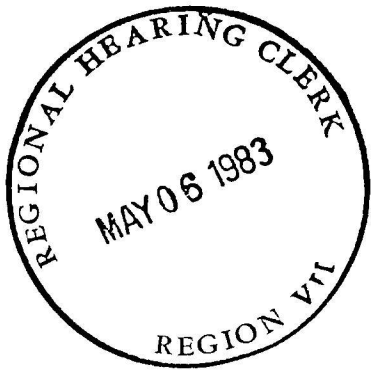
UNITED STATES ENVIRONMETAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	RCRA Docket No. 82-H-025
River Cement Company,	)	
Respondent	)	
EPA I.D. No. MOD050232560	)	
Resource Conservation and Recovery Act (RCRA) Proceedings Section 3008(a)(1), 42 USC Section 6928(a)(1)	)	



1. Hazardous Waste Permit - Where Respondent began construction of a 15,000-gallon storage tank, a hazardous waste management (HWM) facility after having submitted Part A and Part B of its permit application but approximately nine months before it received a finally effective RCRA permit, and such construction was begun less than 180 days after said application was submitted, it violated the express provisions of both 40 CFR 122.22(b)(1) and 122.22(b)(2).

2. Hazardous Waste Management Facility - The construction of a 15,000-gallon tank, a HWM facility, in contemplation of storing hazardous waste which Respondent contemplated burning as an alternative fuel, subjects Respondent to regulatory requirements concerning the time and specifications of construction and the management of said facility following construction.

3. Hazardous Waste - Resource Conservation and Recovery Act (RCRA) - The Act (RCRA) contemplates comprehensive "cradle to grave" regulation and the regulations promulgated pursuant thereto provide regulation and management of hazardous waste from time of its generation until properly disposed of or properly used or reclaimed irrespective of the end use for which it is destined for the reason that during the stages when it is being transported or stored, it presents essentially the same hazard as when generated.

4. Jurisdiction under RCRA - The definition of "discarded material" in 40 CFR 261.2 is meant to expand, not limit, the common meaning of the term "solid waste". Since the determination whether material is "hazardous waste" must be made by the "handler" generating said waste and, in the usual instance, once a material is characterized as a hazardous waste it remains such, any exceptions provided by the regulations must be considered with reference to whether said waste is being generated, transported, stored or destined for re-use, recycling or reclamation.

5. Civil Penalty - Intent is not an element of an offense for which a civil penalty is provided.

6. Civil Penalty - Where a charge derives primarily from another charge cited in the Complaint for which a penalty is properly to be assessed, the subsequent charge may not warrant a separate penalty to be assessed.

Appearance for Respondent:

Donald H. Whaley, Attorney
Whaley and McAuliffe
Suite 2004
7777 Bonhomme Avenue
Clayton, Missouri 63105

Appearance for Complainant:

Barbara Peterson, Attorney
Office of Regional Counsel
U.S. EPA, Region VII
324 East 11th Street
Kansas City, Missouri 64106

INITIAL DECISION
by
Administrative Law Judge
Marvin E. Jones

On September 1, 1982, subject Complaint and Compliance Order was filed by the United States Environmental Protection Agency (EPA), Region VII, pursuant to Section 3008(a)(1) of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act (RCRA) of 1976, as amended, 42 USC 6902 et seq. (hereinafter "RCRA" or "the Act") and EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, etc., 40 CFR, Part 22.

Said Complaint charges, first, that Respondent, River Cement Company, violated 40 CFR 122.22(b)(1) in that it began physical construction of a hazardous waste storage facility without having received a finally

effective RCRA permit. In support of said charge, it alleges that, on September 23, 1981, Respondent filed Part A and Part B of its Hazardous Waste Permit Application to operate a storage facility for storing certain waste solvents listed in 40 CFR 261.31 as F003, F004 and F005; that it constructed a storage tank (and associated equipment) during October through December, 1981; and that the final RCRA permit applied for was issued to Respondent on July 30, 1982. The Complaint further charges that by commencing physical construction of said hazardous waste management facility before the expiration of 180 days from and after its said permit application, Respondent violated 40 CFR 122.22(b)(2). Said Complaint proposes that civil penalties of $1000 and $500 be assessed for the respective violations by Respondent.

The Compliance Order requires Respondent to:

1. Immediately comply with the terms of the final RCRA permit issued on July 30, 1982; and

2. Immediately comply with Standards for Owners and Operators of Treatment Storage and Disposal Facilities per 40 CFR, Part 262.

