:TED STATES ENVIRONMENTAL PROTEC:ION AGENCY

BEFORE THE ADMINISTRATOR

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In the Matter of)
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The Bass Plating Co.,) Docket No. 82-1024
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Respondent)

1. RCRA - Interim Status Standards, 40 CFR 265.192(c) - Treatment tank whose top is left open during treatment is an "uncovered" tank within the meaning of the regulation.

2. RCRA - Interim Status Standards, 40 CFR 265.13(b) - The requirement of a written waste analysis plan is not satisfied by the fact that Respondent did all necessary analysis in connection with its NPDES permit, and kept records of its tests. The analytical procedures must be consolidated in a written RCRA waste analysis plan, specifically denominated as such.

3. RCRA - Interim Status Standards, 40 CRR 265.14(a) - Respondent found not to be excused from the security requirements by the fact that some of the fencing had been removed to accommodate new construction at the site since it was not shown that removal of the fencing was necessary during all of the time that the waste was unsecured.

4. RCRA - Interim Status Standards, 40 CFR 265.142(e) - A penalty of $1,000 assessed for failure to maintain adequate freeboard on an uncovered 200 gallon treatment tank.

5. RCRA - Interim Status Standards, 40 CFR 265.13(b) - A penalty of $500 assessed for failure to have a written waste analysis plan.

6. RCRA - Interim Status Standards, 40 CFR 265.14(a) - A penalty of $1,000 assessed for failure to have the active portion adequately secured.

Appearances:

George A Ciampa, United States Environmental Protection Agency, Region I, Boston Massachusetts, for Complainant.

Earl W. Phillips, Jr. and Robert B. Cohen, Asbel, Channin, Cohen, Mines & Droney, P.C., Hartford, Connecticut, for Respondent.

INITIAL DECISION

This is a proceeding under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended, (hereafter "RCRA"), Section 3008, 42 U.S.C. 6928 (Supp. IV 1980), for assessment of a civil penalty for alleged violations of the requirements of the Act, and for an order directing compliance with those requirements.[1/] A complaint and compliance order was issued against Respondent, The Bass Plating Company, by the United States Environmental Protection Agency ("EPA") on November 27, 1981. The complaint alleged that Respondent at its facility at Bloomfield, Connecticut, performs electroplating and metal finishing, in the course of which hazardous wastes are generated which Respondent treats, stores and disposes of at the facility, and that Respondent had violated the Interim Status Standards for Hazardous Waste Treatment, Storage and Disposal Facilities, 40 CFR Part 265 (hereafter referred to as "Interim Standards"), to which it is subject. Specifically it was alleged that Respondent had operated treatment or storage tanks with less than two feet of freeboard (the distance between the top of the tank and the surface of the waste) when said tanks were not equipped with a containment structure, a drainage control system, or

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1/ Pertinent provisions of Section 3008 are:

Section 3008(a)(1): "(W)henever on the basis of any information the Administrator determines that any person is in violation of any requirement of this subtitle [C] the Administrator may issue an order requiring compliance immediately or within a specified time period . . . ."

Section 3008(g): "Any person who violates any requirement of this subtitle [C] shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation."

Subtitle C of RCRA is codified in 42 U.S.C. 6921-6931.

a diversion structure, contrary to the requirement of 40 CFR 265.192(c), that Respondent did not develop and follow a written waste analysis plan with respect to the waste being treated, stored or disposed of as required by 40 CFR 265.13(b), and that the part of Respondent's facility where hazardous waste was stored was not secured against the unknowing or unauthorized entry of persons or livestock as required by 40 CFR 265.14(a). A penalty of $3,150 was proposed for each violation, or a total penalty of $9,450, in all. The compliance order directed Respondent to correct the alleged violations.

Respondent answered and denied the violations. Respondent also asserted as affirmative defenses that the inspection was made without Respondent's consent and without the procedures required by law, that the freeboard and security standards were unconstitutionally vague, that the proposed penalty was excessive, and that Respondent had been unfairly singled out for enforcement.

