UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

Babcock and Wilcox Company
Naval Nuclear Fuel Division

Respondent

Docket No. RCRA-III-162
JUDGE GREENE

ORDER DENYING MOTION FOR CERTIFICATION

Respondent Babcock and Wilcox moved to certify for interlocutory appeal, pursuant to 40 C.F.R. §22.29, certain findings made in an Order Denying Motion to Dismiss and Granting Motion for "Accelerated Decision" ("Order") in this proceeding. Respondent claims that the rejection of its argument -- that the hazardous waste pond at issue at its facility contained uranium enriched in the U-235 isotope (hereafter referred to as 'enriched uranium') and was therefore governed as radioactive mixed waste by the Atomic Energy Act rather than as hazardous waste under RCRA- -was in error. In that regard, Respondent asserts that there is no authority for applying a *de minimis* standard, *viz*., that a *de minimis* amount of enriched uranium is insufficient to bring a waste material out of the jurisdiction of EPA under RCRA. Respondent further argues that the inference to be drawn from its evidence should carry its burden of proof. The evidence showed that in 1990 Respondent discovered that some enriched uranium contamination of the pond had occurred as a result of roof run-off from a building at Respondent's facility. The inference to be drawn is that the pond was contaminated with enriched uranium during the period of time at issue, from 1980 until September 1983, because the pond received water from the recycle water system at that time. Respondent adds that the Order did not comply with 40 C.F.R. §22.20(b)(2) in that it did not specify the facts that are substantially uncontroverted and those upon which the hearing will proceed.

Complainant opposes the motion on the grounds (1) that the motion is untimely, having been filed more than six days after the Order was served; (2) that, in any event, the holding of the Order was correct, i.e. that Respondent could not

show by a preponderance of the evidence that its pond was contaminated with enriched uranium for the entire period claimed in order to avoid regulation by federal and State of Virginia hazardous waste authorities; (3) the lack of detail in setting forth claims and issues, in light of a consent agreement having already been negotiated in this case, is a technical and easily corrected matter; and (4) that an initial decision assessing a penalty based upon that already agreed upon by the parties presents no great impediment, allowing review of the jurisdictional issue.

Complainant is correct in its assertion that Respondent's motion was filed out of time. 40 C.F.R. § 22.29(a) provides, in pertinent part, that requests for certification " . . . shall be filed in writing within six (6) days of notice of the ruling or service of the order, and shall state briefly the grounds to be relied upon on appeal." 40 C.F.R. §22.07(c) provides that when an order is served by mail, five days are to be added to the time allowed for filing a response. Here, the Order was served on December 20, 1991. Respondent was required to file its motion for certification by December 31, 1991, in order to meet the requirements of the *Rules of Practice.* Respondent's argument that it did not in fact receive "notice" until December 24, 1991, does not refute that conclusion. Respondent's apparent interpretation of Section 22.29(a), that the time period begins to run from either the date of service or any later date when Respondent receives the ruling or gets actual notice of it, renders the phrase "the date of service" unnecessary and the five-day mailing allowance meaningless. This result runs counter to a basic principle of construction. Suwannee River Finance, Inc. v. United States, 7 Cl.Ct. 556 (Cl.Ct. 1985) (Regulations must be interpreted to give meaning to every word, particularly when doing so leads to an entirely sensible interpretation of the provision in question).

Nevertheless, even if the request for certification had not been filed out of time, nothing presented by Respondent warrants certification. The standard for certifying a ruling for appeal to the Environmental Appeals Board, under 40 C. F. R. §22.29 (b) is that:

> (1) the order or ruling presents an important question of law or policy concerning which there is substantial grounds for difference of opinion, and (2) either (i) an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or (ii) review after the final order is issued will be inadequate or ineffective.

The questions raised by Respondent do not constitute important issues of either law or policy, and therefore cannot meet the standard. It is clear that

mixtures of hazardous waste and low-level radioactive waste (as defined in the Low-Level Radioactive Waste Policy Amendments Act of 1985), known as "Mixed LLW" or "radioactive mixed waste," are regulated in a dual regulatory scheme whereby EPA governs the hazardous waste component and NRC governs the radioactive component of the waste. Sierra Club v. U.S. Dep't of Energy, 734 F.Supp. 946, 949 (D. Col. 1990) ; 52 Fed. Reg. 15937, 15940 (May 1, 1987); 53 Fed. Reg. 37045, 37048 (September 23, 1988); "Guidance on the Definition and Identification of Commercial Mixed Low-Level Radioactive and Hazardous Waste," EPA memorandum dated January 1, 1987, and revised October 4, 1989, submitted respectively as attachment 1 to Complainant's response and as attachment 1 to the rebuttal to Respondent's reply in support of its motion for certification. This scheme was not clarified until after the period at issue here, 1980 to 1983, which raises the question of whether radioactive mixed waste was governed by RCRA during that time. [1]

However, the basic facts on that issue are not likely to be encountered frequently, i.e. that an NRC licensee stored radioactive mixed waste in violation of RCRA requirements prior to the clarification of the EPA and NRC dual regulatory scheme.

