7/31/96

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Cytec Industries, Inc.,	)	Docket No. V-W-009-94
	)	
Respondent	)	

ORDER

Proceedings

The Region 5 Office of the United States Environmental Protection Agency (the "Complainant" or "EPA") commenced these proceedings by filing an administrative Complaint, dated February 23, 1994, against Cytec Industries, Inc., (the "Respondent" or "Cytec").[1] The Complaint charges Respondent with six violations of the Hazardous Waste Burned in Boilers and Industrial Furnaces ("BIF") regulations, 40 CFR Part 266, Subpart H, and the interim status standards for owners and operators of hazardous waste management facilities, 40 CFR Part 265, at its chemical manufacturing facility in Kalamazoo, Michigan. Violations of these regulations, which were promulgated pursuant to Section 3004(q) of Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6924(q), are subject to the assessment of civil penalties under the authority of RCRA §3008(a)(1). Complainant seeks a proposed penalty of $417,600 for the alleged violations. In its Answer of April 1, 1994, Respondent denied the material allegations of the Complaint, raised certain defenses, and requested a hearing.

The Complaint charges Respondent with the following specific violations at the facility: Count I - failure to have an updated waste analysis plan, contingency plan, and closure plan for its BIF operations from August 21, 1991 until February 17, 1992, constituting violations of 40 CFR §§266.103(a)(4), 265.13, 265.54, and 265.112; Count II - failure to develop a waste analysis plan that does not specify the test method for ash and the frequency for the review or repetition of the initial waste analysis to ensure accuracy, constituting a violation of 40 CFR §§265.13(b) and 266.103(a)(4); Count III - failure to monitor equipment for leaks, in violation of 40 CFR §§266.103(a)(4)(viii), 265.1052, and 265.1057; Count IV - failure to include a limit for the total feed

[1] The Complaint named American Cyanamid Company as the Respondent. In an order of January 26, 1996, the name of the Respondent was changed in the caption to reflect the parties' undisputed acknowledgment that Cytec Industries, Inc., which was formerly part of American Cyanamid, is the proper Respondent for the violations alleged in the Complaint.

rate of ash in total feed streams in its certification of compliance, in violation of 40 CFR §266.103(c)(1). ; Count V - failure to operate with an adequate automatic waste feed cutoff system, in violation of 40 CFR §266.103(g); and, Count VI - failure to record feed rates of ash, total chlorine and chloride, in violation of 40 CFR §§266.103(b)(5), 266.103(c)(4), 266.103(j), and 266.103(k).

On August 30, 1994, Complainant filed a motion for Partial Accelerated Decision as to liability for all six counts. This motion was amended on September 19, 1994 to eliminate objectionable material concerning settlement negotiations. Respondent served its motion in opposition on October 19, 1994. Following these pleadings, the parties submitted additional replies.

In an Order dated January 26, 1996, the undersigned Administrative Law Judge ("ALJ") accepted the parties' final responses and replies. That Order also directed the parties to submit briefs addressing the effect of the Paperwork Reduction Act ("PRA" or "Act") of 1980, as amended in 1986, 44 U.S.C. §§3501 et seq.,[2] on this proceeding in light of Complainant's statement in its prehearing exchange that the Act may affect the disposition of this case. On March 5, 1996, the undersigned also granted Complainant's request to submit reply briefs on this issue. These rulings will first address the Paperwork Reduction Act issues, and then will resolve the accelerated decision motion.

Paperwork Reduction Act

Congress enacted the PRA to reduce and minimize federal paperwork demands imposed on the public. S. Rep. No. 930, 96th Cong., 2d Sess. 2 (1980), reprinted in 1980 U.S.C.C.A.N. 6242. In order to address this concern, Congress delegated to the Director of the Office of Management and Budget ("OMB") the responsibility to ensure that all paperwork required from the public is first checked to determine whether the information requested is "needed, not duplicative and collected efficiently." Id. This mandate is achieved through a clearance process in which all agencies' proposed "information collection requests" ("ICRs") must be submitted to OMB for review and approval. 44 U.S.C. § 3507. As defined in 44 U.S.C. §3502(11), ICRs include written report forms, application

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[2] The PRA was amended on May 22, 1995, Pub. L. No. 104-13, 109 Stat. 163 (1995). The implementing regulations, 5 CFR Part 1320, were also amended to incorporate the changes in the Act. 60 Fed. Reg. 44978 (August 29, 1995). However, for this matter, the procedural requirements of the Act of 1980, as amended in 1986, continue to apply to collections of information approved on or before September 30, 1995. 109 Stat. at 185. Thus, unless otherwise stated, all citations are to the Act prior to the 1995 amendments.

forms, schedules, questionnaires, reporting and recordkeeping requirements, and similar methods for the collection of information. If the ICR is approved, then the ICR is assigned an OMB control number, which signifies that it has undergone and met the clearance requirements. 44 U.S.C. §§3504(c)(3), 3507(b).

