin. News at 5022.

10/ 45 Fed. Reg. 79808 (Dec. 2, 1980).

pliance order, as mentioned by Section 3008(a)(2), the complaint should be dismissed. In pertinant part, this Section provides:

> In the case of a violation of any requirement of this subchapter where such violation occurs in a State which is authorized to carry out a hazardous waste program . . . the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order. . . .

Complainant's view is that EPA retains authority under Section 3007(a) to inspect and request information from a respondent independent of any authority given to the State under Section 3006. Accordingly, the State would not be involved in the information request to respondent and the complainant, therefore, is not obligated to notify the State before issuing a compliance order.

Section 3007(a) contains a grant of inspection authority to both the EPA and a state having an authorized hazardous waste program. The purpose of the notification requirement in Section 3008 (a)(2) is to permit an authorized state to have the initial opportunity to enforce the hazardous waste program against violators. 11/ Under Section 3007(a), EPA in its oversight capacity retains an independent authority to gather information and conduct irspections which is not supplanted by any investigative powers delegated to the states. Complainant observes correctly that under these

11/ 1976 U.S. Code Cong. and Admin. News, at 6269.

circumstances, the notice requirement of Section 3008(a)(2) is ineffective because the information request by complainant was made pursuant to one of its independent powers and would not implicate State action.

The word "shall" in Section 3008(a)(2), if construed as mandatory, would allow respondent to avoid compliance with Section 3007(a) and the penalties imposed under Section 3008 for its violation. "Statutes that, for guidance of a governmental official's discharge of duties, propose 'to secure order, system and dispatch in proceedings' are usually construed as directory, whether or not worded in the imperative, especially when the alternative is harshness or absurdity. . . we prefer a construction that bestows the benefits of the Act on those for whom it was chiefly intended. . . ." 12/ The notice provision was not intended to benefit potential violators but was included to facilitate the state-federal relationship and their respective enforcement responsibilities. In that the State would not benefit from notification that the EPA was issuing a compliance order pursuant to its independent authority, neither the State nor respondent was harmed by the failure of the complainant to alert the State before the compliance order was issued.

12/ Ralpho v. Bell, 569 F.2d 607, 627 (D.C. Cir. 1977)

4. Civil Penalty

Respondent also takes the position that complainant failed to comply with 40 C.F.R. §22.14(a)(5) in that the complaint did not include a statement explaining the reasoning behind the proposed civil penalty. On the facts of this case, the omission of a statement in the complaint explaining the penalty reasoning is not fatal. The requirement is procedural and not substantive in nature. The purpose and intent of 22 C.F.R. §22.14(a)(5) is satisfied here if the respondent is provided with an explanation somewhere in the submissions pertaining to the motion for an accelerated decision. Such an obligation was fulfilled by complainant in its response to respondent's memorandum concerning the motion for the accelerated decision. (at 20-21) Complainant stated that the proposed penalty was assessed in accordance with the current penalty policy, a copy of which respondent acknowledged it possessed and understood.

It is asserted that complainant, in determining the proposed civil penalty of $14,000, apparently multiplied the determined penalty by 14, the number of waste streams for which information was sought but not provided. Respondent argues that the proposed civil penalty is inconsistent with EPA's Civil Penalty Policy for the Act of May 8, 1984. However, there is no persuasive evidence that the penalty amount was arrived at by complainant in a manner inconsistent with the Civil Penalty Policy.

ULTIMATE CONCLUSION AND ORDER

It is concluded that respondent violated Section 3007 of the Act, 42 U.S.C. §6927, in failing to provide completely the information sought by complainant in its letter of August 12, 1985 and a penalty of $14,000 is assessed against respondent. IT IS ORDERED that this penalty of $14,000 shall be paid by submitting a certified or cashier's check in this amount, payable to the Treasurer of the United States and mailed to:

EPA - Region IX
Regional Hearing Clerk
P. O. Box 360863M
Pittsburgh, PA 15251

Payment shall be made within 60 days of the receipt of this order.*

Frank W. Vanderheyden
Administrative Law Judge

Dated: April 8, 1987

*Unless appealed in accordance with 40 C.F.R. §22.30, or unless the Administrator elects to review same sua sponte as provided therein, this decision shall become the final order of the Administrator in accordance with 40 CFR §22.27(c).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Accelerated Decision and Order issued by Administrative Law Judge Frank W. Vanderheyden on April 8, 1987, was served on each of the parties, addressed as follows, by mailing certified mail, return receipt requested, in a U.S. Postal Mail Box, or by hand delivering, in in the City and County of San Francisco, California, on the 13th day of April, 1987:

William C. Kuhs, Esq.
Kuhs & Parker
1200 Truxtun Avenue, Suite 200
P.O. Box 2205
Bakersfield, CA 93303

Certified Mail
No. P010614494

David M. Jones, Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 9
215 Fremont Street
San Francisco, CA 94105

Hand Delivered

Dated at San Francisco, California, this 13th day of April, 1987.

Lorraine Pearson

Lorraine Pearson
Regional Hearing Clerk
EPA, Region 9