UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Hoosier Spline Broach Corporation	)	Docket No V-W-16-93
	)	(Application under EAJA)
Respondent	)	

Recommended Decision

The complaint in this case, brought under the Resource Conservation and Recovery Act of 1976, as amended ("RCRA"), 42 U.S.C. §6928(a)(1), charged Respondent in four Counts with violations of the Act and the regulations issued thereunder. A penalty of $825,509 was requested.[1] The case was settled before hearing with three of the four Counts dismissed with prejudice and the remaining Count amended and a penalty of $3,000 assessed.[2] Respondent has now applied for fees and expenses under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. §504, and the Agency's implementing regulation, 40 C.F.R. Part 17.

Background

The complaint was issued on June 30, 1993. The following facts do not appear to be disputed:

Respondent manufactures a cutting tool made from steel which is called a "broach". In its operation it generates a grinding

[1] Complainant was the U.S. EPA acting through an authorized official of Region V, and is also referred to as the "EPA."

[2] Order of Judge Vanderheyden dated July 20, 1995, as amended by order dated August 2, 1995.

waste (also referred to as "grinding sludge").[3] A RCRA compliance inspection of Respondent's facility was made on February 21, 1992, by the Indiana Department of Environmental Management ("IDEM") during the course of which a waste pile of grinding sludge was found at the facility. For approximately the past two years Respondent had been storing its grinding sludge at that location.[4]

On November 7, 1991, Respondent had submitted analytical data relating to the waste pile in an application to IDEM's Special Waste Section for Special Waste Certification.[5] The analytical data consisted of four separate tests of samples taken from the waste pile during the period between October 1990 and September 1991.[6] The tests run were for the determination of whether the waste exhibited the characteristic of toxicity using the Toxicity Characteristic Leaching Procedure, in this instance testing for the presence of chromium ("hereafter TCLP Chromium).[7] IDEM made a statistical analysis of the four test results and concluded that the waste contained TCLP Chromium in excess of the regulatory limit

---

[3] Complainant's Exhibit ("CX") 1; Respondent's Exhibit ("RX") 21. References are to exhibits filed with each party's prehearing exchange.

[4] CX 1, p.2, CX 4B.

[5] CX 5. The application proposed the disposal of the waste at Byer's Landfill with Waste Management of Central Indiana as the hauler. Certification was required if the waste was to be disposed of at a facility that was not a hazardous waste facility with a valid permit under 329 IAC 3 (dealing with the hazardous waste management permit program).

[6] CX 5.

[7] 40 C.F.R. §261.24.

of 5.0 mg/l, making it a D007 characteristic hazardous waste.[8] Accordingly, by letter dated January 9, 1992, IDEM wrote Respondent that approval to dispose of grinding sludge as Special Waste was denied.[9]

Following the inspection, or commencing with the inspection, Respondent placed the grinding sludge in 55 gallon drums, marked them with hazardous waste stickers and shipped the waste off-site as hazardous waste by manifests dated May 29, and June 12, 1992.[10]

The Complaint

The Complaint, issued on June 29, 1993, alleged four violations with respect to the hazardous waste pile discovered during the inspection:

Count One alleged that Respondent as a generator of hazardous waste failed to make a hazardous waste determination with respect to the waste pile by September 29, 1990, as required by 40 CFR §262.11, that it failed to timely submit a hazardous waste notification and that it failed to timely obtain an EPA identification number and continued with hazardous waste storage

---

[8] Respondent stresses that IDEM's conclusion was that the waste "probably" contained TCLP chromium. Any statistical analysis, however, based on sampling is expressed in terms of probabilities. The significance is that IDEM found the probabilities of the waste being hazardous sufficiently great to require that it be disposed of as hazardous waste.

[9] RX 2.

