UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
BKK Corporation,	)	Docket No. RCRA-IX-84-0012
	)	
Respondent	)	

Resource, Conservation and Recovery Act - State Enforcement Responsibility - EPA Oversight - Settlement. Although § 3008(a)(2) of Act (42 U.S.C. 6928 (a)(2)) literally requires only that Administrator, prior to instituting enforcement action, give notice to State that has been authorized to carry out hazardous waste program, legislative history indicates it was intended that the Administrator take enforcement action only where State had failed to do so and where State, which had been granted interim authorization to administer hazardous waste program, had entered into a comprehensive settlement agreement with operator of hazardous waste management, treatment and disposal facility, concerning alleged violations of Act and regulations, EPA was precluded under the circumstances from instituting enforcement action based on the same alleged violations. There is no requirement that result of enforcement action instituted by State, which has been granted interim authorization to carry out its own hazardous waste program, be identical to that considered appropriate by EPA.

Appearance for Respondent:

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Appearance for Complainant:

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Opinion and Order on Motion

for an Accelerated Decision

The captioned proceeding under § 3008 of the Resource, Conservation and Recovery Act, as amended (RCRA) (42 U.S.C. 6928) was initiated on December 29, 1983, by the Director, Toxics and Waste Management Division, U.S. Environmental Protection Agency, Region IX, San Francisco, California, by the filing of a document "Determination of Violation, Compliance Order and Notice of Right to Request a Hearing." The Determination of Violation (DOV) alleged, inter alia, that BKK Corporation, a California Corporation, owned and operated a facility for the treatment, storage or disposal of hazardous wastes at 2210 South Azusa Avenue, West Covina, CA 91792, that on

June 8 and 9, 1983, EPA and the California Department of Health Services (DOHS) conducted an inspection of the BKK facility and that said inspection found violations of various hazardous waste requirements (DOV, Pars. 2 & 3). Specifically, the DOV stated that based on the mentioned inspection and the RCRA Part B permit application submitted by BKK to EPA on August 1, 1983, EPA finds that BKK was in violation of requirements of Chapter 6.5 of Division 20 of the California Health and Safety Code and Subtitle C of RCRA, 42 U.S.C. § 6921 et seq. By letter, dated August 25, 1983, EPA gave notice to DOHS of hazardous waste violations at BKK as required by § 3008(a)(2) of the Act (42 U.S.C. 6928(a)(2)) (Id. Pars. 4 & 5).

As the jurisdictional basis for the proceeding, the DOV alleged that federal regulations providing standards for owners and operators of hazardous waste treatment, storage, and disposal facilities became effective on November 19, 1980 (40 CFR Part 265) and that on or about November 19, 1980, BKK filed a Part A RCRA permit application, thereby qualifying for interim status under § 3005(e) of the Act and becoming subject to interim status standards found in 40 CFR Part 265 (Id. Pars. 6 & 7). It was further alleged that on December 22, 1980, DOHS imposed interim operating conditions on the BKK facility by means of an Interim Status Document (ISD) issued pursuant to California Health and Safety Code § 25200.5 and that on June 4, 1981, EPA awarded the State of California Phase I interim authorization to administer the RCRA hazardous waste program (46 FR 29935) (DOV, Pars. 8 & 9).

According to the DOV, Phase I authorization requires that the State of California impose interim status standards as required under RCRA § 3005(e). Further, according to the DOV, BKK, in addition to the requirements of the

ISD, is, by virtue of § 25159.6 of the California Health and Safety Code, also subject to federal regulations adopted pursuant to §§ 3004 and 3005 of the Act, until such time as DOHS adopts standards and regulations corresponding to and equivalent to, or more stringent than regulations adopted by the U.S. Environmental Protection Agency (Id. Par. 10). It is alleged that the State of California, as of the date of this action, has not adopted standards or regulations corresponding, equivalent to or more stringent than EPA regulations, that BKK is subject to 40 CFR Part 265, that § 3008 of the Act authorizes the Administrator to issue orders requiring compliance immediately or within a specified time, that authorized state hazardous waste programs are carried out under Subtitle C of RCRA, that violation of any requirement of law under an authorized state hazardous waste program is a violation of Subtitle C of RCRA and that BKK, by violating requirements of California's authorized hazardous waste program, has violated Subtitle C of RCRA and is subject to powers vested in the Administrator by § 3008 of RCRA (Id. Pars. 11, 12, 13 & 14).

Turning to specific violations (Count I-A), it is alleged that BKK's ISD requires implementation of a groundwater monitoring program capable of determining the facility's impact on the uppermost aquifer near the facility and to install, maintain and operate a groundwater monitoring system (DOV, Par. 15). As a result of the joint DOHS-EPA inspection of June 8 and 9, 1983, it is alleged that: (1) Respondent had an inadequate groundwater monitoring program in that BKK had not implemented a groundwater monitoring system capable of yielding samples which are representative of background water quality in the uppermost aquifer near the facility, (2) there were an inadequate number of monitoring wells,

(3) BKK had failed to analyze for all required parameters, (4) BKK had failed to obtain replicate measurements and (5) BKK had failed to complete an outline of a groundwater quality assessment program (Id. Par. 16). The DOV further alleged that a document submitted to an EPA inspector purporting to be a groundwater monitoring waiver demonstration was inadequate to support such a waiver and that as a result of the foregoing facts, Respondent was in violation of its ISD, Part V (Id. Pars. 17 & 18).

Count I-B (Pars. 19-23 of the DOV) repeats the allegations of Count I-A except that the alleged violations are based on 40 CFR 265.90 et seq. as incorporated by California Health and Safety Code § 25159.6.

Paragraph 24 of the DOV (Count II-A) alleges that BKK's ISD (Part X.4.a) requires, inter alia, that:

> [b]ulk or non-containerized liquid waste or waste containing free liquids shall not be placed in the landfill, unless: (1) The landfill liner is chemically and physically resistant to the added liquid, and the leachate collection and removal system functions and has a capacity sufficient to remove all leachate produced; or (2) Before disposal, the liquid waste or waste containing free liquids is treated or stabilized, chemically or physically (e.g., by mixing with an absorbent solid), so that free liquids are no longer present.

It was further alleged that the inspection of June 8 and 9, 1983, found that Respondent failed to treat or stabilize liquid waste prior to disposal so that free liquids were no longer present (Par. 25). Quoting from Respondent's Part B permit application to the effect that changes in electrical conductivity and chemical oxygen demand of water samples from the monitoring and extraction wells near Barrier No. 1 indicate that some leachate is migrating around or beneath the Barrier, and that the grout curtain is not completely effective (probably because of its limited

length and depth) and that analyses of water samples from wells below Barrier No. 1 indicate high values for chemical oxygen demand and specific conductance (indicating leachate contamination beyond the barriers), it is alleged that Respondent is in violation of ISD Part X.4 (Id. Pars. 27 & 28). Count II-A (Pars. 29-31) repeats these allegations, alleging that BKK is in violation of § 25159.6 of the California Health and Safety Code.

