2/9/86

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

'86 FEB 14 A11:18

IN RE	)	
	)	RCRA-III-116
QUAKER STATE OIL REFINING CORP.	)	
	)	
Respondent	)	

RESOURCE CONSERVATION AND RECOVERY ACT - Liability under the Act - Where a facility, in good faith, advises the Agency that it is managing a particular hazardous waste and later determines, based upon laboratory analysis and legal investigation, that the waste is not and never was the listed waste previously identified, is not liable for the imposition of a civil penalty for its failure to comply with the requirements of the act relative to such waste.

Appearances

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U.S. Environmental Protection Agency, Region III
Philadelphia, Pennsylvania
For the Complainant

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Manager, Administrative Operations, Production Division
Quaker State Oil Refining Corporation
Oil City, Pennsylvania
For the Respondent

Introduction

As evidenced by the attached Accelerated Decision which is hereby incorporated and made a part of this Initial Decision based upon stipulations of fact and briefs filed in regard thereto, an Accelerated Decision on the question of liability of the Respondent for two of the four violations set forth in the original complaint was made on July 11, 1985. Following the issuance of that decision, the parties were unable to agree on the amount an appropriate penalty to be assessed and therefore a hearing on the sole issue of the amount of the penalty to be assessed, if any, was held in Pittsburgh, Pennsylvania on November 14, 1985.

Based upon testimony produced at that hearing and as amplified in its post-hearing briefs, the Respondent raises for the first time a threshold issue of liability under the Act which must be addressed before proceeding with a determination of the appropriate penalty, if any, to be assessed in this matter.

The Respondent takes the position that the hazardous waste which is the subject of this proceeding is not, in fact, a hazardous waste and that when it identified it as such in its Part A application and revised Part A application, was operating under an honest belief that the waste in question was a hazardous waste. Subsequent investigations have now convinced it that the waste is not a hazardous waste and, therefore, its management is not subject to the provisions of the Act nor the regulations promulgated pursuant thereto.

The waste in question is identified in the regulations as K049 which is described as "slop oil emulsion solids from the petroleum refining industry".

Obviously this definition, which appears in the table associated with 40 C.F.R. 261.32, is not particularly illuminating and in order to discover exactly what this waste is one must refer to the listing background document for the petroleum refining industry. A copy of this document was provided to the Court by the Respondent. Reference thereto reveals that "slop oil emulsion solids" are the skimmings from an API separator. It generally consists of a three-phase mixture of oil, water and a third emulsified layer. The oil is returned to crude storage, the water discharged to the wastewater treatment system, while the emulsion (oil, water and solids) becomes a process waste stream. A typical combination of the waste stream by weight is 40 per cent water, 43 per cent oil, and 12 per cent solids. Among the solids are the heavy metals chromium and lead, for which the waste is listed.

Reference to the appropriate regulations reveals that a solid waste can become a hazardous waste in one of two ways. One, the waste may be a "listed hazardous waste" and by that it is meant that the source of the waste is described and any waste generated by that particular industrial or manufacturing process is deemed by the Agency to be a hazardous waste because of the constituents traditionally contained therein, which are considered by the Agency to be hazardous for some reason. The other way in which a solid waste may be deemed to be hazardous is if it is a "characteristic waste" and by that it is meant that the waste exhibits one of the described characteristics set forth in the regulations, such as ignitability, corrosivity, reactivity and toxicity. As indicated above, the hazardous waste in question is a listed hazardous waste because of the manufacturing process from which it is generated. In this case, it is the skimmings from an API separator. The waste in this case did not come from that source but rather came from settled material which accumulated in the bottom of oil storage tanks owned

by the Respondent. This material consists of oily debris, such as, sand, grass, dirt, and organic material settling to the bottom of the tank. The debris in question is only generated when the process tanks are cleaned and this only occurs when the tanks are taken out of service for some reason.

Why the Respondent ever assumed that the waste in question was slop oil emulsion solids certainly escapes this writer since its source is no way related to the skimmings from an API separator. As indicated from a reading of the listing document, the primary reason why this material is considered by the Agency to be a hazardous waste is that it is assumed to contain the constituents of chromium and lead. Prior to the institution of this action, the Respondent, at the direction of the State of West Virginia, had some of this material analyzed and it was determined that it did not contain either hexavalent chromium or lead in sufficient concentrations as to render it hazardous for any purpose. This result is not unexpected when one realizes that the Respondent does not use either hexavalent chromium or lead in its processes, unlike a refiner whose end product is gasoline. In this case, the Respondent only manufactures motor oil and lubricants from crude oil and does not manufacture gasoline.

In any event, the Respondent identified this material as the listed hazardous waste K049 and for all practical purposes treated it as such in its operation. The Complainant's answer to this allegation is that: "Therefore, whether the material generated by Quaker State in November 1982 is a hazardous waste is not relevant to the violations or the imposition of civil penalties. The Respondent chose this course of action when it decided to add the storage tanks as part of its RCRA-regulated facility. It must face the consequences of that decision and should not be allowed to shift the focus of this proceeding from the tanks to their contents." (Complainant's reply brief at p. 2.)

The Complainant also takes the position that if the Respondent doesn't think the material in question is a hazardous waste it should file a de-listing petition and have it removed as a hazardous waste to be managed at its facility and until such a petition is filed and acted upon favorably by the Agency, the material must be considered, for all purposes, to be a hazardous waste. As to that last argument, the Respondent testified that in the course of filing a de-listing petition for some of its other hazardous wastes, it, upon further inquiry and advice, decided to remove the K049 waste from its de-listing petition since it takes the posture that the material never was K049 in the first place and, therefore, it is not necessary to file a de-listing petition for it.

