UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	:	
SPANG AND COMPANY	:	**DKT. NO. RCRA-III-169**
	:	Judge Greene
Respondent	:	

ORDERS UPON MOTION FOR SUMMARY DECISION AS TO LIABILITY AND OTHER MOTIONS

This matter arises under Section 3008 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928. The Second Amended Complaint ("Complaint")[1] charges that Respondent Spang & Company stored a listed hazardous waste[2] in three surface impoundments on Spang's property after November 19, 1981, the effective date of Pennsylvania's federally-authorized hazardous

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[1] Second Amended Complaint, Compliance Order and Notice of Opportunity for Hearing, March 12, 1991.

[2] Respondent's contention that the "theory of the . . . Second Amended Complaint was that the sediment content of the impoundments had tested as a characteristic hazardous waste" is rejected. Respondent's Reply to Complainant's Reply Re Motion for Accelerated Decision [Respondent's Reply], June 26, 1992 at 3 (emphasis added).

waste regulations.[3] The Complaint alleges further that Respondent's facility was an "existing hazardous waste management facility" as defined by applicable Pennsylvania regulations and was subject to the requirements of those regulations. Respondent was charged with three violations: 1) failure to prepare and submit an outline of a groundwater quality assessment and abatement program by November 19, 1981 (Count I)[4]; 2) failure to implement an adequate groundwater monitoring program by November 19, 1981 (Count II)[5]; and 3) failure to obtain closure and post closure bonds before September 9, 1985 (Count III).[6] Complainant proposes a total civil penalty of $284,802.[7]

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[3] On January 30, 1986, pursuant to Section 3006(b) of RCRA and 40 C.F.R. Part 271, Subpart A, Pennsylvania was granted final authorization to administer a state hazardous waste management program in lieu of the federal hazardous waste management program. The provisions of the Pennsylvania hazardous management regulations are, accordingly, enforceable by EPA pursuant to Section 3008(a) of RCRA. Citations in this Order are to the relevant provisions of the Pennsylvania authorized hazardous waste management regulations, and, in parentheses, to the analogous provisions of the federal hazardous waste management regulations under RCRA Subtitle C.

[4] 25 Pa. Code § 75.265(n)(13), currently 25 Pa. Code § 265.93(a) (40 C.F.R. § 265.93(a)).

[5] 25 Pa. Code §§ 75.265(n)(1) and 75.265(n)(3)(i) and (3)(ii), currently 25 Pa. Code §§ 265.90(a) and 265.91(a)(1) and (a)(2) (40 C.F.R. §§ 265.90(a) and 265.91(a)(1) and (a)(2)).

[6] 25 Pa. Code § 75.311(a), currently 25 Pa. Code § 267.11(a) (40 C.F.R. § 265.143). Since issuance of the Complaint, the Pennsylvania Department of Environmental Resources ("DER") has renumbered its regulations. This Order will henceforth use the current regulation numbers.

[7] Complainant indicated that the proposal will be reduced due to lapses in EPA's authority to collect information under the Paperwork Reduction Act. See Letter of Senior Assistant Regional Counsel, Region III, to this Office, of April 4, 1996 at 2.

Respondent's Answer to the Second Amended Complaint ("Answer") of April 3, 1991, denied a number of the allegations.

Complainant moved for accelerated decision on the issue of liability.[8] Complainant's motion was followed by several responsive pleadings.

In a motion for summary determination, the moving party has the burden of establishing that there is no genuine issue as to any material fact. The question is "whether the evidence presents a sufficient disagreement to require submission to [a trier of fact] or whether it is so one-sided that one party must prevail as a matter of law."[9] For reasons set forth below, it is determined that Complainant has met this burden with respect to each of the Counts in the Complaint, to the extent that the Counts are not affected by 3M Company v. Browner, 17 F.3d 1453 (D.C. Cir. 1994).[10]

As a threshold matter, it is determined that Respondent owned and operated an "existing hazardous waste facility" as defined in 25 Pa. Code § 260.2 (40 C.F.R. § 260.10),[11] and is

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[8] EPA's Motion for Accelerated Decision as to Liability, May 14, 1992.

[9] Anderson v. Liberty Lobby, 477 U.S. 242, 251-252 (1986).

[10] It appears that Counts I and II are at least partially affected.