[10] CX 1, CX 4B.

and disposal activities without the EPA identification number.[11]

Count Two alleged that Respondent stored hazardous waste without a RCRA permit or acquiring interim status during the period from September 29, 1990 to May 29, 1992.[12]

Counts Three and Four alleged that Respondent since September 29, 1990, was subject to certain operating standards set forth in 40 CFR Part 265, for the management of hazardous waste, and failed to meet those standards.[13]

Included in the complaint was a compliance order that required Respondent to do the following:

A. Determine if each solid waste generated by Respondent is a hazardous waste.

B. Stop hazardous waste treatment, storage or disposal activities for which a RCRA permit is required and for which

---

[11] The Toxicity Characteristic Leaching Procedure for identifying a hazardous waste (replacing the extraction procedure leach test) was adopted by regulation issued on March 29, 1990. Wastes containing chromium in excess of 5.0 mg/l concentration, as tested by the toxicity characteristic leaching procedure, were identified as D007 waste. Large generators were required to bring themselves into compliance with the statutory and regulatory requirements for managing this waste by September 25, 1990. 55 Fed. Reg. 11796 (Mar 29, 1990).

[12] Respondent had not applied for a permit to treat, store and dispose of hazardous waster, nor did it qualify for interim status. Assuming Respondent would be a treatment, storage and disposal facility newly regulated by the Toxicity Characteristics rule, interim status required filing a notification of hazardous waste activity under RCRA §3010 (42 U.S.C. §6930) by October 29, 1990, and submitting a Part A permit application by September 25, 1990. 55 Fed. Reg. 39411 (Sep 27, 1990).

[13] Count Four dealt specifically with the standards required for hazardous waste piles, and Count Three dealt with other requirements applicable to the operation of a hazardous waste facility.

neither a RCRA permit nor interim status has been obtained.

C. Comply with each standard applicable to the owners or operators of hazardous waste piles.

D. Submit a closure and, if necessary, a post-closure plan for the waste pile.

The Complaint proposed to assess a penalty of $825,509.00.

Discussion

The EAJA, 5 U.S.C. §504, awards to a party prevailing in an adversary adjudication with an agency, the party's litigation fees and expenses unless the position of the agency was "substantially justified."[14] In the case of a corporate party such as Respondent, the award is limited to corporations whose net worth did not exceed $7 million and which did not have more than 500 employees at the time the adversary adjudication was initiated. The procedures for obtaining the award are set out in the Act and the agency's regulations promulgated thereunder, which in the case of the EPA are set out at 40 CFR Part 17.[15]

In order to be entitled to an award, there are certain

---

[14] For this case being an adversary adjudication, see the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. §22.01(a)(4). The rules govern adjudicatory proceedings conducted by the EPA.

[15] Under Section 17.4 the regulation would not be applicable to proceedings begun after September 30 1984. That provision has been made obsolete by the enactment of Pub. L. 99-80, 99 Stat. 183 (1985), which revived the EAJC and repealed the provision in the original Act that it would expire on October 1, 1984. The 1985 Act also raised the limit for corporations to $7 million, thus superseding the $5 million limit in 40 C.F.R. §17.5(b)(5). 99 Stat. at 185.

conditions that must first be met. This is a matter that can be readily disposed of:

First, the order amending Count One of the complaint and dismissing the other counts with prejudice was issued on July 20, 1995. Voluntary dismissal of the counts with prejudice constitutes a final disposition as to those counts.[16] The application was filed on August 17, 1995, clearly within the thirty-day time limit for the final disposition of those counts.

Second, Respondent has submitted a detailed exhibit showing that at the time the complaint was issued in June 1993, its net worth (assets minus liabilities) was considerably less than $7 million.[17]

Finally, Respondent has submitted documentation showing that the number of its employees was less than 500.[18]

Turning to the merits of Respondent's application, there is no question that Respondent prevailed on Counts Two, Three and Four charging Respondent with failure to comply with the requirements for managing hazardous waste. These counts were withdrawn with prejudice, attesting to Respondent's success in persuading Complainant that the grinding sludge was not D007 waste.

As to Count One, three separate violations were really alleged: the failure to timely make a hazardous waste

---

[16] 40 CFR §17.14(b).

[17] Application for Award of Fees and Expenses under Equal Access to Justice Act, 5 U.S.C. §504, and 40 C.F.R. Part 17 (hereafter " EAJA Application"), Exhibit 1.