No agency shall engage in the collection of information without obtaining a control number to be "displayed" on the ICR. 44 U.S.C. §3507(d), (f). The PRA regulations at 5 CFR §1320.7(e)(2) require the control number to be "displayed" by publication in the Federal Register with the ICR, and in the Code of Federal Regulations, if the ICR is also included there. The Act includes a public protection section that provides that no person shall be subject to any penalty for failing to maintain or provide information to an agency if the ICR does not display a current OMB control number. 44 U.S.C. §3512. The failure to display a currently valid control number does not, as a legal matter, amend or rescind the rule, but that portion of the rule requiring the collection of information will have no legal force and effect, and the public protection provision cited above will then apply. 5 CFR §1320.5(a)(2).

The parties only dispute the applicability of the PRA to the alleged noncompliance in Counts I-III of the Complaint. As an initial matter, however, Complainant asserts that the PRA is an affirmative defense that has been waived by Respondent's failure to raise this defense in the Answer. This argument is without merit. In an Order Setting Prehearing Procedures, the former presiding ALJ specifically directed Complainant to submit a statement concerning whether the PRA applied to this matter, and if so, whether Complainant had complied with the Act. (Order, April 18, 1994, p. 2). The PRA defense cannot be deemed waived when the ALJ raised this issue, sua sponte, in his order. In addition, several prior decisions of EPA ALJs have addressed this issue and have all rejected the argument that the failure to plead the PRA as a defense constitutes a waiver.[3]

- Count I

Count I alleges that Respondent did not have an updated written waste analysis plan, contingency plan or closure plan in

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[3] See In re Zaclon, Inc., Docket No. RCRA-V-W-92-R-9 (Initial Decision, March 19, 1996, pp. 11-15); In re ROI Development Corp., Docket No. RCRA (3008) VIII-90-12 (Initial Decision, March 31, 1994, p. 20); and In re Bickford, Inc., Docket No. TSCA-V-C-052-92 (Initial Decision, October 18, 1995, pp. 3, 13-14). Moreover, these holdings comport with the 1995 amendment to 44 U.S.C. §3512(b), which explicitly states that the PRA defense can be raised at any time during the administrative proceeding.

place for Boiler No. 3, as required by 40 CFR §§ 265.13, 265.54 and 265.112, respectively, until February 17, 1992. Pursuant to 40 CFR §266.103(a)(4), BIF owners and operators operating under interim status were subject to these standards in 40 CFR Part 265, effective August 21, 1991.[4] In its motion, Complainant concedes that lapses in OMB approval occurred in the ICRs for all three of the above regulations.

-- 40 CFR §265.13

Complainant concedes that there was no OMB approval for 40 CFR §265.13 during the entire alleged period of violation. Thus, under Section 3512 of the PRA, EPA is barred from seeking a penalty relating to the alleged noncompliance with 40 CFR §265.13, failure to maintain a waste analysis plan. This requirement constitutes an ICR that had no legal force or effect during the period of alleged violation. Thus, this portion of Count I in the Complaint is dismissed with prejudice.

-- 40 CFR §265.54

Complainant states that OMB approval for 40 CFR §265.54 lapsed from October 1, 1991 until March 29, 1992. Based upon this admission, under §3512 of the PRA no penalty can be assessed after September 30, 1991, for the alleged failure to have an updated contingency plan until February 17, 1992.

For the remaining period of this charge, August 21, 1991 through September 30, 1991, EPA displayed an incorrect OMB control number on 40 CFR §265.54 in the 1991 edition of the CFR. The OMB control number that should have been published was "2050-0011" instead of "2050-0002." Complainant asserts that both control numbers were "current," having been approved through September 30, 1991, and that their approval was correctly published in the Federal Register.[5] Complainant urges that this mistake should not affect the validity of an OMB-approved collection of information requirement. Respondent counters that EPA's failure to display the proper OMB control number for 40 CFR §265.54 does not meet the clear requirement to display a currently valid OMB control number under both the PRA and its implementing regulations. As a

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[4] Respondent argues that a closure plan was not required until six months after the effective date of the rule, or until Feburary 21, 1992, pursuant to 40 CFR §265.112(a). The dispute over the effective date is rendered moot, however, by these rulings on the PRA.