I am of the opinion that the Complainant's arguments in regard to this threshold issue are rather circuitous and do not focus on the end result that must necessarily follow if this Court should rule that the material in question is not, in fact, a hazardous waste. The Complainant apparently takes the position that if a facility operator mistakenly designates a waste on its property as a hazardous waste, it must forever live with that decision even though subsequent facts reveal that identifying it as such was an honest mistake and that the material is not and never was a hazardous waste as defined by the regulations.

The purpose of filing a de-listing petition is an attempt by a facility operator to convince the Agency that the constituents contained in its listed waste, although coming from the type of process which the regulations describe, does not, in fact, contain the toxic or hazardous constituents which caused the Agency to list the material as hazardous in the first place. A de-listing petition, as I understand the regulations, is only appropriate where the listed waste is generated by the type of process that the regula

tions identify, but that due to the particular manufacturing or operating methods employed by the facility they do not contain the constituents which caused the waste to be listed. In this case, the material does not have as its source of generation the process which the regulations describe, i.e., the skimmings from an API separator. This material is not and was never generated from that source and its inclusion as an identified listed waste by the Respondent was an obvious error. The record is silent as to why the Respondent chose to identify its waste in that fashion, but testimony elicited at the hearing seems to suggest that in making these notifications, the plant managers, who are not trained environmental specialists, elected to identify them as such without consulting corporate Headquarters personnel or any national trade association which has at its disposal significant resources to aid people in the refining industry. In any event, the Respondent identified this material as K049 and made a good-faith effort, as the record reveals to handle it as required by the hazardous waste regulations. Complainant's arguments missed the point that if, in fact, this material is not and never was a listed hazardous waste, no possible violations of RCRA could stand since the material is not subject to any regulation.

The Complainant's position seems to be that if a facility mistakenly identifies a waste managed by its facility as a hazardous waste, it must live with that decision forever more even though subsequent evaluations determine that the material should never have been listed in the first place. The Complainant would require that once such an honest mistake was made, the facility operator must go through some formal Agency process in order to have its handling of that particular material excluded from the operation of the Act and its regulations. I find this approach to be unduly rigid and illogical.

40 C.F.R. 262.11 provides an alternative way of dealing with situations such as this and it seems to be particularly applicable here. The section states that the person who generates a solid waste, as defined in the Act, must determine if that waste is a hazardous waste by using the described methods. The section then goes on to describe some things that the generator must do and Part C states that "if the waste is not listed as a hazardous waste in Subpart D of 40 C.F.R. Part 61, he must determine whether the waste is identified in Subpart C of 40 C.F.R. Part 61 by either; 1) testing the material according to described methods, or 2) "applying knowledge of the hazardous characteristics of the waste in light of the materials or the processes used". Since the waste in question does not appear to fit any of the defined listed hazardous wastes associated with the petroleum industry, the facility owner may take the position that it is not a hazardous waste based on his knowledge of the material and the processes used. If a facility owner decides to utilize that methodology, which seems appropriate here, he takes the risk that subsequent analysis of the waste may prove that his threshold determination was in error and he would then be subject to substantial penalties for failing to handle and manage the material as a hazardous waste. If, however, subsequent analysis of the material in question substantiates the facility owner's original contention, then it is excluded as a hazardous waste for purposes of RCRA. That situation seems to precisely fit the circumstances as they have developed in this case. Given the fact that this Respondent processes Pennsylvania crude oil, which by its nature contains very few impurities or hazardous constituents, and further given the fact that the facility uses neither lead nor hexavalent chromium in its processing could have allowed the Respondent to make a determination that the material was not hazardous and treated it as such. In this case, subsequent

analysis of this material did demonstrate that it does not contain the identified toxic constituents in sufficient concentrations to make it subject to regulation under RCRA. Despite the above, the Respondent in this case, out of caution and perhaps a lack of specialized knowledge of the inner workings of the regulations, chose to treat this material as if it were a hazardous waste and placed it in secure containers with the ultimate intention of having it shipped off site for disposal in a regulated waste storage facility.

Under the circumstances in this case, it occurs to me that the Respondent's conduct in regard to this material was certainly consistent with one who wanted to take every precaution to assure itself that no harm to man or the environment would occur and chose to take the conservative approach and handle this material in a way which is mandated by the regulations as though it were, in fact, a hazardous waste. Certainly, the Respondent should not be punished for its honest mistake and its zeal in electing to abide by what it perceived to be applicable regulations and requirements in regard to the material in question.

Based on the entire record before me, I am of the opinion that the solid waste in question is not, in fact, a hazardous waste as defined by the regulations either as to its source of generation under the listing requirements nor as to its constituents by their characteristics. Having determined that the material in question is not K049 and is not, in fact, a hazardous waste of any description, there is no necessity to make a determination as to what penalty would be appropriate since there is no violation of RCRA.

Conclusion

Based on the record before me, I am of the opinion that a proposed order in the form and substance set forth below should issue.

ORDER[1]

1. The complaint in this matter is hereby dismissed.

2. The Respondent is directed to amend its Part A application in regard to K049 in a manner consistent with this opinion.

Thomas B. Yost
Administrative Law Judge

DATED: February 6, 1986

[1] 40 C.F.R. 22.27(c) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its service upon the parties unless (1) an appeal is taken by a party to the proceedings, or (2) the Administrator elects, sua sponte, to review the Initial Decision. 40 C.F.R. 22.30(a) provides that such appeal may be taken by filing a Notice of Appeal within twenty (20) days after service of this Decision.