[11] An "existing hazardous waste management facility" is defined as "[a] storage facility, a treatment facility or a permitted disposal facility which was in operation on November 19, 1980. . . ." 25 Pa. Code § 260.2.

therefore subject to the standards of Chapter 265 (Part 265), the interim status standards which Respondent is alleged to have violated.[12] This conclusion is based upon evidence in the record that Respondent's facility was used to treat hazardous waste prior to November 19, 1980.[13]

The issue then becomes whether Respondent's three surface impoundments are subject to Chapter 265 (Part 265). Complainant maintains that Respondent discharged hazardous waste to the impoundments and stored it there after the effective date of Pennsylvania's regulations (November 19, 1981). Memorandum in Support of EPA's Motion for Accelerated Decision as to Liability [Complainant's Memorandum], May 14, 1992 at 21. As a result, Complainant argues, the surface impoundments were hazardous waste management facilities,[14] subject to regulation.

In making this argument, Complainant cites eleven transmittals from Respondent's representatives to EPA or DER which it maintains constitute admissions that hazardous waste was discharged to, and stored in, its surface impoundments. Complainant's Memorandum at 14-19. One such transmittal is described by Complainant as follows:

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[12] See Pa. Code § 265.1(b) (40 C.F.R. § 265.1(b) (discussing the applicability of Chapter 265 (Part 265)).

[13] See Affidavit of Charles S. Rath, June 3, 1992 at 1-2; Stipulations, July, 19, 1990 at ¶¶ 3-4. Respondent treated cyanide-containing wastewater from electroplating operations (F007).

[14] 25 Pa. Code § 260.2 defines a "hazardous waste management facility" as "[a] facility where storages, treatment or disposal of hazardous waste occurs."

In a letter dated March 12, 1985 from Paul R. Schneider, Spang's Manager of Manufacturing Engineering, to Mr. Gary Wozniak of DER regarding what Spang intended to do with its lagoons (Attachment 16), Mr. Schneider stated that one of Spang's choices was to "become a permitted storage facility and maintain the lagoons containing hazardous waste." Id., p. 1. He proposed a plan for cleaning the lagoons "to remove the contaminated materials" (Id., p. 2) and added that "the operations which caused the original contamination have been modified to insure that it does not occur again."

Complainant's Memorandum at 14-15.

Another transmittal is described by Complainant as follows:

In a letter dated October 31, 1985 from William T. Marsh, Vice President and General Counsel for Spang, to Mr. Russell Crawford of DER (Attachment 19), Mr. Marsh stated:

> As you know, this company owns two surface impoundments at East Butler which contain minor traces of cyanide which trace from inadvertent discharges from our drill pipe plant. Such discharges were discontinued as soon as we became aware of the problem.

Complainant's Memorandum at 16.

And another as follows:

Paul R. Schneider . . . stated in a June 13, 1985 letter to EPA (Attachment 6) that:

> After the rinse water [in the treatment tank] was treated with the sodium hypochlorite and adjusted for pH, the contents were pumped to the lagoon, including the sludge from the bottom [of the tank] . . . . As soon as this error was discovered the tank was modified to raise the pump pick-up to a location above the sludge level so only water would be transferred and operating procedures were revised to assure that the sludge was completely settled out. This was done in April, 1984.

Complainant's Memorandum at 5.

And another as follows:

In a letter dated August 20, 1985 from Mr. Schneider to Mr. James Rozadis of DER (Attachment 17), Mr. Schneider stated:

> As you are aware, Spang and Company has three surface impoundments at its East butler site which were designed for the treatment of waste waters from three plants. It has been determined that a small amount of F006 sludge was inadvertently discharged into one of these impoundments. . .

Complainant's Memorandum at 15.

In addition, Complainant cites cases which stand for the proposition that discharge of a listed waste into a surface impoundment, and its storage there, subjects the impoundment to RCRA regulation. See EPA's Reply to Spang and Company's Response to EPA's Motion for Accelerated Decision [Complainant's Reply], June 22, 1992 at 4-5 (citing, inter alia, U.S. Conservation Chemical Company of Illinois, 733 F. Supp. 1215, 1225-26 [1223] (N.D. Ind. 1989)).

In response, Respondent produces six affidavits which it maintains rebut Complainant's argument.[15] These affidavits fail, however, to raise an issue of fact sufficient to defeat Complainant's motion. See Complainant's Reply at 5-7.[16] The transmittals and cases cited by Complainant have established that

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[15] Affidavits of John T. Lee, Ronald D. Lehman, Charles S. Rath, Timothy Keister, Matthew H. Kenealy III, and William T. Marsh, received June 5, 1992.