[5] To demonstrate that the correct control number was displayed in the Federal Register, Complainant cites 50 FR 4513 (January 31, 1985). However 40 CFR §265.54 here displays the same inaccurate control number, "2050-0002," as in the 1991 CFR.

consequence, Cytec asserts it is not subject to assessment of a civil penalty for any noncompliance.

In these circumstances, the display of an incorrect control number, in both the CFR and FR, cannot be considered a "currently valid" display that satisfies the requirements of the PRA. It cannot be said on this record that the public would not be misled by such an error, just as if no control number were displayed. While the OMB's numbering system is not explained on the record of this proceeding, someone cross-referencing the ICR's with the OMB control numbers could be misled by the publication of incorrect numbers that do not apply to particular ICR's. In any event, the plain language of the public protection provision, PRA §3512, precludes penalty liability where an ICR "does not display a current control number assigned by the Director [of OMB] . . ." The number displayed for 40 CFR §265.54 was not that assigned by OMB. Therefore, this portion of Count I must also be dismissed with prejudice.

-- 40 CFR §265.112

Complainant states that OMB approval for 40 CFR §265.112 lapsed from January 31, 1992 to March 29, 1992, but that this regulation was approved by OMB and fully complied with the PRA's display requirements during the remaining period of alleged noncompliance, August 21, 1991 through January 30, 1992. The OMB control number then appeared in the text of the 1991 edition of the CFR. The control number and OMB approval for all the information collection requirements, in 40 CFR Part 265, Subpart G (Sections 265.110 - 265.120) appeared at the end of the last section in this subpart -- Section 265.120. Respondent contends that this form of "blanket display," covering an entire subpart of regulations, is inadequate when the PRA requires a control number to be displayed on each information collection requirement. In addition, this type of display diverged from EPA's customary practice at that time of listing control numbers at the end of each section of the regulations for which the PRA applied.

The PRA requires control numbers to be "displayed" upon the information collection requirement. 44 U.S.C. §3507(f). In addressing comments on the display requirement, the Director of OMB concluded that, in adhering to Congressional intent in Section 3507(f), all "collections of information" must display a current OMB control number. 48 Fed. Reg. at 13669 (emphasis added). This requirement is further reflected in the final modification of the term "display," stating the most significant change was that:

> [T]he phrase "(as part of the regulatory text or as a technical amendment)" [has been added] . . . to indicate more clearly that OMB intends for agencies to incorporate OMB control numbers into the text of regulations so that the numbers will appear in the regulations as published

> in the Code of Federal Regulations. Publication of control numbers in the preamble to regulations would not have accomplished this purpose.

48 FR 13676. This language unambiguously requires publication of the control numbers with each applicable section of the CFR. Here, EPA's manner of publication at the end of a subpart failed to comply with this requirement. This form of display is similar to merely publishing the control number in the preamble and is contrary to OMB's determination to require the display of a control number with each applicable regulation.[6] This blanket manner of publication failed to fulfill the purpose of the PRA to give the public reasonable notice that an ICR has been approved by OMB. Therefore, that portion of Count I of the Complaint alleging Respondent violated 40 CFR §265.112 is also dismissed with prejudice.

- Count II

This charge alleges Respondent failed to develop an adequate waste analysis plan since its plan dated February 17, 1992 failed to specify the test method used for ash and does not specify a frequency for review or repetition of the waste analysis, in violation of 40 CFR §§265.13(b) and 266.103(a)(4). As seen above, OMB approval for the ICR in Section 265.13 lapsed from July 1, 1991 through March 29, 1992. Given this lapse, Complainant acknowledges that penalties would be barred, but only through March 29, 1992. This statement seems to imply that this count involves a multi-day violation extending beyond March 1992. However, EPA's penalty calculation for Count II simply lists a one-time violation without any multi-day component or alleged period of violation.

The Complaint simply alleges that Respondent's plan of February 17, 1992, failed to comply with the applicable regulations. No period of violation is alleged. (Complaint, ¶ 27). Complainant presented no additional argument on this issue in its reply brief. From these pleadings, February 17, 1992, is the only day that can be reasonably linked to the alleged violation for the purpose of civil penalty assessment. Because no OMB approval existed for the ICR in Section 265.13, on that date, no penalty can be assessed under Section 3512 of the PRA. Therefore, no civil penalty can be assessed for any violation alleged in Count II of the Complaint.