Paragraph 32 of the DOV (Count III-A) quotes Part X.6 of the ISD to the effect that ignitable and reactive waste shall not be placed in the landfill, unless the waste is treated, rendered or mixed before, or immediately after placement in the landfill, so that the resulting waste or mixture, or dissolution of material is no longer ignitable or reactive and there is compliance with Part III 7(b) of the ISD, requiring that the treatment, storage or disposal of ignitable or reactive wastes, and the mixture or commingling of incompatible wastes be conducted so that, inter alia, it does not threaten human health or the environment. It is alleged that the June 8 and 9 inspection previously mentioned found that BKK accepted ignitable or reactive waste and that it failed to treat, render, or mix ignitable or reactive waste before or immediately after placement in the landfill so that the material placed was no longer ignitable or reactive (Id. Par. 33). As a result, Respondent was alleged to be in violation of Part X.6 of the ISD (DOV, Par. 34). Count III-B (Pars. 35-37) repeated the allegations of Count III-A, alleging that they constituted a violation of 40 CFR 265.312 as incorporated by California Health and Safety Code, § 25159.6.

For the violations alleged in Count I-A or I-B a penalty of $23,750 was proposed to be assessed, for Counts II-A or II-B a penalty of $25,000 was proposed and for Count III-A or III-B a penalty of $23,750 was proposed. The DOV indicated that the penalties proposed in Counts I-A or I-B, III-A or III-B would be canceled, if Respondent has fully complied by June 1, 1984, with the obligations and requirements of its agreement with DOHS, dated December 20, 1983.

Respondent answered,[1/] denying that EPA was authorized to prosecute this action under § 3008 of RCRA; admitting that an inspection of its facility was made on June 8 and 9, 1983, by representatives of EPA and DOHS; admitting that it filed Part B RCRA permit application on August 1, 1983; admitting that initial federal regulations providing standards for owners and operators of hazardous waste treatment, storage and disposal facilities became effective on November 19, 1980, but alleging that many of the regulations sought to be enforced in this action were not effective until after that date and in some cases not until 1983; denying that BKK was subject to interim status standards found at 40 CFR Part 265, except to the extent such standards were lawfully promulgated, adopted in whole or in part by the State of California and effective at times material hereto and denying that Phase I authorization requires, inter alia, that the State of California impose interim status standards as required by RCRA § 3005(e) and alleging that the grant of interim authorization was made on the finding that the state's program was substantially equivalent to the federal program. BKK alleges that such authorization has been in full force and effect since June 4, 1981, and has not been revoked, suspended or withdrawn nor has EPA notified the state of withdrawal or of any reasons for withdrawal.

1/ BKK Corporation's Request For Judgment As A Matter Of Law, Answer to Compliance Order, and Request For Hearing, dated February 2, 1984.

Turning to the factual allegations, Respondent denies the allegations of Pars. 15 and 16 of the DOV relative to its obligation to maintain a groundwater monitoring program and install a groundwater monitoring system, denies the allegations of Par. 17 relative to the adequacy of its waiver demonstration and denies the conclusion in Par. 18 that it is in violation of Part V of its ISD. BKK alleges, however, that under the Phase I interim authorization granted to California, DOHS is authorized to waive all or part of the groundwater monitoring requirements set forth in 40 CFR 265.90(c).

Respondent denies the allegations of Par. 24 of the DOV relative to the requirements of its ISD concerning bulk or non-containerized waste containing free liquids; denies Par. 25 to the extent it alleges that Respondent failed to treat or stablilize liquid wastes prior to disposal so that free liquids were no longer present; admits that Par. 26 accurately quotes from its Part B permit application, but alleges that a subsequent report from its consultants (LeRoy Crandall and Associates) concluded that the barriers and leachate removal systems are effective. Respondent denies the allegations of Par. 27, except to the extent that the Part B permit application reports analyses of water samples from wells below Barrier No. 1, and alleges that background water analysis at the facility has historically indicated elevated levels of mineralization. BKK asserts that such mineralization may be due to historical and chemical causes which do not reflect on the adequacy of BKK's groundwater procedures.

Respondent denies the allegations of Par. 32 (Count III-A) relative to the requirements of its ISD concerning ignitable or reactive waste, denies the allegations of Par. 33 concerning the findings of the June 8 and

9 joint inspection and denies the conclusion in Par. 34 relative to being in violation of its ISD Part X.6. BKK denies that any penalties are appropriate or that it is liable for penalties in any amount.

Accompanying BKK's answer was a motion for judgment as matter of law, based on the contention that EPA lacked authority to bring an enforcement action against a hazardous waste facility licensed and operating under a federally authorized state hazardous waste program, where the state has already pursued enforcement action and achieved results with regard to the same matters.2/ In this regard, BKK alleges that it owns the only licensed Class I hazardous waste disposal facility currently operating in and serving the 12 county Southern California region and while vigorously denying that it has violated any applicable standards at its facility, alleges that it had entered into a complex and comprehensive settlement agreement with the State, entailing direct costs to BKK of at least $1,306,000, daily supervision and authority by the State and a firm schedule of complex work to assure the continued safety and utility of the facility (Request For Judgment As A Matter Of Law, note 1, supra, at 2).

BKK alleges that EPA was at all times aware of the nature and content of its agreement with the State during the negotiation and drafting of the agreement, that EPA demanded that the agreement be signed by December 20, 1983, if EPA were not to take its own enforcement action, and that although requested to do so, EPA declined to state that it had found any major deficiencies in the terms of the agreement prior to its execution.

For the foregoing assertions, BKK relies upon the declaration of its counsel, Peter H. Weiner, dated February 2, 1984 (Exh 11), to the effect

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2/ In accordance with Rule 22.20 (40 CFR 22.20), BKK's motion is being treated as a motion for an accelerated decision.

that he participated in all aspects of the negotiations with DOHS, which culminated in an agreement with DOHS on December 20, 1983, and that, from the outset, BKK representatives were informed by DOHS and EPA personnel that EPA was insisting on a tight time schedule for settlement or EPA would deem the State to have defaulted in its enforcement responsibilities and would take independent enforcement action. The declaration states, inter alia, that BKK was presented with a proposal for settlement in a meeting with representatives of DOHS on November 22, 1983,[3/] wherein a response was demanded by November 29, 1983, and that upon Respondent's request for more time, BKK was informed that DOHS had no objection, but that EPA was insisting upon an answer by November 29. When Mr. Weiner called EPA (Mr. Phil Bobel, deputy or assistant to Director, Hazardous Waste Management Division) and asked for more time, the request was denied, Mr. Bobel stating that a response in principal had to be made by November 29. BKK met the November 29 deadline and by letter, dated December 5, 1983, DOHS acknowledged receipt of the response, and indicated a willingness to discuss changes suggested by BKK (Exh 12). The letter acknowledged that the proposal had been discussed with EPA.

BKK was subsequently informed that EPA was insisting that the settlement agreement be executed not later than December 20, 1983. On December 16, Mr. Weiner gave a copy of the draft to Mr. Robert Wyatt, Deputy EPA Regional Counsel. According to Mr. Weiner, Mr. Wyatt's only legal concern was with regard to a provision of the agreement relating to sanctions in the event of breach. Mr. Wyatt is reported to have stated that technical staff had been apprised of the matter thoughout the negotiations and to have reiterated

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3/ A proposal for settlement, which was apparently unacceptable to BKK and was the basis for negotiation, accompanied the DOHS notice of violations, dated September 23, 1983 (Exh 1).

that the agreement must be signed not later than December 20, 1983. Further, according to Mr. Weiner, he spoke with Mr. Wyatt on December 20, 1983, informing him that BKK would prefer delaying execution of the agreement until EPA had an opportunity to indicate concurrence on a technical basis. Mr. Wyatt is reported to have replied that EPA technical staff would not finish reviewing the agreement for a few days, but that they were certainly familiar with the overall thrust of the agreement and had been for some time. Mr. Wyatt is alleged to have repeated EPA's insistence that the agreement be signed that day.