A hearing was held in Hartford, Connecticut on June 17 and June 18, 1982. At the hearing, the EPA moved to amend Count I of the complaint, which charged that Respondent was operating its treatment tanks with insufficient freeboard, to conform to the proof. Respondent opposed the amendment and moved to dismiss Count I for failure of proof, and because the EPA was allegedly relying on illegally obtained evidence. Those motions were taken under advisement as was also a request Respondent had made at the beginning of the hearing for discovery on its claim that it had been unfairly singled out for enforcement. At Respondent's request, it was ruled that these matters would be decided before briefs on the merits had to be submitted.

On November 2, 1982, I issued an order granting Complainant's motion to amend the complaint and denying Respondent's motion to dismiss and for further discovery, and directing the filing of briefs on the merits. That order is made a part of this decision and attached hereto as an Appendix.

Each party then submitted proposed findings of fact and conclusions of law on the merits, and a supporting brief. On consideration of the entire record, and the submissions of the parties, a penalty of $2,500 is assessed and an order directing compliance is issued. All proposed findings inconsistent with this decision are rejected.

Findings and Conclusions

It is undisputed that Respondent, The Bass Plating Company, operates a facility at Bloomfield, Connecticut at which it performs electroplating and metal finishing. In the course of its operations, Respondent generates such hazardous wastes as wastewater treatment sludges from electroplating operations (EPA Hazardous Waste No. F006), spent cyanide plating bath solutions from electroplating operations (EPA Hazardous Waste No. F007), plating bath sludges from the bottom of plating baths from electroplating operations where cyanides are used in the process (EPA Hazardous Waste No. F008), and spent stripping and cleaning bath solutions from electroplating operations where cyanides are used in the process (EPA Hazardous Waste No. F009).[2/] Respondent has complied with the interim status requirements under RCRA, Section 3005(e), and 40 CFR 122.22, applicable to owners and operators of facilities that treat, store or dispose of hazardous waste, and, accordingly, is subject to the Interim Standards.

The violations which are the subject of the complaint are based on an inspection made by an EPA inspector of Respondent's Bloomfield facility on July 28, 1981. The original complaint in this case alleged that Respondent was operating two treatment tanks of 3,000 gallons and 500 gallons capacity, respectively, with insufficient freeboard. The EPA's evidence at the hearing, however, centered around three treatment tanks, a 200 gallon tank, a 1,200 gallon tank, and a 1,000 gallon tank, as being operated without proper freeboard.

2/ Respondent's answer; Complainant's Exhibit 2, p. 3.

Following the hearing, the complaint, on motion of the EPA, was amended to change the gallonage figures of the tanks to 200 and 1,200.[3/] Neither in the motion to amend nor in its brief has the EPA referred to the 1,000 gallon tank, and it appears, therefore, that the EPA has abandoned any claim, with respect to that tank, leaving only the question of the alleged freeboard violation of the 200 and 1,200 gallon tanks. In addition, to the freeboard violation, Respondent is also charged with failure to have a written waste analysis plan, and with failing to maintain adequate security around the areas where its hazardous waste was being stored.

A. The Alleged Failure to Maintain Proper Freeboard

The pertinent provision in the Interim Standards governing the alleged freeboard violation is 40 CFR 265.192(c), which provides as follows:

> Uncovered tanks must be operated to ensure at least 60 centimeters (2 feet) of freeboard unless the tank is equipped with a containment structure (e.g. dike or trench), a drainage control system, or a diversion structure (e.g. standby tank) with a capacity that equals or exceeds the volume of the top 60 centimeters (2 feet) of the tank.

The violations as noted pertain to a 200 gallon treatment tank and 1,200 gallon treatment tank. The 200 gallon tank was being used on the day of the inspection to treat a cadmium cyanide solution for the destruction of cyanide.[4/] Treatment consisted of adding sodium hypochloride to the waste solution and also agitating the solution with air to make sure that the chemical reaction is complete.[5/] At the time of the inspection, the solution in the

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3/ See Appendix infra, at 3-6.

4/ Tr. (June 17) 54-55; Tr. (June 18) 217-220. The solution, thus, would seem to come under the spent cyanide plating bath solutions (EPA Hazardous Waste No. F007), which Respondent admitted to handling at its plant. See Complainant's Exhibit 2.