Compliance with these waste analysis plan requirements may still be relevant in the context of the Compliance Order (¶C)

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[6] The inadequacy of this display is evidenced by EPA's technical amendment, consisting of insertions of control numbers at the end on each specific section in 40 CFR Part 265, Subpart G, for which the PRA applies. 58 Fed. Reg. 18014, 18017 (April 7, 1993).

sought by Complainant as part of the relief against Respondent in this matter. This potential liability is addressed below in these rulings in the section on Count II in the rulings on the motion for accelerated decision.

- Count III

Pursuant to 40 CFR §266.103(a)(4), this count charges Respondent with a failure to monitor certain equipment for leaks as required by 40 CFR §§265.1052 and 265.1057. EPA never obtained control numbers for these two regulations, in the belief that they are not ICR's subject to the PRA. The Respondent disputes this position.

A review of the regulatory scheme reveals that these monitoring requirements do not constitute ICRs subject to the PRA. The PRA regulations define "collection of information" broadly to include not only written, but oral, telephonic, and automated communications. 5 CFR §1320.7(c)(1). That definition also includes "rules and regulations, information collection requests or collection of information requirements contained in, derived from, or authorized by such rules or regulations, . . ."

The subject regulations, 40 CFR §§1052(a)(1) and 1057(a)(1) state that each pump or valve "shall be monitored monthly to detect leaks by the methods specified . . ." and go on to prescribe monitoring and inspection methods. Neither regulation contains anything that can reasonably be construed as a requirement to collect information. The reason for that is simple. The ICR for these monitoring sections is found later in Subpart BB -- 40 CFR §265.1064, entitled Recordkeeping Requirements. That is the ICR "derived from" the physical monitoring requirements found in §§265.1052 and 265.1057. Section 265.1064 requires extensive records to be kept for all equipment subject to Subpart BB monitoring. The EPA quite properly sought and obtained OMB approval and a control number for 40 CFR §265.1064 as covering all ICRs for Subpart BB monitoring. Respondent's argument would deem any "rule and regulation" an ICR even if the actual ICR were contained in a different regulation. Taken to its logical extent, this would lead to the untenable conclusion that virtually all rules and regulations are ICRs subject to the PRA.

Respondent here is not charged with failing to keep proper monitoring records, but with failing to actually monitor its equipment. For the reasons given, this charge in Count III of the Complaint does not relate to an ICR and is therefore not subject to the PRA.

Ruling on Motion for Partial Accelerated Decision

Pursuant to 40 CFR §22.20(a), the ALJ may grant an accelerated decision without a hearing "if no genuine issue of material fact

exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding." This procedure is the administrative functional equivalent to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. In re CWM Chemical Services, Inc., 5 EAD TSCA Appeal No. 93-1 slip op. at 14 (EAB, May 15, 1995)(citations omitted). As the moving party, the burden is on Complainant to show that no genuine issue of material fact exists. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). A "material" fact is one that may affect the outcome of the case, and a dispute about a material fact is "genuine" if a reasonable decision maker could rule in favor of the nonmoving party when analyzing the evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Under these guidelines, all evidence submitted and any reasonable inferences therefrom must be viewed in the light most favorable to the party opposing the motion. Matsushita Electric Industries, Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)(citing U.S. v. Diebold, 369 U.S. 654, 655 (1962)).

An accelerated decision can serve to expedite the judicial process by eliminating frivolous or baseless claims. However, an accelerated decision is a harsh resolution to a controversy, and it must be approached with circumspection. When facing a summary judgment or accelerated decision motion, a court's role is limited to determining whether triable issues of material fact exist. 10 C. Wright & A. Miller, Federal Practice and Procedure, §2712 at 574-78 (2d. ed. 1983). If it is determined that there is an issue of material fact, then a court is not empowered to resolve that issue or weigh the evidence supporting each argument. Todd v. Heekin, 95 F.R.D. 184 (S.D. Ohio 1982)(citing Wright & Miller, Federal Practice and Procedure, § 2712); Redna Marine Corp. v. Poland, 46 F.R.D. 81, 85 (S.D.N.Y. 1969). However, if the moving party makes a prima facie showing for summary judgment, then the party opposing summary judgment must come forth with specific facts, not mere unsupported allegations, establishing a genuine issue for trial. Liberty Lobby, Inc., 477 U.S. at 256. The decision on an accelerated decision motion must be based upon the pleadings, affidavits, and other evidentiary material submitted in support or opposition to the motion. 40 CFR §22.20(a).