Mr. Weiner states that based in part on the lack of objection from EPA and EPA's insistence that the agreement be executed immediately, he recommended that BKK sign the December 20, 1983, agreement. He says that he would not have done so had EPA's technical or legal staff indicated that they would not honor the agreement or viewed the agreement in some inexplicable manner as non-enforcement.

BKK alleges that in reliance upon the agreement it has incurred expenses of at least $600,000 of the minimum of $1,306,000 in direct costs entailed by the settlement and paid the State $23,750.00 as the first installment of a total of $47,500 in administrative costs (apparently in lieu of penalty)[4/] it agreed to pay as part of the settlement (declaration of Ronald R. Gastelum, General Counsel, Exh 3). BKK further alleges that it has promptly carried out its performance obligations under the agreement, that it is subject to daily onsite supervision and guidance of DOHS and that EPA is aware of these activities (additional factual allegations at 33).

4/ The DOHS letter to BKK, dated December 5, 1983 (Exh 12), states that "(t)he proposed penalties may be characterized as 'costs' and we will reduce the amount to $80,000."

BKK asserts that the allegations in the DOV relative to groundwater monitoring (Counts I-A and I-B) are substantially similar to those asserted and resolved by DOHS. While acknowledging that it did not have a groundwater monitoring program designed to comply with the ISD, BKK insists that it has met all the requirements for a waiver specified in 40 CFR 265.90, which provisions were made part of its ISD by notice, dated January 20, 1982 (Exh 14). The waiver provides essentially that all or part of the groundwater monitoring requirements may be waived if the owner or operator of the facility can demonstrate that there is a low potential for migration of hazardous waste or hazardous waste constituents from the facility via the uppermost aquifer to water supply wells or surface water. The demonstration must be in writing, must be certified by a qualified geologist or geotechnical engineer and must be kept at the facility. Respondent points out that neither state nor federal regulations provide for the waiver to be submitted to or approved by a government agency prior to implementation, notes Complainant's contention that the waiver is inadequate, a factual claim BKK strongly disputes, and argues that in any event, Complainant should be estopped from imposing any compliance order or penalties, until BKK has had the opportunity to have such dispute resolved in an administrative or legal forum.

Concerning the groundwater quality assessment program, BKK asserts that its failure to institute such a program by November 19, 1981, is not a violation of the ISD, because DOHS by notice, dated November 18, 1981, postponed all groundwater monitoring requirements for six months (Exh 13). The notice points out that the postponement does not apply to groundwater

monitoring requirements imposed on any hazardous waste facility in waste discharge requirements issued by a Regional Water Quality Control Board (RWQCB). BKK alleges that it has sampled quarterly for all parameters specified in RWQCB documents (additional factual allegations at 35). BKK points out that the RWQCB did not require sampling for coliform bacteria and turbidity until October 4, 1983, that BKK's sampling and analysis plan does not specify analytical procedures, because the RWQCB does not impose such requirements, but instead requires that samples be sent to a certified laboratory. BKK alleges that it has complied with this requirement at all times.

BKK states that it seals the annular space in each monitoring well with material which is capable of preventing contamination of samples and any groundwater, but does not do so in a way to comply with the ISD, which is allegedly inapplicable. Respondent contends that the annular space sealing requirement is inapplicable, because no groundwater monitoring program is required, that the wells in question are leachate monitoring wells required by the RWQCB, that the material used is capable of preventing contamination of samples in any groundwater and that EPA has not presented any evidence to the contrary.

Regarding bulk liquid waste disposal (Counts II-A and II-B of the DOV), BKK asserts that its ISD no longer provides for the operating conditions alleged in Par. 24 of the DOV, but has been amended by a notice letter from DOHS, received January 4, 1984, providing for the phase out of the disposal of bulk or noncontainerized liquids in the facility, with all such disposal to cease by May 2, 1984. The above schedule is not applicable, if BKK can

demonstrate that the facility has a competent liner and collection and removal system that fully prevents the vertical or lateral migration of leachate or hazardous materials, or that before disposal the noncontainerized liquid waste or waste is treated or stabilized so that free liquids are no longer present. BKK alleges that DOHS has already imposed the same bulk liquid phaseout requirements as EPA is attempting to impose herein. BKK further alleges that its historical method of disposing of bulk liquids does not violate any regulation to which it is subject and that EPA has not and cannot present any substantial evidence of significant migration of leachate beyond the facility's hazardous waste disposal area in an uncontrolled manner.

BKK contends that in the completed enforcement action by DOHS, the issue of the proper method of disposal for ignitable and/or reactive wastes has been addressed and resolved (additional factual allegations at 38). BKK says that the requirements of its ISD (Part X(6)) are identical to those specified in 45 CFR 265.312, that for some wastes, ignitability so as to create a hazardous waste requires not only the ability to ignite, but to burn vigorously and persistently, and that in the decade in which it has accepted ignitable and reactive wastes, it has never experienced a fire or explosion at its facility.

In support of its motion for judgment as a matter of law, BKK contends that RCRA, in common with other environmental legislation, contemplates that the states shall have primary responsibility for implementing and enforcing the Act, and that the requirements of § 3008(a)(2) to the effect that the Administrator, prior to taking enforcement action in a state which has been authorized to carry out a hazardous waste program, must give

notice to the state means that the Administrator can act only if the state, after notice, fails to act (Request for Judgment as a Matter of Law at 6, 7). For this assertion, it relies upon legislative history of RCRA,5/ upon assertedly similar provisions (§§ 309 and 402) of the Clean Water Act (CWA) (33 U.S.C. § 1251 et seq.);6/ upon decisions under the CWA,7/ e.g., Save

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5/ House Committee on Interstate and Foreign Commerce Report No. 94-1461 (September 9, 1976) at 31, U.S. Code, Congressional and Administrative News, 94th Congress, Second Session (1976) at 6269 providing:

> "This legislation permits the states to take the lead in the enforcement of the hazardous waste laws. However, there is enough flexibility in the act to permit the Administrator, in situations where a state is not implementing a hazardous waste program, to actually implement and enforce the hazardous waste program against violators in a state that does not meet the federal minimum requirements. Although the Administrator is required to give notice of violations of this title to the states with authorized hazardous waste programs, the Administrator is not prohibited from acting in those cases where the states fail to act, or from withdrawing approval of the state hazardous waste plan and implementing the federal hazardous waste program pursuant to Title III of this act."

6/ Section 402 of the CWA (33 U.S.C. § 1342) deals with permit issuance by the Administrator or States and § 309 (33 U.S.C. § 1319) concerning federal enforcement provides in part:

> "(a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 301, 302, 306, 307, or 308, 318, or 405 of this Act in a permit issued by a State under an approved permit program under section 402 or 404 of this Act, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section."

7/ Senate Committee on Public Works Report No. 94-988, dated June 25, 1976, referring to what is now RCRA § 3008 provides at 17:

> "In any regulatory program involving Federal and State participation, the allocation or division of enforcement responsibilities is difficult. The Committee drew on the similar provisions of the Clean Air Act of 1970 and the Federal Water Pollution Control Act of 1972."

the Bay v. Administrator, 556 F.2d 1282 (5th Cir. 1977); United States v. Cargill, Inc., 508 F.Supp. 734 (D. Del. 1981); Shell Oil Co. v. Train, 415 F.Supp. 70 (N.D. Calif.), affirmed 585 F.2d 408 (9th Cir. 1978) and upon language in a memorandum from EPA Enforcement Counsel to Regional Administrators and Counsels, dated March 15, 1982, Subject: EPA Enforcement of RCRA--Authorized State Hazardous Waste Laws and Regulations (Exh 5).