[16] For example, the affidavit of Timothy Keister, which maintains that the presence of cyanide in the impoundments can be attributed to operations other than Respondent's electroplating process, does not raise an issue of fact, because even if true, it "is by no means an indication that F006 wasn't managed in the lagoons." Affidavit of Dr. Samuel L. Rotenberg at 9.

hazardous waste was discharged to Respondent's impoundments and stored there. Accordingly, Respondent's surface impoundments constitute a hazardous waste management facility subject to regulation under RCRA (and under Pennsylvania's hazardous waste regulations).[17]

Turning now to the alleged violations of the Pennsylvania regulations, Complainant charges in Count I that Respondent violated 25 Pa. Code § 265.93(a) (40 C.F.R. § 265.93(a)) by failing to submit an Outline of a Groundwater Quality Assessment and Abatement Program to DER by November 19, 1981. This requirement is applicable to all facilities which are used to manage hazardous waste.[18] In its Answer, Respondent admitted that it submitted the required Outline on September 10, 1990. Answer at ¶ 15. Accordingly, there exists no genuine issue of material fact as to Count I of the Complaint, and Complainant is entitled to judgment as a matter of law.

In Count II of the Complaint, EPA alleged that Respondent violated 25 Pa. Code § 265.90(a) (40 C.F.R. § 265.90(a)) by failing to implement, by November 19, 1981, a groundwater

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[17] In addition, Respondent argues that EPA is relying on the so called "mixture rule" in this case. This is incorrect. EPA has not claimed that all of the waste in the surface impoundments was hazardous. Rather, EPA's argument is that one hazardous waste stream entered the impoundment, was stored there, and that as a result, the impoundment became subject to RCRA regulation.

[18] Waste management includes storage. See 25 Pa. Code § 260.2 (40 C.F.R. § 260.10); In the Matter of A.Y. McDonald Industries, Inc., 2 EAD 402, n. 11 (July 23, 1987).

monitoring program capable of determining the facility's impact on the quality of any groundwater system which the facility had the potential to affect. In its Answer, Respondent admitted that it notified DER on October 31, 1985 that it had completed the installation of four monitoring wells included in its monitoring program. Answer at ¶ 21. Accordingly, there is no genuine issue of material fact as to whether Respondent violated Section 265.90(a) from the time period from November 19, 1981 to October 31, 1985.

Count II further alleges that Respondent violated 25 Pa. Code §§ 265.90(a) and 265.91(a)(1) and (a)(2) (40 C.F.R. §§ 265.90(a) and 265.91(a)(1) and (a)(2)) by failing to comply with DER's requirement that Respondent install additional wells. When DER originally approved Respondent's proposed wells it stated that additional monitoring might be required because no site geology/hydrogeology information was currently available. See Attachment 7 to Complainant's Memorandum. On June 13, 1986, DER issued a Notice of Deficiency ("NOD") which stated that:

> On the basis of data submitted on April 11, 1986 and water levels collected on March 13, 1986, it appears that the downgradient wells are affected by groundwater flow from Bonnie Brook Creek and the area south of the creek. The groundwater elevations in the existing downgradient wells do not vary to a degree sufficient to determine groundwater flow direction or groundwater flow rate. Due to these circumstances, two more downgradient wells should be positioned.

Complainant's Memorandum, Attachment 8, at 3.[19]

On October 22, 1987, after an inspection of Respondent's facility revealed that Respondent had not installed the additional wells, DER issued a Notice of Violation ("NOV"), which listed the following violations:

> Failure to implement a groundwater monitoring program capable of determining the facility's impact on the quality of the groundwater system on which the facility has potential to affect or as otherwise deemed necessary by the Department, contrary to 75.265(n)(1).
>
> Failure to install, operate and maintain a groundwater monitoring system in accordance with Subsection 75.265(n)(2).

Complainant's Memorandum, Attachment 10, at 1-2.[20]

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[19] Respondent appears to contend that DER does not have the authority to require the additional wells. See Respondent's Reply at 5. Section 265.90(a) states:

> By November 19, 1981, the owner or operator of a surface impoundment, landfill, or land treatment facility which is used to manage hazardous waste shall implement a groundwater monitoring program capable of determining the facility's impact on the quality of any groundwater system which the facility has the potential to affect, or as otherwise deemed necessary by the Department.