[18] EAJA Application, Exhibit 3.

determination; the failure to timely submit a hazardous waste notification that Respondent was operating a hazardous waste treatment, storage or disposal facility; and the failure to timely obtain an EPA identification number and continuing with its storage and disposal activities without an EPA identification number. The charge that Respondent failed to make a timely hazardous waste determination survived in the amended complaint, and Respondent cannot be considered to have prevailed with respect to that charge. Nevertheless, it does appear that this charge was not really contested by Respondent and that if it and the $3,000 penalty were all that had been involved, this case would have been quickly disposed of without the substantial fees and expenses that Respondent has incurred in its defense.

The EPA's Position Was Substantially Justified But Not For The Entire Proceeding.

Even though Respondent prevailed as to most of the charges in Count One and to the violations charged in the remaining Counts Two, Three and Four and, indeed, can be considered to have prevailed in the entire proceeding, it is not entitled to the fees and expenses incurred by it, if the EPA's position was substantially justified.[19] Complainant's position on which the dropped charges in Count One and the dismissed charges in Counts Two, Three and Four were based was that the grinding sludge generated by Respondent was hazardous waste. The burden with respect to showing that Complainant's position was substantially

[19] EAJA, 5 U.S.C. §504(a)(1).

justified is upon Complainant. The test is one of reasonableness, whether Complainant's case had a reasonable basis both in law and fact.[20]

The legal basis for Complainant's position that this waste, if hazardous, is subject to the requirements cited in the complaint, is not really questioned. What is questioned is the factual basis for Complainant's position that the waste was D007 waste. To be substantially justified means more than having sufficient factual or legal support to keep the complaint from being dismissed as frivolous. The agency's position could not be frivolous and yet, when the agency's position is evaluated by a reasonable mind, it could still be apparent that the agency has only a very slight chance of prevailing. Some greater showing of the reasonableness of the agency's position should be made, but precisely how much greater is elusive.[21]

We start with the evidence as to the hazardous nature of the waste which Complainant had before it at the time the complaint was issued, namely, the four tests submitted with Respondent's application for a hazardous waste determination. While further testing was done prior to the complaint being issued, it does not

---

[20] H. R. No. 96-1418, 96 Cong., 2d Sess., reprinted in 1980 U.S.C.C.A.N., 4984, 4989-4990; Pierce v. Underwood, 487 U.S. 552, 565 (1988).

[21] Pierce v. Underwood, 487 U.S. 552, 565-566 (1988). Respondent's argument that Complainant must show that its position was "clearly" reasonable and "well founded" in law and fact would seem to give a presumptive effect to the fact that Respondent had prevailed which was not intended by the statute. See H. R. No. 96-1418, 96 Cong. 2d Sess., reprinted in 1980 U.S.C.C.A.N. 4984, 4990.

appear that the results of these tests were furnished to the EPA until the parties met following the issuance of the Complaint.[22] Respondent contends that the EPA was unjustified in assuming that the NET test results established that the waste was hazardous. According to Respondent, information known to the Complainant should have put Complainant on notice that the two NET tests showing the presence of chromium in excess of the regulatory level were "fatally" flawed and not reliable evidence of whether the waste was hazardous. I disagree.

Respondent argues that questions were immediately raised about the reliability of the NET analyses. IDEM, apparently, did first question the test results and so examined the quality assurance and quality control information with respect to the NET tests. IDEM concluded that the NET test results were valid and that the waste should be managed as D007 waste.[23] NET also reviewed the laboratory data for the analysis of the two tests. The report it submitted discussed in detail the procedures for sample 36781, which showed TCLP chromium to be present in concentration of 10 mg/l, and it also concluded that the analysis was valid and that the waste exceeded the regulatory limit for D007 waste.[24] In other words,

---

[22] See Respondent's prehearing exchange statement, ¶1 and Respondent's EAJA Application, p. 3. For additional tests made after the inspection and prior to the issuance of the complaint on June 30, 1993, see RX 13 - 19, 21.

[23] RX 3 and 4.