In Save the Bay, supra, the court, while concluding that it had no jurisdiction of a petition seeking review under the CWA of EPA's failure to veto a state issued NPDES permit, nevertheless, discussed legislative history which made it clear that the Administrator was to veto a state issued permit only upon a clear showing of failure to follow the guidelines or otherwise comply with the law and that the Act was to be administered in such a manner that the abilities of the states to control their own permit programs would be developed and strengthened.

United States v. Cargill, supra, was an action under the CWA by the United States to enjoin alleged violations of an NPDES permit issued by the Delaware Department of Natural Resources and Environmental Control (DNREC) and to assess civil penalties for past violations, wherein the court stayed the federal action, because the DNREC had instituted an action in state court seeking identical relief. The court emphasized that the stay was a limited one and was dependent in part on Cargill's good faith in adhering to a revised schedule for the construction of additions to its wastewater treatment system.

Shell Oil Co. v. Train, supra, involved an action whereby Shell sought to invalidate effluent limitations promulgated for the petroleum refining industry and an order requiring its petition for a variance, which had been

denied by the State Water Quality Control Board, to be granted. Shell argued that although the permit was issued by the SWQCB and the Board had denied its application for a variance, all material decisions were, in fact, made by EPA. In the course of granting defendant's motion to dismiss for lack of jurisdiction, the court cited legislative history of the CWA (Senate Report No. 92-414, October 28, 1971, U.S. Code, Congressional and Administrative News, 92nd Congress, Second Session (1972) at 3668, 3730) and stated:

> "This language suggests that Congress did not intend the environmental effort to be subject to a massive federal bureaucracy; rather the states were vested with primary responsibility for water quality, triggering the federal enforcement mechanism only where the states defaulted. One commentator, characterizing the state-federal relationship as a "partnership," noted: "The overall structure is designed to give the states the first opportunity to insure its proper implementation. In the event that a state fails to act, federal intervention is a certainty" (citation omitted) 415 F.Supp. at 77.

The previously mentioned memorandum from EPA Enforcement Counsel relies in part upon Shell Oil Co. v. Train, supra, in concluding that Congress intended the states to have the primary enforcement responsibility of RCRA and that EPA would normally act only if the state, after notice, failed to commence enforcement proceedings or actions within a specified or reasonable time (Id. at 13, 14). BKK points out that the letter from the Director of Toxics and Waste Management Division to DOHS, dated August 25, 1983 (Exh 14) provides in part that should the State fail to order compliance by a date certain and/or remedy the deficiencies noted in our inspection report, EPA would exercise its right to initiate enforcement action under § 3008(a)(2) of RCRA and argues that this letter and the referenced memorandum are public indications of agency policy upon which members of the regulated community

are entitled to rely, citing Gardner v. FCC, 530 F.2d 1086 (D.C. Cir. 1976) (Request for Judgment as a Matter of Law at 11). BKK asserts that agency policy interpretations as well as rules and regulations represent procedures applicable to the regulated community and that once such procedures are established, they must be followed, citing Florida Citrus Packers v. State of California, etc., 545 F.Supp. 216 (N.D. Calif. 1982) and United States ex. rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954).

BKK also cites and relies upon United States v. ITT Rayonier, Inc., 627 F.2d 996 (9th Cir. 1980), wherein it was held that, although the Federal Water Pollution Control Act (FWPCA or CWA) contemplated concurrent enforcement actions by EPA and the states, the FWPCA did not abrogate res judicata principles, and where an identical issue had been decided in state court proceedings, EPA was collaterally estopped from relitigating that issue in a federal enforcement action (Id. at 13-15).

BKK asserts that Complainant has never indicated dissatisfaction with the ISD, that on June 4, 1981, EPA granted California interim authorization to administer the RCRA program, which indicates that the state program was determined to be substantially equivalent to the federal regulations, that BKK, while not conceding that it was not in compliance with applicable standards, nevertheless entered into good faith negotiations with DOHS, culminating in the agreement of December 20, 1983, wherein it agreed to pursue extensive preventive measures, including site characterization, ground-water monitoring, barrier studies, leachate control and other work estimated to cost at least $1,306,000 (Id. at 21).

BKK argues that the State has acted fully to enforce hazardous waste regulations at the site; that EPA tacitly concedes as much by agreeing to

forego proposed penalties for Counts I and III, if the agreement with the State is complied with by June 1, 1984; and that the State's ability to negotiate settlements with owners or operators of hazardous waste mangement, treatment or disposal facilities, the preferred procedure in most cases, would be hampered by the regulated community's knowledge that whatever agreement might be reached would not preclude further enforcement action by EPA (Id. at 12, 13). BKK alleges that is exactly what happened in this case and that it would not have committed itself to expenditures exceeding one million dollars had it known that EPA would institute enforcement action in any event. BKK alleges that this lesson will not be lost on other members of the regulated community in dealing with the State in the future.

Responding to BKK's motion, Complainant asserts that the BKK-DOHS agreement is inadequate to remedy violations cited in the notice letter to DOHS, dated August 25, 1983, because: (1), the agreement does not require compliance with free liquid provisions of the ISD and 40 CFR 265.314; (2), the agreement does not require ongoing compliance with the groundwater monitoring requirements of the ISD and 40 CFR 265.90, et seq; (3), the agreement includes a waiver by DOHS of much of its statutory authority to take enforcement action with regard to hazardous waste violations noted in the August 25 letter to DOHS; and finally, (4) the agreement identifies neither the violations which must be corrected nor the statutory authority upon which it is based, and no penalties are assessed against BKK (Response To BKK's Request For Judgment As A Matter Of Law, dated February 27, 1984, at 5, 6).

Regarding (1) above, Complainant says that the ISD and the regulation prohibits disposal of free liquids in a hazardous waste landfill, absent a

landfill liner chemically and physically resistant to the added liquid, and a leachate collection and removal system having the capacity to remove all leachate produced; or (b) before disposal, the liquid waste or waste containing free liquids is treated or stabilized, chemically or physically (e.g., by mixing with an absorbent solid), so that free liquids are no longer present. In contrast, the agreement (Par. 4) allegedly provides only that DOHS may require BKK to take additional actions, including a cessation or liquid disposal at the facility, but only if DOHS determines that there is a significant probability that leachate is migrating beyond the hazardous waste disposal area in an uncontrolled manner and in significant amounts. Complainant alleges that the agreement not only fails to require compliance by a date certain, but contemplates the continued disposal of free liquids, if there is leachate migration in other than "significant amounts," an assertedly undefined term.

Complainant acknowledges that by letter, received by BKK on January 4, 1984 (Exh 4 to answer), DOHS imposed a phase-out of the disposal of liquid wastes in the facility in terms indistinguishable from the compliance order accompanying the DOV, unless BKK was able to demonstrate compliance with the landfill liner and leachate collection and removal system requirements or compliance with the waste stabilization alternative mentioned previously. Complainant alleges, however, that this constitutes a permit action rather than an enforcement action.