The Respondent contends that Complainant lacks jurisdiction to charge Respondent with subject violations for the reason that subject still bottoms are not a solid waste and cannot meet the definition of hazardous waste "by virtue of the fact that said material is being burned as a fuel for the purpose of recovering usable energy" within the exemption provided in 40 CFR 261.2(c)(2); and that, assuming arguendo, the (materials) constitute a solid waste, they are exempt from the definition of hazardous waste under the exemption in 40 CFR 261.6(a)(1) by reason of its beneficial use or re-use, etc.

An adjudicatory hearing was held and the case submitted on March 10, 1983, in the River Cement conference room at Respondent's plant near Festus, Missouri.

On consideration of the evidence in this record, the proposed findings, conclusions, briefs and arguments of the parties, I make the following

FINDINGS OF FACT

1. The parties stipulated that:

A. On or about September 22, 1981, Respondent filed Part A and Part B of its Hazardous Waste Permit Application to operate a storage facility for storing waste solvents listed in 40 CFR 261.31 as F003, F004 and F005.

B. Construction of said facility (a tank with a capacity of approximately 15,000 gallons) was commenced by Respondent in October, 1981, and was substantially completed by the end of 1981.

C. Though said tank was constructed in contemplation of storing still bottoms (the hazardous waste listed in said permit application), the only use made of the tank since its construction is (its use) as a "feeder tank" from which fuel oil is fed into the kiln to obtain a heat level at which pulverized coal will ignite and burn.

D. The subject final permit was issued to Respondent on July 30, 1982.

E. Said tank was constructed by Respondent pursuant to plans attached to said Hazardous Waste Permit Application.

2. Respondent's witness, David Wietes (T. 67), an employee of Clayton (Missouri) Chemical Company, which is a solvent reclamation company, testified that still bottoms there generated were, until November 19, 1980, disposed of by landfilling (T. 67; 84); that after such disposal was prohibited, he, as representative of his company, sought alternative methods of handling said material (T. 68).

3. Wietes, in about March, 1981, discussed with Respondent's Vice President of Technical Services, the use by Respondent of subject still bottoms (solvent distillation residue [T. 84]) as fuel in its kiln (T. 69; 46).

4. Respondent's engineering study showed it would be profitable to burn approximately 1500 gallons per day of said still bottoms, about two percent of the total fuel required in Respondent's No. 2 Kiln (T. 47).

5. After Wietes discussed the proposal of Clayton Chemical Company with the Missouri Department of Natural Resources (MDNR), a temporary certification as a resource recovery facility was applied for by River Cement in June, 1981, and received July 1, 1981 (R. Exhibit 6; T. 70).

6. Respondent was, upon expiration of the one-year temporary permit (R. Ex. 6), certified with the State of Missouri on a permanent basis as a resource recovery facility (T. 71).

7. On June 17, 1981, Witness Wietes inquired of the U.S. EPA (R. Ex. 8) whether or not RCRA (the Act), and the regulations promulgated pursuant thereto, were applicable to the proposed fuels program with Respondent and stated his reasons why he believed, on the basis of 40 CFR 261.2 (definition of solid waste), such program was not subject to the Act (T. 73).

8. On September 11, 1981, Witness Wietes received a telephone response (EPA's only response, T. 79) to a letter forwarded to EPA in Washington, D.C. (R. Ex. 9), at which time he was advised by Messrs. Lehman, Dietrich and Lindsay (all EPA employees) that subject proposed program was "subject to the Act" (T. 76) for the reason that subject still bottoms contained waste materials listed under 40 CFR 261.31 as hazardous waste (T. 78). The Part A application was made by Respondent because Wietes felt it advisable to accept the official position of EPA (T. 78; 82).

9. Witness Wietes assisted in preparation of subject Part A and Part B applications because of his experience and knowledge of subject materials, including the hazards they pose to the public health and environment (T. 82-83).

10. Said still bottoms have the characteristic of "ignitability", as they have a flash point below 140° F., and in some instances are EP Toxic, i.e., they have a heavy metal content exceeding EPA standards (T. 83).

11. Witness Wietes further testified that, based on his knowledge of the nature of subject still bottoms, the manner in which said material is handled, stored or transported would be significant to the protection of the environment and to those members of the public involved in such handling or storage or who may happen to be in proximity thereto (T. 84).

12. Respondent's board of directors authorized acquisition of materials for and installation of subject oil feeder tank at its meeting around the last of July, 1981 (T. 50). Equipment for the smaller tank was procured in mid-September, 1981 (T. 55).