5/ Tr. (June 18) 218-220.

tank was observed to be agitated and bubbling with a yellow foam on top of part of the liquid. The tank had a wooden cover that was propped up with a stick to an angle of about 45 degrees in order to allow Respondent to carry out the treatment.[6/] The EPA inspector did not actually measure the free-board, but concluded from his visual inspection of the contents that the liquid in the tank was less than an inch from the top, and the record supports this conclusion.[7/] After treatment, the tank was drained by means of hoses.[8/]

Respondent contends that since the tank had a wooden cover, it cannot be considered as an "uncovered" tank within the meaning of the rule. The evidence is undisputed, however, that when the EPA inspector saw the tank, the cover had been lifted off the top of the tank leaving the top open.[9/] This was done, according to Respondent, in order to enable Respondent to treat the waste in the tank.[10/]

Respondent in its brief appears to take the position that the EPA is questioning the fact that the cover was wooden. But the testimony of the EPA's inspector clearly showed that the violation was established not

6/ Tr. (June 17) 53-55; Tr. (June 18) 218; Complainant's Exhibits 3, 5(b).

7/ Tr. (June 17) 55; Tr. (June 18) 16-17. Respondent testified that the practice was to fill the tank about one-third full with electroplating solution and one-third with the sodium hypochloride solution. He also said, however, that air is introduced into the solution as part of the neutralization process which roils the solution so as to raise its level, and also causes the solution to foam. Tr. (June 18) 218-19, 246.

8/ See Tr. (June 18) 232.

9/ Complainant's Exhibit 5(b).

10/ Tr. (June 18) 218.

by whether the cover was wooden or metal, but by whether the tank was covered so as to prevent any overflow of the waste.[11/] This is not a strained construction of the regulation as Respondent contends but one perfectly consistent with its wording. If Respondent had any doubts about the meaning of the regulation, he would have found them answered in the preamble to the regulation. There, the EPA pointed out that it was making more flexible the two-foot freeboard requirement originally proposed by allowing owners and operators to use other methods to prevent hazardous waste from splashing over the rim of an uncovered tank, such as a containment structure, drainage control system or diversion structure.[12/]

Given, then, that the purpose of the freeboard requirement is to prevent the waste from splashing or spilling over the side of the tank - a construction justified not only by the wording of the rule but by its legislative history - it is clear that a treatment tank whose top is left open during treatment is an "uncovered" tank within the meaning of the regulation and that either two-feet of freeboard must be maintained or the tank must have a drainage control system, a containment structure or a diversion structure, so that people or the environment will not be exposed to the waste if it does spill or splash over the top. It is also clear, contrary to what Respondent contends, that a hose used to drain the contents out of the tank after treatment does not qualify as a "drainage system" within the meaning of the regulation.

11/ Tr. (June 18) 7-10.

12/ 45 Fed. Reg. 33201 (May 19, 1980). The preamble to a rule is an authoritative aid in construing a rule. Wiggins Bros., Inc. v. Dept. of Energy, 677 F. 2d 77, 88 (Temp. Emer. Ct. Opp., 1982). The remarks in the preamble were addressed to proposed Section 250.45-6(a) published in 43 Fed. Reg. 58982-59022 (December 18, 1978). Proposed 250.45-6(e), specifically stated that reaction vessels are to have two-feet of freeboard "to prevent splashing or spillage of hazardous waste during the treatment (e.g., neutralization, precipitation)." 43 Fed. Reg. at 59014. Thus, the freeboard requirement was specifically intended to apply to Respondent's tank while the contents were being treated. Respondent's claim that the EPA's construction of the regulation constitutes retroactive rulemaking not justified by the rule as worded, accordingly, is found to be without merit.

It is concluded, then, that at the time of the inspection, the 200 gallon treatment tank was uncovered and was being used to treat hazardous waste without sufficient freeboard being maintained and without there being a containment structure, a drainage control system or a diversion structure, in violation of 40 CFR 265.192(e). It is also concluded that at the hearing Respondent was fully apprised of the nature of the violation with which it was being charged as to this particular tank, and of the facts on which the EPA was relying to establish the violation, which are really undisputed.