Regarding (2) above, groundwater monitoring requirements, Complainant alleges that the agreement is ambiguous as to whether groundwater monitoring is to be established as an ongoing program or whether it is to be merely part of the discrete site study to be carried out only during the four-month

period following execution of the agreement. It will be recalled that BKK contends that it has established entitlement to a waiver of this requirement.

Complainant objects to the waiver of much or most of DOHS's authority to take enforcement action for the hazardous waste violations cited in the August 25 letter, because of the alleged inadequacies in the agreement recited above.

Complainant has attached to its response to BKK's motion, the declaration of Harry Seraydarian, Director of the Toxics and Waste Management Division, EPA Region IX, which states that during the negotiations between DOHS and BKK concerning hazardous waste violations at BKK's West Covina, California facility facility members of his staff communicated with representatives of DOHS concerning the proposed agreement. DOHS was assertedly informed on several occasions EPA did not consider that the agreement adequately addressed the violations and thus was not an appropriate enforcement action. Mr. Seraydarian further states that he spoke telephonically with Mr. Richard B. Wilcoxon, Chief Toxic Substances Control Division, DOHS, on December 20, 1983, prior to execution of the agreement with BKK, and informed him that the failure to require compliance with the non-containerized, i.e., free or bulk, liquids disposal provision in the ISD was unacceptable to EPA and that if DOHS, nevertheless, signed the agreement, EPA would likely initiate enforcement action of its own. Mr. Wilcoxon is reported to have replied that attachments to the agreement would satisfy EPA's concerns. Mr. Seraydarian says that the attachments do not satisfy EPA's concerns and that at no time during the negotiations between BKK and DOHS did he, or any member of his staff, indicate to DOHS or BKK, that EPA would commit to not taking enforcement action, if the agreement were executed.

Mr. Robert Wyatt, Deputy EPA Regional Counsel, says that he disagrees with the substance and tone of various telephone conversations and the meeting held with Mr. Weiner during the period December 16 through 20, 1983, as recounted in the declaration of Mr. Peter Weiner (declaration, dated February 24, 1984, at 2). Mr. Wyatt denies informing Mr. Weiner that the BKK-DOHS agreement had to be signed by December 20, 1983, but states that he told Mr. Weiner he had been informed by Toxics and Waste Management Division that BKK and DOHS had targeted December 20 as the signing date. Mr. Wyatt denies telling Mr. Weiner that his only legal concern was with regard to a provision of the agreement concerning sanctions in the event of breach. Instead, he asserts that Mr. Weiner asked a series of questions, seeking his (Wyatt's) comments on the legal adequacy of the agreement. In answer to a further question as to particular areas of EPA concern, he (Wyatt) replied by way of illustration only, that self-executing sanctions in the event of breach were not present.

Mr. Wyatt acknowledges informing Mr. Weiner in a telephone conversation on December 20, 1983, that EPA technical staff had not completed their review, but denies making any statements to the effect EPA personnel were familiar with the overall thrust of the agreement. Mr. Wyatt says that EPA's concern at all times was with specific provisions for correcting the findings of violation specified in the August 25 letter, that the agreement had not been finalized as of December 16 and was still being revised on December 20, 1983. He declares that EPA did not have an opportunity to review attachments to the agreement (setting forth a schedule of remedial activities) until after it was signed. He denies informing Mr. Weiner in the December 20 telephone conversation that EPA insisted the agreement be signed and implemented that day and

says that, in fact, his information at the time of the telephone conversation was that the agreement would not be signed by DOHS because of concerns over technical issues. Mr. Wyatt denies telling Mr. Weiner at any time that EPA would not take enforcement action, if the BKK-DOHS agreement was executed and says that, on the contrary, he made it clear that EPA had independent authority and responsibility under RCRA and that the Region was concerned the proposed agreement would not go far enough in redressing violations cited in the August 25, 1983, letter.

Responding to BKK's legal arguments, Complainant acknowledges BKK's point that Congress intended to model the RCRA enforcement scheme on similar provisions of the CWA, but asserts that dual or concurrent enforcement by state and federal agencies is not thereby precluded. Complainant cites cases under the CWA, e.g., United States v. ITT Rayonier, supra; Aminoil U.S.A., Inc. v. California State Water Resources Control Board, 674 F.2d 1227 (9th Cir. 1982) and United States v. Cargill, Inc., supra, which clearly recognize that concurrent CWA enforcement actions may be filed in state and federal courts and that the Administrator may institute an enforcement action in federal court, notwithstanding an enforcement action by a state in its courts, if the Administrator finds or believes that the state is not prosecuting the action vigorously and expeditiously. Complainant says that EPA should not hesitate to act simply because the state has commenced an enforcement action of its own. Complainant further says that EPA restraint is appropriate only where the state is prosecuting the action vigorously, which is not the case here. Complainant points to the previously noted alleged deficiencies in the DOHS-BKK agreement, argues that its position is

fully consistent with case law under the CWA and with policy considerations concerning the control of hazardous waste under RCRA and asserts that BKK's motion should be denied.

Discussion

It is clear that Congress intended that primary RCRA enforcement responsibility be with the states.8/ The reasons for this would seem to be especially compelling during the period of interim authorization which is granted upon a finding that the state program is "substantially

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8/ House Committee on Interstate and Foreign Commerce Report No. 94-1461 (note 5, supra) additionally provides:

> "The general purpose of having federal minimum standards for hazardous waste disposal, with the option of state implementation of state programs equivalent to the federal program is: * * (4) by permitting states to develop and implement hazardous waste program equivalent to the federal program, the police power of the states are (sic) utilized rather than the creation of another federal bureaucracy to implement this act."

House Report 94-1461 at 30, U.S.Code, Cong. & Adm. News (1976) at 6268.

> "Further, the Administrator, after giving the appropriate notice to a state that is authorized to implement the state hazardous waste program, that violations of this Act are occurring and the state failing to take action against such violations, is authorized to take appropriate action against those persons in such state not in compliance with the hazardous waste title.
>
> Therefore, a state retains the primary authority to implement its hazardous waste program so long as such program remains equivalent to the federal minimum standards. If the state program does not remain equivalent to the federal minimum standards, the Administrator is authorized to implement hazardous waste provisions of this Act in such state."

(Id. at 32, 6270).

equivalent" to the federal program.9/ Legislative history (House Interstate and Foreign Commerce Committee Report No. 94-1461, note 5, supra, at 29) indicates that the purpose of this provision was so that the hazardous waste program in states that had previously instituted such programs not come to a halt pending implementation of the federal program.

It appears that California instituted a hazardous waste control program as early as 1972 and that the State of California was granted interim authorization to administer its hazardous waste program on June 4, 1981. Although Complainant has denied that the California program is equivalent to the federal program, § 3006(c) of the Act requires only that the state program be "substantially equivalent" to the federal program. The point being that "substantially equivalent" necessarily contemplates variations in regulatory provisions, including results of enforcement actions from those considered appropriate or desirable by EPA. It is recognized that the 24-month period of interim authorization specified by § 3006(c), commencing June 4, 1981, had expired by the time of the inspection of June 8 and 9, 1983,

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9/ The Act (§ 3006(c)), (42 U.S.C. 6926(c)) provides in pertinent part:

> "(c) Interim Authorization--Any State which has in existence a hazardous waste program pursuant to State law before the date ninety days after the date of promulgation of regulations under sections 3002, 3003, 3004, and 3005, may submit to the Administrator evidence of such existing program and may request a temporary authorization to carry out such program under this subtitle. The Administrator shall, if the evidence submitted shows the existing State program to be substantially equivalent to the Federal program under this subtitle, grant an interim authorization to the State to carry out such program in lieu of the Federal program pursuant to this subtitle for a twenty-four month period beginning on the date six months after the date of promulgation of regulations under sections 3002 through 3005."

which was the genesis of this proceeding. Accordingly, BKK's assertion that interim authorization to the State of California has not been revoked, suspended or withdrawn (ante at 7), seems beside the point, the authorization having apparently expired by its terms.10/ There is, however, no indication that Complainant regards the authorization as other than fully effective and this decision is based upon the assumption interim authorization to the State is in effect.