Furthermore, Respondent failed to provide any evidence which could overcome Complainant's *prima facie* case, or raise a material issue of fact. Respondent simply has not shown, nor can it show, [2] that the pond was contaminated with enriched uranium from 1980 to 1983, thereby rendering the water in the pond radioactive mixed waste rather than hazardous waste, on the basis of (1) the slight amount of radioactive contamination of water in the recycle water system; (2) the interconnecion between the recycle water system and the hazardous waste pond; [3] (3) the method by which the recycle waste system was contaminated (i. e. roof run-off containing minute quantities of enriched uranium) ; and (4) the inference that if the sludge in the landfill and the wastewater treatment system was slightly contaminated with enriched uranium in 1989, it must have been so contaminated in the period from 1980 through 1983.

Even if an inference were to be drawn that the pond was contaminated with enriched uranium from 1980 through 1983, the record as a whole cannot lead a rational trier of fact to find for Respondent. [4] Respondent did not know that the pond was contaminated with enriched uranium until several years after the period at issue. [5] Respondent could not have claimed in 1980 through 1983 that the Atomic Energy Act governed the waste which it then believed had no enriched uranium contamination. Respondent does not assert that it handled the pond in accordance with requirements under the Atomic Energy Act. Therefore Respondent

cannot now claim that the waste pond fell under the jurisdiction of the NRC. In other words, Respondent cannot have it both ways: that the pond is exempt from RCRA by virtue of contamination with enriched uranium, and also exempt from the Atomic Energy Act by virtue of Respondent's lack of knowledge in 1980 through 1983 that the pond was contaminated with enriched uranium.

Respondent's final point is that the Order does not specify the facts which remain substantially uncontroverted and the issues and claims upon which the hearing will proceed, as required by 40 C.F. R. § 2 2. 2 0 (b) (2) . As the parties acknowledge in their pleadings, a supplemental order could rectify such a technical omission. While the facts upon which the "accelerated" decision was based were set forth in the Order, a statement of the issues remaining for hearing will be clarified here as follows.

The Order concluded that Respondent violated sections 3005 (a) and 3010(a) of RCRA, 42 U.S.C. §§ 6925(a) and 6930(a); and the provisions of the Virginia Hazardous Waste Management Regulations as alleged in the complaint. (Order at 9). It was found that no genuine issues of material fact existed with respect to Respondent's liability for those violations. The hearing will proceed on the amount of penalty to be assessed for those violations; and on the appropriateness of the proposed compliance order set forth in the complaint.

ORDER

It is ORDERED that the Respondent's motion to certify for interlocutory appeal be, and it is hereby, denied.

And it is FURTHER ORDERED that the parties shall confer for the purpose of concluding settlement as referred to in the correspondence of the parties, dated June 26 and 29, 1992. They shall meet, confer, and report upon the status of this matter no later than June 25, 1993.

J.F. Greene

Administrative Law Judge

Dated: June 12, 1997

Washington, D.C.

[1] It was stated in the Order (at 2-3) , for purposes of analyzing the motions for dismissal and for accelerated decision, that the presence of radioactive material would bring the facility within the exclusive jurisdiction of the NRC or the U.S. Department of Energy.

[2] The party opposing a motion for summary judgment is obligated to place before the court all materials it wishes the court to consider when the motion is ruled upon. Cowgill v.

Raymark Industries, Inc. 780 F.2d 324, 329 (3rd Cir. 1986).

[3] The tests performed by Respondent during 1980 to 1983 on the water in the recycle water system do not show radioactivity in excess of those found in water intake levels of radioactivity from the James River. Order at 4.

[4] "Where the record as a whole could not lead a rational trier of

fact to find for the nonmoving party, there is no 'genuine issue for trial.' "

Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

[5] Order at 3-4.

CERTIFICATE OF SERVICE

I hereby certify that the original of this ORDER was f led with the Regional Hearing Clerk and copies were sent to the counsel for complainant and counsel for the respondent on June 17, 1997.

Shirley Smith

Legal Staff Assistant

for Judge J. F. Greene

RESPONDENT'S NAME: Babcock & Wilcox Company

DOCKET NUMBER: RCRA-III-162

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