- Background

Respondent operates a RCRA permitted facility that manufactures industrial chemicals for use in paper, mining and other industries. The Michigan Department of Natural Resources issued Respondent a permit on January 11, 1989, for the operation of a hazardous waste drum storage area. In the manufacturing process, Respondent generates a spent alcohol solution.[7] Spent

[7] Spent alcohol is a by-product of the plant's butylated melamine resins manufacturing process, and it consists of 40% n-

alcohol is classified as a RCRA D001 waste due to its ignitability characteristic.[8] Since 1987, Respondent co-burns spent alcohol with either a fuel oil (Mode A) or natural gas (Mode B) in Boiler No. 3 to produce steam for other manufacturing operations.

On February 21, 1991, EPA promulgated the BIF regulations, which encompass Respondent's activities in Boiler No. 3. 56 FR 7134. These rules were aimed at controlling emissions of toxic organic compounds, toxic metals, hydrogen chloride, chlorine gas, and particulate matter from boilers and industrial furnaces burning hazardous waste. The regulations became effective on August 21, 1991, and subjected BIF owners and operators to the permitting processes, general facility standards and other nontechnical standards applicable to hazardous waste management.

Counts I of the Complaint is dismissed due to EPA's noncompliance with the Paperwork Reduction Act. Further compliance with the requirements that are the subjects of Count I is not sought in the proposed Compliance Order. Hence the following discussion only addresses only the remaining Counts II - VI.

- Count II

As discussed above with reference to the Paperwork Reduction Act, this count charges Respondent with having an inadequate waste analysis plan "dated February 17, 1992" that does not specify the test method for ash and does not specify the frequency for review and repetition of the waste analysis, in violation of 40 CFR §265.13(b). (Complaint, ¶26). No civil penalty can be assessed for any such violation due to EPA's failure to comply with the PRA. However, compliance with these requirements is sought in the Compliance Order that Complainant attached to the Complaint as part of the relief sought against Respondent.

Accelerated decision cannot be granted for such compliance since the status of Respondent's current waste analysis plan is not revealed on the current record. A compliance order can only operate prospectively. Neither party has addressed this (nor any other) issue from this perspective.

Even if Respondent's waste analysis plan has not changed since February 17, 1992, the factual circumstances surrounding this regulation are too vague to grant accelerated decision that a compliance order is warranted. The EPA inspector indicated in his

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butanol, 40% methanol, 20% water, and trace amounts of formaldehyde. (Resp't Mot. in Opp'n at 3).

[8] Under 40 CFR § 261.21(b), substances that exhibit the ignitability characteristic, as explained in 40 CFR § 261.21(a), are assigned EPA Hazardous Waste Number D001.

report that it needed to be determined whether more frequent waste analysis was needed for Cytec's facility. RX-22. It further appears that Cytec had a test method for ash cited in its certification of compliance, but perhaps not in the discreet waste analysis plan document. It will be assumed that this issue remains for adjudication unless the parties stipulate otherwise.

- Count III

This count charges Respondent with the failure to conduct monthly monitoring of pumps and valves to detect leaks of hazardous emissions associated with Boiler No. 3, pursuant to 40 CFR §§266.103(a)(4)(viii), 265.1052 and 265.1057 (Subpart BB). Respondent admits it did not conduct Subpart BB monitoring, but asserts it is exempt from this requirement since its tank system, including ancillary equipment, accumulates hazardous wastes for 90 days or less, citing 40 CFR §§265.1050(b)(1)[Note], 270(c)(2), and 262.34(a)(1).[9] Complainant contends that the Subpart BB monitoring applies to equipment associated with the boiler, regardless of the exemption for the tank system.

The evidentiary record indicates that a genuine issue of material fact exists as to whether or not any of Respondent's equipment is associated with the boiler and subject to Subpart BB monitoring. Resolution of this issue will depend on factual findings concerning the precise relationships among the components of Respondent's tank system, boiler, and ancillary equipment, as those terms are defined in the regulations.[10] The parties have submitted conflicting evidentiary materials on this issue.[11] Since a genuine issue of material fact is raised, accelerated decision on Count III is denied. Respondent's compliance with these Subpart BB monitoring requirements is also at issue in the Compliance Order sought by Complainant (¶B).

- Count IV

Count IV alleges that Respondent's certificate of compliance ("COC") failed to establish operating limits on the total feed rate

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[9] 40 CFR §265.34(a)(1)(ii) was amended on December 6, 1994 to require operators of tanks meeting the 90-day exemption to still comply with Subpart BB equipment leak monitoring. 59 FR 62926. The effective date of this amendment was later delayed to December 6, 1995. 60 FR 26828.

[10] See 40 CFR §264.1031 re "equipment;" and 40 CFR §260.10 re "boiler" and "tank system," and "ancillary equipment."