As indicated (note 7, supra), RCRA state-federal enforcement provisions were modeled after those in the Clean Water and Clean Air Acts. There are, however, differences between the CWA and RCRA enforcement provisions. For example, § 402(d) of the CWA (33 U.S.C. 1342) allows the Administrator to veto NPDES permits proposed to be issued in a state which has been granted permit issuance authority and as indicated (note 6, supra), § 309(a)(1) (33 U.S.C. 1319) provides that upon a finding of violation under a state issued permit, the Administrator is authorized to take enforcement action, if beyond the thirtieth day after notification to the state and the violator, the state has not commenced appropriate enforcement action. Although RCRA as enacted (Public Law 94-580, October 21, 1976, 90 Stat. 2795), required that the Administrator give not less than 30 days notice to an alleged violator prior to instituting enforcement action and not less than 30 days notice to a state which has been authorized to carry out a hazardous waste program, these notice provisions were deleted by the

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10/ A copy of the Memorandum of Agreement (MOA) between the State and EPA, Region IX, entered into pursuant to 40 CFR 271.126 (formerly 40 CFR 123.6) has been obtained. The MOA provides, inter alia, that it shall remain in effect until such time as interim authorization is withdrawn by EPA or at the end of the interim authorization period.

Solid Waste Disposal Act Amendments of 1980, Public Law 96-482 (October 21, 1980). Legislative History (Senate Report No. 96-172 (May 15, 1979) at 4, U.S. Code, Congressional and Administrative News, 96th Congress, Second Session (1980) at 5022) indicates that these deletions were made not because of a diminution of concern for the primary enforcement responsibility of the states, but to stop so-called "mid-night dumping," which might not continue at any location for more than 30 days.

Complainant's position herein appears to overlook § 3006(d) of the Act (42 U.S.C. 6926) providing:

> "(d) Effect of State Permit--Any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under this subtitle."

No reason is apparent why the quoted provision doesn't mean exactly what it says[11/] and it would seem to be clear beyond peradventure that if the Administrator had entered into the questioned settlement agreement, he would be bound thereby and estopped to maintain the instant proceeding.

In this connection, several of Complainant's objections to the settlement appear insubstantial. For example, the assertion that the agreement is not an enforcement action, is answered by the second sentence of the first paragraph providing that in reaching this agreement the parties recognize that DOHS is acting pursuant to its enforcement authority. Moreover, the agreement expressly provides that the parties have considered and responded to the EPA letter of August 25, 1983, constituting notice of

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11/ Legislative history (House Report 94-1461, note 5, supra at 58, U.S.Code, Congressional and Administrative News (1976) at 6296) provides no explanation for this provision, merely repeating the language of the subsection.

alleged violations. The contention that no penalty is assessed is readily met by the $47,500 in administrative costs BKK agreed to pay, which, as indicated ante at 12, appears to have been imposed in lieu of penalty. The objection that the agreement includes a waiver by DOHS of much of its statutory authority to take enforcement action with regard to the violations alleged in the August 25 letter makes sense only if the premise that the agreement is not an enforcement action or the result of such an action is accepted. One would have thought the essence of settlements is that a party gives up something it might have won in return for certainty of result and not incurring the expense of litigation. Indeed, the DOV issued by Complainant emphasizes that Respondent may confer with EPA for the purpose of discussing settlement and that any settlement would be embodied in a written consent agreement and order. While a cover page of the proposed agreement (Exh 1) entitled "Order and Schedule of Compliance" was apparently omitted in final negotiations, surely, the fact that the agreement herein is not in the precise form contemplated by the DOV cannot be the basis of a valid EPA objection.

Turning to the substantive objections, the contention (ante at 20, 21) that the agreement does not require compliance with free liquid provisions of the ISD (Part X.4) and 40 CFR 265.314 is literally accurate, if the fact of violation is assumed. While there would appear to be no question that BKK's method of liquid waste disposal does not comply with the stabilization alternative,12/ this is a violation only in the absence of a liner

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12/ The inspection report (Exh. 14) states that bulk liquids are discharged into a prepared cavity in the daily refuse deposits, which would not constitute compliance even if the refuse was absorbent, because the requirement is that the waste be stabilized prior to disposal (ISD, Part X.4, 40 CFR 265.314).

chemically and physically resistant to the added liquid and a leachate collection system having the capacity to remove all leachate produced. In this connection, BKK alleges that a subsequent report from its consultants demonstrates that the barriers and leachate removal systems are effective. While this may well be an allegation subject to question,13/ the point is that resolution of disputed or doubtful issues is what settlements are all about. Viewed in this light, studies to assess the extent of contamination downgradient from Barrier Nos. 1 and 2, which the agreement specified were to be completed within 120 days from January 1, 1984, seem reasonable and appropriate.14/

Complainant's criticism that the agreement contemplates the continued disposal of free liquids if there is leachate migration in other than

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13/ Apparently the report referred to is that from LeRoy Crandall and Associates, dated November 18, 1983 (Exh 10). The report appears to be somewhat of a "mixed bag" in that it states with respect to Barrier No. 1 that the chemical grout curtain must be leaking and would not prevent the westward migration of any leachate present upgradient from the Barrier. At another point, the report indicates that the Barrier can be operated as an effective means of controlling the migration of leachate and should be capable of recovering most of the contaminated groundwater that has migrated westward from the Barrier. Regarding Barrier No. 2, difficulties were encountered in conducting the test (pumping of extraction wells), apparently because materials surrounding the gravel collector had become partially sealed with a leachate sludge. The report, nevertheless, concludes that until contrary data is obtained, it seems reasonable that operation of the Barrier could control the lateral migration of leachate in the vicinity of the Barrier.

14/ The LeRoy Crandall and Associates' report (note 13, supra) states that the most recent October 1983 chemical analyses of water samples from downgradient monitoring wells adjacent to the Barriers indicate the presence of contaminated groundwater and that samples from Monitoring Well Nos. MW-3 and MW-4, downgradient from Barrier No. 1, are not representative of fluids in the zones they penetrate.

significant amounts is technically correct, if a violation be assumed.15/ As indicated previously, BKK denies that its method of disposal of bulk liquids violates any regulation to which it is subject and resolution of such disputes, rather than litigation, is the essence of settlements. The agreement states that there is no present evidence that the BKK Class I facility has contaminated soil or groundwater off site. Moreover, "significant probability that leachate is migrating beyond the hazardous waste disposal area in an uncontrolled manner and in significant amounts" (Par. 4 of agreement) would seem, prima facie, to be a standard not difficult to meet, if such migration was, in fact, occurring and the fact that the determination is to be made by DOHS appears to afford an ample margin for any questions to be resolved in favor of ordering a cessation of bulk liquid disposal.16/ This, of course, falls short of a date certain for the

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15/ It is of interest that the DOHS letter to BKK, dated December 5, 1983 (Exh 12), has as an enclosure, an amended clause which is assertedly based on comments by EPA, and which provides as follows:

"Liquids Ban

Within 60 calendar days after completion of work implementing the Liquid Management Plan BKK shall either (1) demonstrate, to the satisfaction of the Department, in a written addendum report submitted to the Department, that the Liquid Management Plan is fully effective to contain and/or remove all leachate from the facility, or (2) cease to dispose of liquid waste (hazardous and nonhazardous) at the facility until the date on which the Department approves the demonstration as adequate."