25 Pa. Code § 265.90(a) (emphasis added).

EPA's position that DER has authority to require the additional wells is justified, in light of the language "or as otherwise deemed necessary by the Department." The South Carolina regulatory provision at issue in the case cited by Respondent, In re Landfill Inc., Dkt. No. RCRA-IV-85-62-R (1986) does not contain this language.

[20] Respondent's Answer denied that DER issued this Notice of Violation (Answer at ¶ 27), and stated that "DER has not asserted that Respondent is not in compliance with the provisions of the Pennsylvania program recited in the amended complaint." Answer at ¶ 40.

The record indicates that, as of September 27, 1990, Respondent had not yet installed the additional wells. See Spang's Motion for Prehearing Conference and for Postponement of Hearing, September 27, 1990 at 3. Accordingly, there is no genuine issue of material fact as to whether Respondent violated 25 Pa. Code §§ 265.90(a) and 265.91(a)(1) and (a)(2) (40 C.F.R. §§ 265.90(a) and 265.91(a)(1) and (a)(2)). However, it is not at all clear why the violation is charged from the date of the NOD rather than from the date of the NOV. Consequently, Respondent will be found liable only for the period from October 22, 1987 to September 27, 1990.[21]

Count III of the Complaint alleges that Respondent violated 25 Pa. Code 267.11(a) (40 C.F.R. § 265.143) by failing to file a bond before September 9, 1985 as required by the regulation. In its Answer, Respondent stated that it filed two separate bonds with the DER on May 25, 1990. Accordingly, there is no genuine issue of material fact as to the allegation that Respondent violated Section 267.11(a) (40 C.F.R. § 265.143) for the period from September 9, 1985 to May 11, 1990, and Complainant is entitled to judgment as a matter of law.[22]

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[21] If Complainant can justify its use of the NOD date, this determination will be reconsidered.

[22] Respondent's additional defenses to liability, stated in paragraphs 40, 41, 42, and 44 of its Answer, and in paragraph 3 of its Response to Motion for Accelerated Decision, June 4, 1992, have been reviewed, and it is determined that they fail to raise a genuine issue of material fact.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent's facility was an "existing hazardous waste management facility" as defined by applicable regulations, and was subject to the requirements of those regulations.

Respondent stored a listed hazardous waste in three surface impoundments on its property after November 19, 1981, the effective date of the State of Pennsylvania's federally-authorized hazardous waste regulations.

Respondent failed to prepare and submit an outline of a groundwater quality assessment and abatement program by November 19, 1981, in violation of Title 25 of the Pennsylvania Code, as charged in Count I of the complaint. Respondent failed to implement an adequate groundwater monitoring program by November 19, 1981, in violation of Title 25 of the Pennsylvania Code, as charged in Count II of the complaint. Respondent failed to obtain closure and post-closure bonds before September 9, 1985, in violation of Title 25 of the Pennsylvania Code, as charged in Count III of the complaint.

Respondent is liable for a civil penalty for the violations found herein.

The issue of the penalty to be imposed remains to be determined.

ORDER

Accordingly, it is ORDERED that Complainant's Motion for

Accelerated Decision as to Liability shall be, and it is hereby, granted, to the extent that the Counts are not affected by 3M Company v. Browner, 17 F.3d 1453 (D.C. Cir. 1994).

And it is FURTHER ORDERED that the parties shall resume settlement efforts with respect to the remaining issue herein, and shall report upon the status of their effort during the week ending June 7, 1996. If the effect of the 3M decision upon the penalty proposal herein cannot be resolved, the parties will be given an opportunity to submit briefs. If the penalty issue cannot be settled after the effects of the 3M decision and the Paperwork Reduction Act authority lapse are disposed of, the matter will be set for trial.

And it is FURTHER ORDERED that Respondent's Motion to Strike Complainant's Supplemental Reply Re Motion for Accelerated Decision, dated July 13, 1992, and Respondent's Motion to Strike Complainant's Letter, dated October 12, 1992, shall be, and are hereby, denied.

And it is FURTHER ORDERED that Respondent shall have ten days from the date of service of this Order in which to move for reconsideration of any issue.

J. F. Greene
Administrative Law Judge

May 1, 1996
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that the original of this **ORDER**, was filed with the Regional Hearing Clerk and copies were sent to the counsel for complainant and counsel for the respondent on May 1, 1996.

Shirley Smith
Legal Staff Assistant
for Judge J. F. Greene

NAME OF RESPONDENT: Spang & Company
DOCKET NUMBER: RCRA-III-169

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