[11] See Affidavit of Robert L. Greene, Ph.D., Ex. A to Cytec's Response, October 17, 1994, ¶¶7, 12; RX-21, pp. 6-10; CX-17 at C-54a, F-6, I-6.

of ash in all feed streams as required by 40 CFR §266.103(c)(1)(iv).[12] Respondent's COC lists the operating condition limit for maximum total ash feed rate as "N/A" and in a footnote states that this limit is "Not Applicable because constituent/material is not present in feed stream (e.g., non-detect)." CX-12 at 13. Complainant asserts that this notation "N/A" with accompanying footnote is ambiguous in that a numerical limit is called for, and that Respondent's COC listing is therefore inappropriate.

Respondent described its analytical method in which it used the information provided by its natural gas supplier in combination with sampling and analysis of spent alcohol for BIF parameters. The natural gas is free of ash, and the analysis of the spent alcohol did not detect any ash. Complainant does not take issue with Cytec's analytical method or dispute its result, but only objects to the perceived ambiguity of the way the result is presented in the COC. As Respondent asserts, this charge is indeed "little more than a microscopic dispute over terminology." (Cytec's Response, October 19, 1994, p. 24). There is no dispute over the fact that there is no detectable ash in Cytec's Mode B feed stream.

In the full context of this proceeding, the charge in Count IV of the Complaint is so trivial that it should be dismissed. Although Respondent could have more clearly expressed the fact that no detectable ash was present in the feed stream (such as listing the limit as 0.00 grams per hour), the meaning of the "N/A" listing is reasonably clear. Any possible ambiguity could have been clarified by a simple inquiry, which was in fact done during the 1993 inspection. Mr. Lee's inspection report indicates that Cytec informed him that no ash was detected in this feed stream above a detection limit of 0.01%. CX-2, p. 5. While a numerical operating limit might be preferable, the language of the regulation, 40 CFR §266.103(c)(1)(iv), does not explicitly call for a numerical feed rate for non-detectable constituents. In any event, the limit provided by Respondent here was reasonably construable as non-detectable, or zero. There is no reason to spend further time on this charge, for which the Complaint seeks a penalty of $300, out of the total of $417,600. Further compliance is not necessary, as sought in ¶D of the proposed Compliance Order. For these reasons, Count IV of the Complaint is dismissed with prejudice.

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[12] This count only pertains to the co-burning of spent alcohol with natural gas (Mode B). Respondent's COC did list a total ash feed rate for the the co-burning of spent alcohol with fuel oil (Mode A). CX-12 at 12.

- Count V

The Complaint charges that, at the time of the inspection, Respondent had failed to install an automatic waste feed cutoff system linked to its maximum hazardous waste feed rate into the boiler, as required by 40 CFR §266.103(g). That section requires a boiler to be "operated with a functioning system that automatically cuts off the hazardous waste feed when the applicable operating conditions specified in paragraphs (c)(1)(i) and (v through xiii) of this section deviate from those established in the certification of compliance." 40 CFR §266.103(c)(1)(i) in turn requires the owner or operator to establish limits in the COC for:

> Feed rate of total hazardous waste and (unless complying with the Tier I metals feed rate screening limits under §266.106(b) or (e) and the total chlorine and chloride feed rate screening limits under §266.107(b) or (e)), pumpable hazardous waste.

Respondent argues that it is exempt from the automatic cutoff requirement since it did comply with the Tier I limits, and since it had other controls on the feed stream that functioned to keep it within the COC limits. The undisputed facts, however, indicate that Cytec did not have an automatic cutoff linked to maximum hazardous waste feed rate.

The fact that Respondent operated in compliance with the Tier I screening limits only exempts it from having an automatic cutoff for pumpable hazardous waste, not for the total hazardous waste feed stream. The language of 40 CFR §266.103(c)(1)(i), quoted above, may be somewhat convoluted, but is plain enough on this point. The fact that Respondent also had shut-off systems in place interlocked to carbon monoxide concentration, combustion chamber temperature, and spent alcohol feed pressure, as required by paragraphs (c)(1)(v) and (vii) of that section, also does not exempt it from compliance with paragraph (c)(1)(i).

In addition, Cytec's flow control orifice in place before May 4, 1993 was not an adequate substitute for an automatic waste feed cutoff. Although its size was designed to prevent excess waste feed to the boiler, a flow exceedence did occur on April 29, 1993. RX 24, p. 14 of 15. Cytec did then install a high flow interlock to automatically cut off the spent alcohol feed above its COC limits on May 4, 1993. An orifice alone cannot operate as an automatic waste feed cutoff system in any event.