16/ Although Complainant concentrates its objections on Paragraph 4 of the agreement, Paragraph 3 seems to contemplate a gradual phase out of liquid waste disposal. This paragraph provides: "3. In furtherance of liquid management, BKK shall also reduce the amount of liquid waste it disposes in the landfill per month by an amount equal to the amount of leachate collected and redisposed in the landfill in the previous month." See also Paragraph 13 of the agreement, wherein BKK agrees to add a provision to its ISD as Part X.1.(d) providing in part:

"No leachate shall migrate or escape either laterally beyond the boundaries of the facility or downward through, under or around the material relied upon as a liner and/or barrier for the facility."

cessation of such disposal. It is, however, worthy of emphasis that bulk liquid disposal is not a violation of the ISD in the presence of a landfill liner chemically and physically resistant to the added liquid and a functioning leachate collection and removal system having a capacity to remove all leachate produced, that a substantial portion of the work contemplated by the agreement involves leachate[17/] and that the compliance order issued by Complainant doesn't require an immediate halt to liquid waste disposal. Complainant's contention that the amendment to the ISD, received by BKK on January 4, 1984 (Exh 4), which was almost certainly occasioned by Complainant's initiation of the instant proceeding, constitutes a permit action rather than an enforcement action, seems a mere quibble when it is recognized that the amendment achieves essentially the same result as the EPA compliance order.[18/]

Complainant's second substantive objection is that the agreement does not require ongoing compliance with groundwater monitoring requirements of the ISD (Part 5) and 40 CFR 265.90 et seq. The agreement and attachments are assertedly ambiguous as to whether groundwater monitoring is to be established as an ongoing program or is merely part of a site study to be

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17/ Liquids management (Methods to minimize leachate generation, Leachate collection and removal), Barrier and liner studies, Interim measures for leachate Control and Remedial action for leachate (Attachments B, C, E and F to Agreement).

18/ Although Complainant alludes to the fact that by letter, dated January 23, 1984 (Attachment to Response to BKK's motion), BKK, through its attorneys, filed a petition for hearing regarding the modification to the ISD, the petition was denied by letter, dated January 27, 1984, DOHS taking the position that the modification was effective upon receipt. This position appears to be fully in accord with Paragraph 3 of the General Conditions of the ISD entitled "Limitation." Under these circumstances, the difference between the compliance order issued by Complainant and the amendment is difficult to fathom.

accomplished in the four-month period following execution of the agreement. For reasons hereinafter appearing, the alleged ambiguity is fully explainable. Moreover, the agreement provides, inter alia, that the outline of work contained in Attachments A - G is of a general nature and that the specific tasks or methods may be changed by DOHS within the general scope of the outline and the Liquid Management Plan (Attachment B) provides that BKK shall install the permanent leachate system improvements in accordance with directives and a schedule specified by DOHS in field memoranda and that the results of ground monitoring throughout the site are expected to determine the effectivity of the Leachate Management Program.

As BKK points out, implementation of the groundwater monitoring requirement of the ISD was postponed by DOHS for six months or until May 19, 1982, by notice, dated November 18, 1981 (Exh 13). This postponement, however, was rescinded by notice, dated January 20, 1982 (Exh 14), which added to the ISD what was referred to as a broadened waiver provision, even though the ISD does not contain such a provision. The waiver provision (identical to 40 CFR 265.90(c)) provides essentially that all or part of the groundwater monitoring requirements of the ISD may be waived if the owner or operator can demonstrate that there is a low potential for migration of hazardous waste or hazardous waste constituents from the facility via the uppermost aquifer to water supply wells (domestic, industrial or agricultural) or to surface water. The demonstration must be in writing, must be kept at the facility and must be certified by a qualified geologist or geotechnical engineer.

As indicated (ante at 12), BKK insists that it has met all of the requirements for such a waiver and points out that the regulations do not

provide for government approval of the waiver demonstration prior to its implementation. Although the DOV merely states that the purported waiver demonstration exhibited to Complainant's inspector at the time of the inspection of June 8 and 9, 1983, was inadequate, the basis of the objection appears to be that BKK had not established its contention that there was no aquifer beneath the facility.19/ EPA has changed the definition of an aquifer from the usual or dictionary definition (note 19, supra) and what constitutes a "capability for yielding significant amounts of groundwater to wells or springs" is open to question and would seem to depend on circumstances. In this connection, an August 1982 hazardous waste inspection by an EPA contractor states that the landfill area is characterized by the State of California as an area of non-water bearing bedrock and that the site area is not underlain by an aquifer, but that lateral drainage may occur (Exh 6). Complainant has taken the position that this report was in error and that the inspector should have assumed the existence of an aquifer until the contrary was demonstrated (letter to BKK, dated December 22, 1983, Exh 7).

In view of the foregoing, the alleged ambiguity in the agreement as to whether groundwater monitoring is to be established as an ongoing program or is merely part of a site study to be accomplished within four months following execution of the agreement is readily understandable, because it

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19/ The inspection report (Exh 14) finds a conflict between a statement in a consultant's report, relied upon as a basis for the waiver, to the effect that "no aquifer exists beneath the site, only occasional, seasonal perched water levels which are more or less lenticular in nature" and the EPA definition (40 CFR 260.10) of an aquifer as "a geologic formation, group of formations, or part of a formation capable of yielding significant amounts of ground water to wells or springs." The dictionary (Webster's New Collegiate, 1977) defines an aquifer as "a waterbearing stratum of permeable rock, sand or gravel."

is by no means clear that BKK is not entitled to a waiver of the ground-water monitoring requirement pursuant to the ISD and 40 CFR 265.90(c). Resolution of such doubtful or disputed matters by a settlement, rather than litigation, should be well within the discretion of officials charged with responsibility for administering a program "substantially equivalent" to the federal program. Complainant does not appear to seriously contend to the contrary, for as BKK points out, it is ready to forego the proposed penalty for Count I, provided BKK has complied with all aspects of its agreement with DOHS by June 1, 1984. BKK contends that the agreement with DOHS resolved the appropriate method for the disposal of ignitable or reactive wastes and again, Complainant does not appear to contend to the contrary, being willing to cancel the proposed penalty for Count III, if BKK fully complies with the agreement by June 1, 1984.

The foregoing discussion, while omitting mention of any benefits attributable to the estimated $1,306,000 cost[20/] of the site characterization, leachate control and other work required by the agreement, would seem to establish at the very least that the agreement was a settlement of issues subject to serious dispute and in no sense a "sweetheart" deal designed to thwart or avoid EPA enforcement.[21/] There would appear to be little point in a person or firm subject to RCRA negotiating seriously with

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20/ It is recognized that the report of the inspection of June 8 and 9, 1983 (Exh 14), states that the estimated cost of closure of the landfill is $1,300,000. This may indicate that one of the benefits of the settlement is continued operation of the facility.