In the case of the 1,200 gallon tank, the evidence is that it was being used to treat spent stripping solutions which were collected in drums and then poured into the tank. The treatment was again to destroy cyanide, and the treated waste was then fed back into the wastewater treatment system.[13/] The EPA inspector testified that when he looked at the tank he estimated it to have about three to five inches of freeboard.[14/] The inspector, however, did not record this tank as being a violation either in his RCRA inspection checklist which he made out at the time of the inspection or in the trip summary which he made out about three weeks later.[15/] On the other hand, the inspector did note in his trip summary made out about three weeks after the inspection that one tank was in violation of 40 CFR 265.192, and that it was precariously close

13/ Tr. (June 17) 40, Tr. (June 18) 215; Complainant's Exhibit 4. Respondent admitted to treating spent stripping and cleaning bath solutions (EPA No. F009) in its Part A permit application. See Complainant's Exhibit 2.

14/ Tr. (June 17) 55-56.

15/ Complainant's Exhibit 4 (RCRA inspection checklist); Complainant's Exhibit 3 (Trip Summary); Tr. (June 17) 217. The inspector did mention the 1,200 gallon treatment tank in a general description of Respondent's facilities which he included in his inspection checklist but without any reference to whether the tank had sufficient freeboard. Complainant's Exhibit 4. In the same general description, however, the inspector also mentioned the 1,000 gallon tank which he admitted he did not know enough about to list as a freeboard violation. Tr. (June 17) 232-33, 234. Consequently, it does not appear that the reference to the 1,200 gallon tank was for the purpose of recording a freeboard violation.

to overflowing with less than one inch of freeboard. In his testimony he explained that he was referring to the 200 gallon tank.[16/] The trip summary was forwarded to the EPA enforcement people in Boston, and purported to list the various violations found.[17/] Possibly the omission of the 1,200 gallon tank was an oversight. It may also have been omitted, however because the EPA inspector did not believe that it did violate the freeboard requirements. Respondent for its part testified that it did not know that this tank had insufficient freeboard.[18/] It also claimed that it was unaware that the EPA inspector was questioning the amount of freeboard in the tank and by the time it was advised of this, it was unable to collect evidence to show the contrary. This contention is not without record support.[19/] Consequently, the evidence that the 1,200 gallon tank had insufficient freeboard rests entirely on the persuasiveness of the testimony of the EPA inspector as to his observation of the tank's freeboard.[20/] The fact that the EPA inspector mentioned only the 200 gallon tank in his report raises the question of how confident the inspector

16/ Complainant's Exhibit 3, p. 2; Tr. (June 18) 31-32.

17/ Complainant's Exhibit 3; Tr. (June 17) 221-23; Tr. (June 18) 41.

18/ Tr. (June 18) 220-21.

19/ See order denying the motion to dismiss, Appendix, infra, at 9-11. In the discussion there it is assumed that the trip summary was written at the time of the inspection. See Appendix at 11, fn. 21. Actually it appears that the trip summary was written about three weeks after the inspection. Tr. (June 17) 217. This does not affect the conclusion reached that the evidence is inconclusive as to what Mr. Bass was actually told by the EPA inspector about the presence of RCRA violations. Respondent also contends that by the time it was served with the complaint, the tank was no longer being used, so it could not collect evidence with respect to the tank. See Tr. (June 17) 243.

20/ The EPA inspector did take photographs of the tank, but it is impossible to tell from the photographs what the freeboard in the tank was. See Complainant's Exhibit 5(f), 5(g).

really was about the state of the freeboard on the 1,200 gallon tank, especially since he did not actually measure the freeboard. It is found, accordingly, that the inspector's testimony with respect to 1,200 gallon tank's freeboard is not sufficiently persuasive to establish the violation as to this tank.

B. The Alleged Failure to Have A Written Waste Analysis Plan

The Interim Standards, 40 CFR 265.13(a), require that before an operator treats, stores or disposes of hazardous waste he must obtain a detailed chemical and physical analysis of a representative sample of the waste. The analysis must be repeated as necessary to ensure that it is accurate and up to date, and at a minimum, must be repeated when the operator is notified or has reason to believe that the process or operation generating the hazardous waste has changed. The standards further provide, 40 CFR 265.13(b), that the owner or operator must develop and follow a written waste analysis plan which describes the procedure he will use to carry out the waste analysis requirements. At a minimum the plan must specify the following:

1. The parameters for which each hazardous waste will be analyzed and the rationale for the selection of those parameters.
2. The test methods used to test for those parameters.
3. The sampling method used to obtain a representative sample.
4. The frequency with which the initial analysis of the waste will be reviewed or repeated to ensure that the analysis is accurate and up to date.