It is also irrelevant to this requirement that Cytec did not exceed the adjusted Tier I BIF emission limits during the period before installation of the automatic cutoff. The factual matters raised by Respondent to the effect that its other controls comprised the functional equivalent of an automatic waste feed

cutoff, and prevented emissions exceedences, can be considered as relevant to the amount of civil penalty to be assessed, but do not constitute defenses to liability on this count.

The adjudication on this issue will be limited to the appropriate amount of the penalty for the period of noncompliance. Further compliance as requested in ¶E of the proposed Compliance Order appears moot, due to Cytec's installation of a high flow interlock on May 4, 1993.

Respondent also contends that the waste feed cutoff requirement is unenforceable because the applicable cutoff limits were deleted for thirteen months from the BIF regulations. Section 266.103(c)(1)(i) was erroneously omitted from the CFR's 1992 edition.

However, the requirements in Sections 266.103(c)(1)(i) and 266.103(g) both appeared in the final rule in the Federal Register (56 FR 7134, 7214, 7219; Feb. 21, 1991), and the CFR's 1991 edition (effective July 1, 1991) well before Respondent's submittal of its COC in March 1993. RX-17. Moreover, within three months after the omission in the 1992 CFR, EPA published a correction notice at 57 FR 44999 (Sept. 30, 1992). The correction notice stated that paragraphs (i) through (xiii) of §266.103(c)(1) were erroneously omitted, and that they have continuously remained in effect in the form published in the 1991 CFR. This correction notice coincidentally appeared at the same time that Respondent initiated its compliance testing to establish the operating limits on the feed rate of total hazardous waste, on September 30, 1992 through October 2, 1992. RX-17, Appendix 3. Even if this had not been the case, this correction notice still was published five months before Respondent's submittal of its COC, and seven months before the inspection.

Regardless of whether Respondent had actual notice of the regulations, it is charged with such knowledge. Publication of rules and regulations in the Federal Register provides the regulated community with legal notice of their contents. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 385 (1947). Therefore the regulations requiring installation of an automatic cutoff system on the total hazardous waste feed stream remained in effect and applicable to Cytec during the period §266.103(c)(1)(i) was inadvertently omitted from the CFR. For these reasons, the motion for accelerated decision is granted with respect to Respondent's liability for the violation alleged in Count V of the Complaint.

- Count VI

In this count, the Complaint charges Respondent with failing to record the feed rates of ash, total chlorine, and chloride as required by 40 CFR §§266.103(b)(5), 266.103(c)(4), and

266.103(j,k). The Complaint (¶47) stated that "[b]ased on the April 29-30, 1993 U.S. EPA inspection, it was determined that Respondent does not record feed rates of ash and total chlorine and chloride." In its motion for accelerated decision, Complainant particularizes this allegation by alleging that Cytec did not monitor and record these parameters on an instantaneous or hourly rolling average basis as specified in §§266.103(b)(5)and 266.103(c)(4)(iv). In its reply to Respondent's opposition to the motion, Complainant further particularized this allegation by limiting it to the time frame of August 1991 to February 1992, or, before April 1993. (Complainant's Reply, pp. 18, 19). In addition to citing these inconsistencies, Respondent asserts it has, and continues to, monitor and record the feed rates for these parameters on an instantaneous basis through a computerized system since April 1993. Before that, Respondent used a circular recording chart system. (Greene Affidavit, ¶14).

There are several factual issues that arise under this count that preclude granting accelerated decision. The inconsistencies between the Complaint and motion pleadings create ambiguity and confusion over the dates of the alleged violation. Only a single violation is alleged in the Complaint. Since the changes in alleged dates of violation are at least partly in response to Respondent's defenses and materials submitted in opposition, a sufficient factual issue is raised to be determined at hearing. In addition, EPA's inspector, Mr. Lee, checked Respondent as in compliance with this requirement on his inspection report (CX-1, p. IV-4). EPA has cited documents submitted by Respondent as indicating Cytec only recorded daily maximum feed rates. Intertwined with the factual uncertainties is the meaning of the regulations themselves. 40 CFR §§266.103(b)(5) and (c)(4) apply respectively to determining limits for the certifications of precompliance and compliance, during compliance testing. Under 40 CFR §266.103(j)(1), monitoring and recording of these parameters is subsequently required during general operation "as necessary to ensure conformance with the certification of precompliance or certification of compliance."

For these reasons, Complainant's motion for accelerated decision on Count VI is denied. Respondent's continued compliance with these requirements also remains at issue in the context of the proposed Compliance Order (¶G).

