

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF

Kentucky Solite Corporation

Docket No. RCRA-93-12-R

Respondent

Judge Greene

ORDERS UPON RESPONDENT'S MOTION FOR PARTIAL
"ACCELERATED" DECISION

This matter arises under Section 3008 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928. The complaint contains four counts. Respondent moved for partial summary decision as to liability for Counts III and IV, and moved to strike the proposed multi-day penalties sought by Complainant for Count I. Following certain concessions by Complainant,¹ only Count IV remains at issue in connection with Respondent's motion.

Count IV charges that Respondent violated 40 C.F.R. 266.104(c)(3) by failing continuously to record and monitor the hydrocarbons in its stack gas while burning hazardous waste. Respondent maintains that it was not required to monitor the hydrocarbon level continuously.

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."² For the reasons set forth below, it is determined that Respondent failed to meet this burden. Accordingly, the motion will be denied.

An owner or operator of an industrial furnace is required to conduct emission testing to document compliance with, among other standards, the emission standards set forth at Section 266.104(b) through (e).³ The question of whether Respondent was required to monitor the hydrocarbon level continuously requires an analysis of Sections 266.104(b) and 266.104(c). These Sections provide, impertinent part:

(b) Carbon monoxide standard. (1) Except as provided in paragraph (c) of this section, the stack gas concentration of carbon monoxide (CO) from a boiler or industrial furnace burning hazardous waste cannot exceed 100 ppmv on an hourly rolling average basis (i.e., over any 60 minute period), continuously corrected to a 7 percent oxygen, dry gas basis.

* * * *

(3) Compliance with the 100 ppmv CO limit must be demonstrated during the.... compliance test (for interim status facilities). To demonstrate compliance, the highest hourly rolling average CO level during any valid run of the compliance test must not exceed 100 ppmv.

(c)Alternative carbon monoxide standard. (1) The stack gas concentration of carbon monoxide (CO) from a boiler or industrial furnace burning hazardous waste may exceed the 100 ppmv limit provided that stack gas concentrations of hydrocarbons (HC) do not exceed 20 ppmv . . .

(2) HC [hydrocarbon] limits must be established under this section on an hourly rolling average basis

(3) HC shall be continuously monitored in conformance with . . . this part . . .

.

(4) The alternative CO standard is established based on CO data during the. . . compliance test (for an interim status facility).

Sections 266.104(b) and 266.104(c) are regulatory alternatives, and the requirements for each are clear. As Complainant explains, Section 266.104(b)

does not require HC monitoring provided that CO [carbon monoxide] does not exceed 100 ppmv on an hourly rolling average basis. A specific condition of this option, as prescribed by 40 C.F.R. § 266.104(b)(3), is that compliance with the 100 ppmv CO limit be demonstrated during the compliance test. To demonstrate compliance, the highest hourly rolling average CO level during any valid run of the compliance test must not exceed 100 ppmv.⁴

Respondent acknowledged that carbon monoxide exceeded 100 ppmv during one of three runs during their compliance test.³ As a result, the terms of the first regulatory alternative were not met. Therefore, Respondent was subject to the terms of Section 266.104(c), which requires that hydrocarbon limits be established, and that the hydrocarbon level be continuously monitored.

Nevertheless, Respondent avers that the regulations afford the option of complying with the standard established in Section 266.104(b)(1) by using automatic waste feed cutoffs to keep the facility below the 100 ppmv CO level:

Based on its experience in the period leading up to the compliance test, Kentucky Solite believed that during normal operations it could meet the 100 ppmv CO standard, and therefore it was unnecessary to monitor HC and make use of the alternative, higher, CO standard. Accordingly, Kentucky Solite has established automatic waste feed shutoff limits for Kiln No. 2 at a CO concentration of less than 100 ppmv, and since certifying compliance has operated on that basis.⁶

The regulations, however, provide no such option. Indeed, Respondent's interpretation would render Section 266.104(b)(3) meaningless. Pursuant to Section 266.104(c)(3), Respondent was required to record and monitor the hydrocarbon level in its stack gas continuously. The regulations provided "fair warning" of this requirement, meeting the standard of notice set forth in General Electric Co. v. EPA, 53 F.3d 1324 (D.C. Cir. 1995) and In re CWM Chemical Services, Inc., TSCA Appeal No. 93-1 (EAB May 15, 1995). Accordingly, Respondent cannot prevail as a matter of law with respect to Count IV, and its motion for accelerated decision as to that count must be denied.

ORDER

Accordingly, it is ORDERED that Respondent's motion as it relates to Count IV shall be, and it is hereby, denied.

And it is FURTHER ORDERED that Count III shall be, and it is hereby, dismissed.

And it is FURTHER ORDERED that the proposed multi-day penalties sought in the complaint for the violation alleged in Count I shall be, and are hereby, stricken.

And it is FURTHER ORDERED that the parties shall confer with respect to the issues remaining to be resolved. They shall report upon their progress during the week ending December 20, 1996.

J. F. Greene
Administrative Law Judge

Dated: Nov 12, 1996
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that the original of this ORDER was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on November 12, 1996.

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

NAME OF RESPONDENT: Kentucky Solite Corporation

DOCKET NUMBER: RCRA-93-12-R

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¹ In Complainant's Response to Respondent's Reply, dated September 25, 1995, at 1, Complainant stated as follows:

EPA agreed that it would withdraw the multi-day penalties and only seek penalties for two days of violation for Count 1. In addition, EPA has now further evaluated the factual information relating to Count 3 and determined that Count 3 should be withdrawn from the Complaint.

² Anderson v. Liberty Lobby, 477 U.S. 242, 251-252 (1986).

³ 40 C.F.R. § 266.103(c).

⁴ Complainant's Brief in opposition to Respondent's Motion for Partial Accelerated Decision, June 15, 1995, at 15-16.

⁵ Legal Memorandum in Support of Respondent's Motion for Partial Accelerated Decision, March 27, 1995, at 4.

⁶ Id. at 13.