[24] RX 4. NET subsequently reported that the analytical report for sample number 36781 had erroneously stated that the test result had been adjusted to reflect spike recovery when it had not. When adjusted for spike recovery, the concentration for TCLP chromium

neither IDEM nor NET considered the errors and misinterpretations claimed to be inherent in the NET analyses to be of such gravity as to impeach the validity of the test results.[25]

Respondent argues that it and its waste contractor were convinced the waste was not hazardous and the waste contractor had approved the waste for disposal at its landfill. The record support cited is the Special Waste Certification Application, in which Respondent is asking for a determination as to whether its waste is nonhazardous and can be approved for disposal at the landfill.[26] So far as appears from the record, the NET test results were unqualifiedly submitted as data which IDEM could rely upon in making this determination.[27] The record also shows that after the special certification was denied and following the RCRA inspection where the waste pile was observed by the inspectors, the waste by manifests dated 5/29/92 and 6/12/92, was manifested by Respondent

---

was 14 mg/l. RX 5.

[25] This would be certainly true with respect to sample No 36781, showing TCLP chromium present in a concentration of 10 mg/l. NET does not in its letter express any opinion as to the validity of Sample No. 30267, the first analyses made by NET, which showed TCLP chromium present in concentration of 5.8 mg/l. RX 4, 5. IDEM, however, must have found both NET tests valid since it included both in its statistical analysis of the test data. RX 2.

[26] RX 1. CX 5 is the same document with the test data attached.

[27] The fact that quality assurance/quality control ("QA/QC") data for the NET tests was submitted to IDEM does not indicate that Respondent and its waste contractor considered the tests unrepresentative of the waste. Such information was required by regulation to accompany the application. CX 9 (329 IAC 2-21-14(c)). In any event, the QA/QC information for the test showing chromium to be present in concentration of 10 mg/l (sample 36781) was found by IDEM to be "OK". RX 3, 4.

off the premises as D007 hazardous waste.[28]

Complainant, then, from the information it had about Respondent's waste at the time it issued the Complaint could reasonably conclude that the waste generated by Respondent should be managed as hazardous waste and Respondent had not complied with its obligation to do so.[29] Violations of RCRA and the applicable regulations are redressed by civil penalties.[30] Civil penalties ensure that the Act and regulations will be complied with and that it is unprofitable for violators to wait until they are caught before complying. They are assessed in accordance with the adjudicatory hearing procedures prescribed by regulation.[31]

Respondent faults the EPA for not acting as carefully as Respondent contends the EPA should have done but it cannot escape the consequences of its own lack of care in this matter. If the NET test results were unrepresentative of its waste, this should have been as obvious to Respondent as to the EPA.[32] Had Respondent taken the care that it did in reapplying for certification to assemble test data that it believed accurately represented the

---

[28] CX 4B.

[29] Respondent contends that the evidence as to the chain of custody for Sample 36781, showing a TCLP chromium concentration of 10 mg/l, is inconclusive and should have been a red flag warning the EPA that the test should not be relied upon. EAJA Application at 11, n. 8. IDEM, however, and NET found no grounds for invalidating or disregarding the results of Sample No. 36781.

[30] RCRA, section 3008.

[31] 40 C.F.R. §22.01(a)(4).

[32] See Respondent's EAJA Application, p. 3.

characteristics of its waste, the charges that Respondent had mismanaged hazardous waste would probably never have been brought.

The inquiry as to the merits of Respondent's application does not end with the issuance of the complaint. The proceedings thereafter should also be examined to determine whether the EPA was substantially justified in continuing with the case up to the point of settlement on September 1995.[33] Between the issuance of the complaint and settlement, Respondent expended both time and effort in trial preparation.[34]

On December 9, 1993, Respondent submitted to the EPA various sampling and other data and met with the EPA on December 13, 1993, to discuss settlement.[35] There appear to have followed further discussions on settlement, but no agreement having been reached, the parties in March, 1994, made their respective prehearing exchanges. Further settlement discussions followed as well as certain discovery by Respondent, but on January 25, 1995, the EPA reported that the parties believed that further negotiations would not be productive and agree that the matter should be scheduled for hearing.[36]

On June 12, 1995, Judge Vanderheyden issued his order scheduling the case for a hearing on July 26, 1995. By order dated

---

[33] Environmental Defense Fund, Inc. v. Watt, 722 F. 2d 1081, 1086 (2d Cir. 1983).