Ruling on Respondent's Motion for Discovery

Respondent has filed a Motion for Discovery dated October 26, 1994. Complainant has filed a response opposing Respondent's motion. Cytec requests the opportunity to depose three employees of EPA who were involved in the inspection of Respondent's facility and the determination of the proposed penalty assessment. Cytec also seeks permission to file a request for production of documents.

Respondent's motion for discovery is denied at this time, since it wholly fails to meet the requirements of 40 CFR §22.19(f) for granting such additional discovery beyond the prehearing exchanges. Subsection (1) provides that further discovery shall be permitted only upon a determination by the ALJ:

> (i) That such discovery will not unreasonably delay the proceeding; (ii) That the information to be obtained is not otherwise obtainable; and (iii) That such information has significant probative value.

40 CFR §22.19(f)(2) provides that depositions upon oral questions may only be ordered "upon a showing of good cause and upon a finding that:

> (i) The information sought cannot be obtained by alternative methods; or (ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness to the hearing."

The party seeking further discovery must submit a motion setting forth the circumstances warranting the taking of the discovery and the nature of the information expected to be discovered. 40 CFR §22.19(f)(3).

In this motion, Cytec does not indicate with any specificity the type of information it expects to obtain through these depositions and document requests. The motion simply lists a series of topics that Cytec "would seek, among other things, information on." (Motion, p. 3). Without expressing any opinion on the propriety of those topics (some of which Complainant asserts are privileged), this listing completely fails to show that any of the requested discovery will produce any information with significant probative value.

In addition, Cytec does not show that such information is not obtainable through other methods. Many of the listed topics are addressed quite extensively by exhibits submitted in the Complainant's prehearing exchange. In particular, absolutely no good cause is shown for the requested depositions. All three proposed deponents are listed as witnesses for EPA in Complainant's prehearing exchange. There is therefore no question that their testimony will be preserved for the hearing. Cytec gives no reason why depositions before the hearing will yield otherwise unobtainable information with significant probative value.

Cytec states it has made requests for documents relevant to this proceeding under the Freedom of Information Act ("FOIA") to EPA Region 5 and headquarters. Respondent might well have first availed itself of the opportunity to simply seek voluntary discovery from Region 5 for production of documents. The best way

to determine if material is otherwise discoverable is to ask for it. The FOIA request might yield some material that Respondent would also seek as discovery. However the FOIA process is completely separate from this proceeding and outside any control by the ALJ.

There is no absolute right to discovery in administrative proceedings in general, or to discovery beyond the prehearing exchanges in EPA administrative enforcement proceedings in particular. Such discovery may only be granted upon a motion that fully meets the requirements of 40 CFR §22.19(f). In this proceeding, such a motion will not be granted unless voluntary discovery has been attempted and not satisfactorily completed. Any motion for further discovery must include the actual proposed discovery request. In this case it is difficult to envision any additional discovery being allowed other than perhaps a limited production of documents. Respondent's instant Motion for Discovery is denied, without prejudice to renewal in accord with this ruling.

Further Proceedings

The parties are encouraged to engage in voluntary discovery, without my involvement. If such discovery cannot be completed satisfactorily, any motions for additional discovery must be filed no later than August 30, 1996.

The hearing in this matter will be held beginning at 9:30 A.M. on October 22, 1996, in Chicago, Illinois, continuing if necessary through October 25, 1996. The parties will be informed of the exact location of the hearing and other details after the arrangements are made by the Regional Hearing Clerk.

These rulings reduce the maximum amount of the penalty that could be assessed in this proceeding to $260,575. The parties remain encouraged to continue to engage in settlement negotiations on the remaining counts. If a settlement in principle is reached that could eliminate the necessity for the hearing, the parties are directed to notify my office immediately.

Order

1. Counts I and IV of the Complaint are dismissed with prejudice.

2. No civil penalty can be assessed for any violation of Count II, but that count remains at issue in the context of the proposed Compliance Order.

3. Complainant's motion for partial accelerated decision on liability is granted with respect to Count V.

4. Complainant's motion for partial accelerated decision is denied with respect to Counts III and VI.

5. Respondent's motion for discovery is denied without prejudice. Any motions for further discovery must be made by August 30, 1996.

6. The hearing will be held as scheduled as indicated above. The remaining issues are as follows: liability and compliance order under Count II; liability, civil penalty amount, and compliance order under Count III; civil penalty amount under Count V; and liability, civil penalty amount, and compliance order under Count VI.

Andrew S. Pearlstein
Administrative Law Judge

Dated: July 31, 1996
Washington, D.C.