13. Final plans for the subject 15,000-gallon tank were drawn sometime in July, 1981 (T. 49). Respondent planned to dispose of 1,300,000 gallons of oil in its 2,000,000-gallon oil tank as soon as practicable, and said oil was sold on or about January 1, 1983 (T. 48).

14. It was the intention of River Cement Company to use the subject 15,000-gallon tank for the feeding of still bottoms into the kilns if the same was feasible and, if not, then for the feeding of fuel oil into the kilns (T. 49; 57).

15. Other than size, the only difference in the two tanks is the EPA-required alarm system on the smaller tank (T. 50), and two signs which read: "Danger. Unauthorized Personnel Keep Out" and "Danger. No Smoking or Open Flames" posted on the concrete holding area around the tank (T. 60).

16. The smaller tank is closer to Respondent's plant (R. Ex. 2, 3) than the large tank.

CONCLUSIONS OF LAW

I

Because subject materials, when generated by Clayton Chemical Company, are characterized by it, pursuant to 40 CFR 262.11, as solid waste which is ignitable and EP Toxic, which was by it "sometimes discarded", said materials are a solid waste (T. 1.c. 83-84; 40 CFR 261.2(b)(1); H.R. Rep. at 9-10; 40 CFR 262.11).

II

Because subject materials are listed as hazardous waste under 40 CFR 261.31 (Subpart D), said solid waste must also be characterized as a hazardous waste (40 CFR, Sections 261.1(b)(1); 261.3(a)(1); 261.3(a)(2)(i) and (ii).

III

Said materials "became a hazardous waste" at the time it first met the listing description as "a particular hazardous waste" in Subpart D of Part 261 of 40 CFR, as specifically provided in 40 CFR 261.31; 40 CFR 261.3(b)(1); 261.1(a)(4).

IV

So long as said materials exhibit the characteristics of hazardous waste identified in 40 CFR 261.21, and shown on this record, they will remain a hazardous waste (40 CFR 261.3(c)(1); 261.3(d)(1) and (2); 261.6(b).

V

Said material is a hazardous solid waste under the definition provided in Section 1004(5) of the Act (42 USCA 6903(5); 40 CFR 261.1(b)(1)).

VI

Subtitle C of the Act (RCRA), 42 USCA and 6921 et seq., establishes a Hazardous Waste Management Program to provide comprehensive regulation of hazardous waste, which is intended to provide "cradle to grave" regulation of hazardous waste (45 FR 12722, February 26, 1980; 45 FR 33066, May 19, 1980).

VII

During the stages when subject hazardous waste is being transported or stored, it presents essentially the same hazard as when generated and, therefore, requires essentially the same management procedures irrespective of the end use for which it is destined (45 FR 33093, May 19, 1980; 40 CFR, Parts 262, 263, 264 and 265; 40 CFR 261.6).

VIII

The Act, as well as its legislative history, indicates that Congress intended that four broad categories of materials be regulated as solid waste under the Act, and particularly Subtitle C, irrespective of their ultimate disposition. The common thread linking all such materials is that they are "sometimes discarded" and should be properly regulated and managed until properly disposed of or properly used or reclaimed (45 FR 33093, and sections of the Act, H.R. Rep. and S. Rep. there cited; 40 CFR 261.2).

DISCUSSION

For the reasons hereinbelow set forth, I find that Respondent is and was at all times here pertinent subject to the Act and the regulations. As no argument persists respecting Respondent's violations as charged, an appropriate civil penalty should be assessed as discussed infra.

On this record, there is no question that the materials for which the subject permit was issued on July 30, 1982, are hazardous waste (R. Ex. 1). In said permit, they are listed as "particular hazardous wastes" (see 40 CFR 261.1(a)(4)), F003, F004 and F005 - "still bottoms" from the recovery of certain solvents. Further, the permit specifies that said wastes possess the characteristics of "ignitability" and "toxicity"; and describes Respondent's 15,220-gallon tank as a "hazardous waste storage facility", regulated by the provisions of 40 CFR Part 264, Subpart J (Sections 264.190 et seq.).

Respondent's argument that it is not subject to said regulations is based on the definition of solid waste contained in 40 CFR 261.2: Definition of Solid Waste. The materials appear to be "other waste material", as used in said definition, and is there generally typified as (material) that is "discarded" or "sometimes discarded."