[34] Respondent's EAJA Application, Exhibit 2.

[35] Respondent's prehearing exchange statement.

[36] See the Status Reports and correspondence in the file.

July 13, 1995, Judge Vanderheyden canceled the hearing, stating that on July 10, 1995, the parties had reported that the case had been settled in principal. There followed the amended complaint proposing to assess a $3,000 penalty for amended Count One and dismissal of the remaining three counts with prejudice in accordance with the settlement agreement reached by the parties.

In September 1994, about nine months prior to settlement, as disclosed in the papers filed with the Application, Respondent was granted a Special Waste Permit for its grinding sludge by IDEM, based on a new application by Respondent and new sampling results.[37]

It is not necessary to examine what actually took place during the settlement discussions. Indeed, it would be inappropriate to do so since settlement discussions are privileged.[38] It does appear that from the beginning of the settlement discussions, the EPA had all the test data and other information bearing upon the TCLP chromium content of the waste which were included in Respondent's prehearing exchange.[39] Also, it can be assumed that Respondent at all times was willing to settle on the terms that were finally agreed to but unwilling to settle on any other terms.

---

[37] EAJA Application, p. 14; EPA's answer to EAJA Application, p.8.

[38] 40 C.F.R. §22.22(a).

[39] The latest test report is dated December 6, 1993. RX 21. As to other data relating to the chromium content of the waste, the latest is a report on the performance of Heritage Laboratories, which conducted some of the tests, dated December 21, 1993. RX 20, 22 - 25.

We note that what the EPA was confronted with was a factual determination as to whether the waste found at the inspection was hazardous. Respondent submitted the test results of 17 samples of its grinding sludge made after the four tests that were the basis for denying the Special Waste Certification Application. One sample showed that TCLP Chromium was present in a concentration of 7.7 mg/l.[40] Another sample, or its blanchard sludge, showed the TCLP Chromium was present at a concentration of 48.1 mg/l, but a sample of the O.B. grinding sludge showed TCLP Chromium present only in a concentration of 3.2 mg/l.[41] The remaining samples all showed TCLP chromium present in concentration below the regulatory limit.[42]

The tenor of Respondent's argument seems to be that the test data was such clear proof that its waste was not D007 waste that the EPA should have immediately recognized that the charges were groundless and conceded defeat. I disagree. The additional test data on its face did not compel the conclusion that the EPA's case was without merit. In view of the fact that the waste initially tested as hazardous, and continued to test hazardous on some of the early subsequent tests, I find that the EPA was substantially justified in holding out for an order, as I assume that it did,

---

[40] RX 13.

[41] RX 15. According to a report submitted by Respondent, Respondent generates two wastestreams, grinding sludge from the Blanchard Machine and grinding sludge from dry grinding dust collectors. RX 21, p. 1. The amended complaint and compliance order dealt with blanchard grinding sludge generated at the facility.

[42] RX 14, 18, 19 21. One test result, RX 16, is reported in parts per million (ppm) and since the equivalent mg/l figure is not given, it is ignored.

that would address its concern that hazardous waste was being generated, or, at least, at the time of the inspection had been generated by Respondent.[43] If such an order had been entered, we would have been presented with a different question as to Respondent's entitlement to fees and expenses under the EAJA.

I find, however, that the EPA's case became considerably weaker once IDEM had approved the waste for disposal as nonhazardous. It is true, as the EPA points out, that the certification was for the "current" wastestream as distinguished, presumably, from what had been generated at the time of the inspection. The EPA does not point to any evidence in the record, independent of the test results, indicating that the waste now being generated should not also be considered representative of the waste generated at the time of the inspection. It should, then, have become clear to the EPA that it was unlikely to prevail on the merits.[44]

---

[43] As the IDEM analysis of the initial test data indicates, the statistical significance of the data cannot be determined solely by counting the number of passes and failures. None of the subsequent samples tested by Respondent came from the wastepile, since that had been disposed of. Of the first three subsequent tests, run in July 1992, one showed a concentration 7.7 mg/l (RX 13), and one, for the blanchard sludge, showed a concentration of 48.1 mg/l (RX 15).