21/ Cf. International Harvester Co. v. Occupational Safety and Health Review Commission, 628 F.2d 982 (7th Cir. 1980). (Petitioner's contention that prior uncontested citation for which only nominal penalty was assessed was res judicata so as to preclude new enforcement action for alleged violations of noise regulations was rejected, because, inter alia, acceptance of the argument would allow purpose of statute to be frustrated.)

a state, which has been granted authorization to administer its own hazardous waste program, for the settlement of alleged violations of the regulations and little point in the state acting vigorously to enforce its own program, if EPA is going to take enforcement action in any event. This would seem to be especially true during the period of interim authorization when the state program need only be "substantially equivalent" to the federal program and there is no requirement that the result of state enforcement be identical to that considered appropriate by EPA. Moreover, the elaborate provisions of § 3006(e) of the Act (42 U.S.C. 6926(c)) for the withdrawal of a state's authorization to administer its own hazardous waste program, i.e., notification of reasons in writing, public hearing and opportunity for corrective action, would appear to be a dead letter[22/] and the intent of Congress that primary enforcement responsibility be with the states would surely be frustrated,[23/] if EPA can maintain the instant proceeding.

As BKK points out, it is well settled that an Agency is bound by its own rules and regulations. Gardner v. FCC, supra, and cases cited. In that case, however, the practice in question, i.e., mailing copies of the Commission's decisions to the parties, was a requirement of the Administrative Procedure Act, and a regulation to that effect had been published in the Federal Register. In this instance, the letter to DOHS, dated August 25, 1983

22/ In Save the Bay v. Administrator (ante at 16), the court indicated that it was skeptical whether unsatisfactory handling of a single permit would ever warrant withdrawal of a state's NPDES authority.

23/ It is of interest that on April 4, 1984, the Administrator reportedly signed a policy statement under which the states will be encouraged to assume more responsibility for administering federal environmental laws through, inter alia, increased leeway to conduct environmental programs. Environmental Reporter, Current Developments, April 6, 1984, at 2203.

(Exh 14), informing it of the violations and stating in part that "(s)should the State fail to order compliance by a date certain and/or remedy the deficiencies noted in our inspection report, EPA would exercise its right to initiate enforcement action under Section 3008(a)(2) of RCRA" was, of course, not published in the Federal Register. Additionally, there is no evidence that the memorandum from Enforcement Counsel to Regional Administrators and Counsels, dated March 15, 1982 (ante at 17), providing essentially that if, at the end of the time period mentioned in the notification letter to the state, the state agency has not initiated enforcement action or indicated its willingness to do so, EPA may proceed to take action as the enforcing authority, was published in the Federal Register.

Promulgation in accordance with the Administrative Procedure Act and publication in the Federal Register are, however, not the sine qua non of a regulation binding on the government within the meaning of the cited rule[24/] and there would seem to be no question, but that the March 15, 1982, memo to Regional Administrators and Counsels regarding the circumstances under which EPA would institute enforcement action in states administering their own hazardous waste programs constitutes a policy, practice or rule binding on Complainant. Complainant's position is, of course, that the settlement did not provide for the cessation of the disposal of bulk liquids in the landfill by a date certain and that accordingly, initiation of this proceeding was fully in accord with the cited policy. As noted previously, however, during the period of interim authorization, the state program need only be "substantially equivalent" to the federal program, which certainly contemplates

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24/ See, e.g., United States v. Heffner, 420 F.2d 809 (4th Cir. 1969); Gulf States Mfgrs., Inc. v. NLRB, 579 F.2d 1298 (5th Cir. 1978) and Morton v. Ruiz, 415 U.S. 199 (1974).

that the result of enforcement action may differ from that considered appropriate or desirable by EPA.25/ Moreover, it is by no means clear that BKK hasn't met the conditions of the ISD and 40 CFR 265.314, for the continued disposal of bulk liquids, i.e., a liner physically and chemically resistant to the added liquid and a leachate collection and removal system adequate to remove all leachate produced.

Although Complainant is correct that estoppel does not ordinarily operate against the government, there is a well recognized exception where the circumstances amount to "affirmative misconduct."26/ If the facts were as alleged by BKK, i.e., BKK was pressured to enter into the settlement agreement, the terms of which EPA was fully aware, by EPA threats of enforcement action,27/ and BKK in good faith entered into the settlement,

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25/ Although Complainant has not so argued, it is recognized that a provision of the MOA (note 10, supra, at 14) that "(i)n instances where EPA determines that the State has not initiated timely or appropriate enforcement action, EPA shall normally notify the State of its determination and discuss further action" could be regarded as a modification or interpretation of the "substantially equivalent" language of the Act. The MOA provides, however, that nothing in the agreement shall be construed as an alteration of any requirement of RCRA and it is unlikely that any such modification or interpretation was intended.

26/ See, e.g., Home Savings and Loan Association v. Nimmo, 695 F.2d 1251 (10th Cir. 1982) (where at time of foreclosure proceedings under Veteran's Administration guaranteed loan, VA knew, but did not disclose, possibility of forgery of signature on note and mortgage, VA was held estopped to deny validity of loan guaranty); and Community Health Services, ETC v. Califano, 698 F.2d 615 (3rd Cir. 1983) (where on five separate occasions over two-year period agent of Secretary of HHS had incorrectly advised plaintiffs that CETA grants did not have to be offset against reimbursable medicare costs and plaintiffs acted on this advice to their detriment, government was estopped from seeking recoupment).

27/ Although the declaration of Mr. Seraydarian is to the effect that at no time during the negotiations did he or any member of his staff advise BKK or DOHS that if the agreement were executed, EPA would not take enforcement action, he does not appear to deny BKK's contention that EPA insisted that the agreement be signed on or before December 20, 1983.

incurring substantial expenses in connection with its implementation, there would appear to be little doubt that Complainant could be estopped to maintain this proceeding. Mr. Wyatt, however, in effect denies that EPA was aware of the terms of the settlement, asserting that EPA did not have an opportunity to review the attachments until after the agreement was signed. While this falls short of an assertion that the attachments were not available until after the agreement was executed, the view that they were not is at least inferentially supported by the declaration of Mr. Seraydarian, which reports Mr. Wilcoxon of DOHS saying in a telephone conversation on December 20, 1983, that the attachments to the agreement would satisfy EPA's concerns. In view thereof, at least one of the elements essential to successfully invoke an estoppel under the circumstances present here has not been established.

Nothing herein is to be construed as an indication that the same result would follow if the State of California, pursuant to § 3006 of the Act, had been granted final authorization to administer its own hazardous waste program[28/] and, of course, nothing herein is, or can be, a limitation on the Administrator's authority to invoke the imminent hazard provision of § 7003 (42 U.S.C. 6973).

28/ In order for a state to obtain final authorization to administer its own hazardous waste program, it must be determined that the state program is, inter alia, equivalent to the federal program and consistent with federal or state programs applicable in other states (§ 3006(b), 42 U.S.C. 6926(b)).

Order

The Determination of Violation and Compliance Order are dismissed.29/

Dated this 13th day of April 1984.

Spencer T. Nissen
Administrative Law Judge

29/ In accordance with Rule 22.20(b) (40 CFR 22.20(b)), this decision constitutes an initial decision, which, unless appealed in accordance with 40 CFR 22.30 or unless the Administrator elects, sua sponte, to review the same as therein provided, will become the final decision of the Administrator in accordance with 40 CFR 22.27(c).