Part 261.2(c) provides:

> (c) "A material is 'discarded' if it is abandoned (sic) by being:
>
> . . .
>
> (2) "Burned or incinerated, except when the material is being burned as a fuel for the purpose of recovering usable energy; . . .

Said definition has admittedly been the source of confusion, the most obvious reason being that it contains no reference to the time of the "handling of the material", nor to the identity of the "handler" thereof. While it could be argued that the provision is construed against the "writer", such argument is too contextual and obviously "flies in the face of," and is contradictory to, other sections of the Act and the regulations here pertinent. In construing the Act and the regulations, they must be read in a manner which effectuates, rather than frustrates, the major and comprehensive regulatory purpose of the Act (Shapiro vs. U.S., 335 US 1 [1948]). Further, it is clear that the term "discarded material" (in said section) is meant to "expand," not limit, the common meaning of the term "solid waste" (45 FR 33091 citing H.R. Rep. at 2).

Section 261.1 identifies those solid wastes which are subject to regulation as hazardous wastes and . . . subject to the notification requirements of Seection 3010 of the Act, 42 USC 6930. Section 261.1(a)(4)

provides that Subpart D (261.30 et seq.) lists particular hazardous wastes (the subject wastes are there listed). Further, 261.1(b) provides (emphasis supplied):

> "This part identifies only some of the materials which are hazardous wastes. . ."

and then states that a material which is not a hazardous waste identified . . . is still a hazardous waste for purposes of those sections if:

> ". . . EPA has reason to believe the material may be a hazardous waste within the meaning of 42 USC 6903(5)."

Said Section 6903(5) provides, in pertinent part, that:

> "The term 'hazardous waste' means a solid waste which (sic) because of its characteristics may . . .
>
> "(B). . . pose a substantial present or potential hazard (sic) when improperly treated, stored, transported . . . or otherwise managed."

Section 1008(a) of the Act, 42 USC 6927(a), directs EPA to publish "suggested guidelines for solid waste management" which, as defined in Section 1004(30), expressly includes "planning or management respecting resource recovery and resource conservation" and "utilization of recovered resources" (42 US 6903(30) and (21)). It is thus apparent that comprehensive "cradle to grave" regulation of hazardous waste was intended by the Act (45 FR 12722, February 26, 1980; see also U.S. Brewers Association, Inc., vs. EPA, 600 F2d 974, l.c. 983 [1979]).

The Act, 40 CFR 262.11, Hazardous Waste Determination, provides the time and handler reference necessary to proper interpretation of said Section 261.2. The person who generates a solid waste must determine

if that waste is a hazardous waste. Clayton Chemical Company determined that the subject wastes were hazardous under at least two of the criteria there provided, to wit: (1) the wastes are listed under Subpart D of 40 CFR Part 261; (2) it applied its knowledge of the hazardous characteristics of the waste (T. 83; 84).

Section 261.3(b)(1) provides that a solid waste becomes a solid waste, in the case of a waste listed in Subpart D, when the waste first meets the listing description set forth in Subpart D. Section 261.3(c) provides that unless and until said waste meets criteria, not here pertinent, it will remain a hazardous waste.

Respondent's reliance on Section 261.6(a)(1) is obviously misplaced. Section 261.6(b) provides that, in the instance there referred to, a hazardous waste, which is listed in Subpart D, and which is transported or stored prior to being used or reused, (sic) is subject to enumerated regulatory requirements with respect to such transportation or storage, including, specifically, the notification requirements, under Section 3010 of the Act, and transportation and storage requirements provided by Parts 122, 124, 263 and 264 of 40 CFR. I find such provisions both logical and appropriate. The transportation and storage stages of the waste handling process present essentially the same hazards and should, therefore, require essentially the same tracking and management, irrespective of whether the wastes involved therein are destined for disposal, re-use, recycling or reclamation (see 45 FR 33093, May 19, 1980).

CIVIL PENALTY

40 CFR 22.27(b) provides that if it is determined that a violation has occurred, a civil penalty amount shall be assessed in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty and on consideration of any civil penalty guidelines issued under the Act. Specific reasons must be advanced to support any increase or decrease in the amount proposed in subject Complaint.

Though the facts support violations of both 40 CFR 122.22(b)(1) and 40 CFR 122.22(b)(2), I have concluded that a single offense is shown and it is appropriate that a single penalty shall be assessed.

Complainant's proposed "Conclusion of Law" states:

> "2. Respondent commenced physical construction of a new hazardous waste management facility without having submitted a Part A and Part B RCRA permit application and received a finally effective RCRA permit in violation of 40 CFR 122.22(b)(1) and (2)."