[44] Respondent argues that the test data should have triggered additional inquiry by the EPA. Reply to EPA's answer, p. 8, n.2. What Respondent is really complaining about is the EPA's resistance to settling on Respondent's terms, so that Respondent felt the need to proceed with its preparation for trial. I find, however, that until IDEM had analyzed the waste as nonhazardous, the EPA would have been substantially justified in going to hearing on the question of whether the waste found during the inspection was hazardous, or, at least, holding out for a settlement other than the dismissal with prejudice of the counts related to the

None of the reasons advanced by the EPA for finally agreeing to the settlement demonstrate that the EPA's position that Respondent had been generating hazardous waste at the time of inspection was justified after IDEM had approved the waste for disposal as nonhazardous waste. Judge Nissen's stand on how the economic benefit of a Respondent's noncompliance should be calculated and the EPA's policy with respect to small businesses may have persuaded the EPA to moderate its stand on the penalties it should seek, but I do not see that they are relevant to the question of whether Respondent had generated hazardous waste, which was the issue on which Respondent ultimately prevailed on the merits.

As I have previously noted, we are not privy to the actual settlement negotiations that took place. I am assuming that Respondent in September 1994, was either proposing or would have accepted the settlement relating to Count I which was incorporated in the amended complaint, and that it was because the EPA either refused to dismiss the other Counts with prejudice or was simply holding out in the expectation of a settlement more favorable to its position on those Counts that final settlement was not reached until September 1995. I find that the EPA was not substantially justified in delaying settlement for either reason. Respondent,

---

mismanagement of hazardous waste. Unless the EPA's case rested upon evidence besides the test results, however, and there is no showing that it did, IDEM's approval for disposal of the waste as nonhazardous should have made it clear to the EPA that the EPA's chances of prevailing in the administrative hearing were slight.

accordingly, is entitled to fees and expenses incurred after September 1994.

Fees and Expenses Allowed

The EPA objects to the allowance of attorney's fees in excess of $75 an hour and to certain expenses claimed by Respondent.

By law, attorney and agent fees cannot exceed $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys justifies a higher fee.[45] The EPA's regulation does not allow for attorney's fees in excess of $75 per hour.[46] Accordingly, Respondent's application for an award of attorney's fees in excess of $75 per hour is denied.[47]

Travel expenses to the offices of Respondent's client seem a reasonable expense and they are allowed to the extent they were incurred after September 1994.

The other expenses objected to by the EPA were incurred prior to September 1994, and they are, accordingly, not considered here.

---

[45] EAJA, 5 U.S.C. §504(b)((1)(A).

[46] 40 C.F.R. §17.7(b)(2).

[47] Pierce v. Underwood, 487 U.S. 552 (1988), cited by Respondent, applies to awards under 28 U.S.C. §2412(d), which governs court awards of litigation expenses and not agency awards. John Boyle & Co., 2 EAD 893, n.1 (Judicial Officer, July 27, 1989). The wording of the two statutes on this matter is not identical. Compare 5 U.S.C. §504(b)(1)(A) with 28 U.S.C. §2412(d)((2)(A). Respondent's citation to a footnote in the Administrative Law Judge's recommended decision in John Boyle refers to court litigation expenses. 1987 RCRA LEXIS 71 *19 (October 8, 1987).

Order[48]

Respondent is entitled to an award of fees and expenses incurred in this proceeding after September 1994. Respondent's application for fees and expenses prior thereto is denied. A revised application itemizing the amount of fees and expenses sought as calculated in accordance with the opinion herein for the period allowed should be submitted within thirty (30) days from the date of this order.

Gerald Harwood
Gerald Harwood
Senior Administrative Law Judge

ed: September 17, 1996

[48] Review of this recommended decision is governed by 40 C.F.R. §17.27. Appeal is to the Environmental Appeals Board. 57 Fed. Reg. 5323 (February 13, 1992).