This principle has previously been considered by this Agency in connection with violations of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 39 FR 27711 (July 31, 1974), where it is stated in its Preamble, Part (B)(2):

> "A separate civil penalty shall be assessed for each violation of the Act which results from an independent act (or failure to act) of Respondent which is substantially distinguishable from any other charge in the Complaint for which a civil penalty is to be assessed."

Said Preamble further states:

> "Where a charge derives primarily from another charge cited in the Complaint for which a penalty is properly to be assessed, the subsequent charge may not warrant a separate assessment."

The above accords with the discussion concerning "identical offenses" in Tesconia vs. Hunter, 151 F2d 589 (1945).

The Act provides, 42 USCA, Section 6928(C)[1], for assessment of a (civil) penalty, "taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements." Provision is thus made for consideration of the threat which the violation presents to human health and the environment along with the extent of misconduct which is attributable to Respondent. While lack of intent is not an element of the offense charged, it can appropriately be considered in determining Respondent's good faith efforts, or the lack thereof, in connection with the subject offense.

Though it is undisputed that Respondent violated 40 CFR 122.22(b)(1) and (2), the record also confirms that its subsequent actions conform to regulatory requirements promulgated for the protection of human health and the environment. An alarm system has been installed on subject tank to prevent spills (of this ignitable waste) from overfilling. Danger signs have been posted as a further precaution.

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[1] Intent is not an element of the offense for which a civil penalty is provided. Cf. with Section 6928(d) - Criminal Penalties - which contains the word "knowingly", indicating the element of intent.

On this record, I find that the potential for harm presented by the offense here found is serious only to the extent that Respondent is or was oblivious to possible perils inherent in its handling and storage of subject waste. Further, it must be considered that the premature construction (of such facility) created the possibility of the contemplated burning of said waste without regulatory supervision as required by law. Its intended use (burning) of said waste indicates a definite awareness of its ignitable character, and the toxic character is acknowledged in the subject application.

No remedial measures are feasible which will correct the premature construction complained of; however, Respondent's good faith efforts to comply thereafter with applicable requirements are commendable. It is stipulated in this record that Respondent has at no time burned said waste as contemplated; in March, 1983, subject tank was filled with fuel oil (T.5; 57). In the event said still bottoms are ultimately burned, the regulatory requirements have been complied with as stated supra.

On the basis of the foregoing, along with other facts and circumstances reflected by the record, I find that an appropriate civil penalty is the sum of $500, which is proposed hereinbelow.

On consideration of the record, the conclusion reached herein and in accordance with the criteria set forth in the Act, I recommend adoption of the following Proposed Final Order -

PROPOSED FINAL ORDER[2]

1. Pursuant to Section 3008(c) of the Resource Conservation and Recovery Act, 42 USC 6928(c), a civil penalty in the sum of $500 is hereby assessed against the Respondent, River Cement Company.

2. Payment of the full amount of the civil penalty assessed shall be made, within 60 days of the Service of the Final Order, upon Respondent, by forwarding to the Regional Hearing Clerk, EPA, Region VII, a Cashier's or Certified Check payable to the United States of America.

3. Respondent shall in all respects comply with:

   (A) The terms of the final RCRA permit issued to Respondent on July 30, 1982, and

   (B) Standards for Owners and Operators of Treatment, Storage and Disposal Facilities (40 CFR, Part 262).

DATE: May 6, 1983

Marvin E. Jones
Administrative Law Judge

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[2] 40 CFR 22.27(e) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its service upon the parties unless (1) an appeal is taken by a party to the proceedings, or (2) the Administrator elects, sua sponte, to review the Initial Decision.

CERTIFICATION OF SERVICE

I hereby certify that, in accordance with 40 CFR 22.27(a), I have this date forwarded to the Regional Hearing Clerk of Region VII, U.S. Environmental Protection Agency, the Original of the above and foregoing Proposed Initial Decision of Marvin E. Jones, Administrative Law Judge, and have referred said Regional Hearing Clerk to said section which further provides that, after preparing and forwarding a copy of said Proposed Initial Decision to all parties, she shall forward the Original, along with the record of the proceeding, to the Hearing Clerk, who shall forward a copy of the Proposed Initial Decision to the Administrator.

DATE: May 6, 1983

Mary Lou Clifton

Mary Lou Clifton
Secretary to Marvin E. Jones, ADLJ