Respondent's hazardous waste is generated in the course of treating the wastewater emerging from its electroplating operations. The question is at what point or points in the treatment of the wastewater and in the handling of sludge obtained therefrom should the waste be analyzed. Respondent did

regularly analyze the contents of the plating tanks themselves and knew what they consisted of.[21] After the wastewater is discharged from the plating tanks it appears to have been treated to precipitate or settle out the solids and metals in it, to destroy the cyanide, and to adjust the pH. The sludge obtained from the wastewater is then stored in two lagoons.[22] The only facilities in the wastewater treatment processing which the EPA inspector appears to have observed were the outside treatment tanks used to destroy cyanide, which tanks have already been discussed in the alleged free-board violations, and the lagoons used to store the sludge.[23] As to the tanks, Respondent did as a matter of practice test the solutions put into the tanks for pH before treating the solutions for cyanide destruction.[24] This testing was done so that an acid solution was not mixed with a cyanide solution.[25] With respect to the storage of the sludge, there is no evidence of the sludge being tested before it was put into the lagoons, but the sludge in the lagoons was analyzed annually.[26]

21/ Tr. (June 18) 212 - 213. The EPA contends that the waste stream is subject to change every day. This change is caused by changing, for example, from a zinc plating solution to a nickel plating solution. Tr. (June 18) 249-51. This is not inconsistent with Mr. Bass' testimony that he knows what the contents of the tanks consist of. The EPA has not shown why such changes in the metal content of the wastestream would require for proper management any testing over and above what Respondent is already doing.

22/ Complainant's Exhibit 3.

23/ Tr. (June 17) 47 - 50.

24/ Tr. (June 17) 57; Tr. (June 18) 139.

25/ Tr. (June 18) 229.

26/ Tr. (June 18) 232 - 33; Respondent's Exhibit 8, 9, 9a.

Analysis of the waste is required to ensure that the waste will be managed in a manner that will not pose a threat to human health or the environment.[27] A written waste analysis plan is required not only to allow owners or operators to tailor their waste analysis procedures to the type of wastes and techniques which the facility uses to manage the wastes, but to provide the EPA with a review mechanism that will encourage owners or operators to thoroughly analyze the wastes they manage.[28]

In this case, the EPA has not shown that the analytical procedures Respondent was following were not sufficient to properly manage the waste. For all that appears in this record, testing the solutions for pH before treating to destroy cyanide may have been sufficient to ensure correct handling of the waste at that stage.[29] As for analysis at other stages in treatment, Respondent contended that plating tank solutions were analyzed frequently and that the composition of the solution did not change after it was discharged from the plating tanks except that rinse water was added

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27/ See preamble to Interim Standards, 45 Fed. Reg. 33154, 33179-1806 (May 19, 1980). As has been pointed out in a recent decision, City Industries, Inc., RCRA 81-6-R-DSE-C (Initial Decision, January 14, 1983), at 10-11, among the reasons for having a waste analysis are to prevent incompatible chemicals from being mixed which might result in either explosion or the generation of noxious or poisonous gases. The waste analysis also provides a means for assuring the proper ultimate disposal of the hazardous waste in that depending on the characteristics of the wastes themselves, different methods of disposal are mandated.

28/ Preamble to Interim Standards, 45 Fed. Reg. at 33180.

29/ The pH test was to make certain that an acid was not being mixed with a cyanide, since hydrogen cyanide, a dangerous gas, could be generated if it were. Tr. (June 18) 229. The solution was also tested to make sure that the cyanide was properly destructed. Tr. (June 18) 218. The EPA inspector whose testimony and investigative reports constitutes the sole evidence of the alleged violations, apparently assumed that additional testing should have been done, but he did not explain the basis for that assumption, see Tr. (June 18) 108-09, 142-43.

to it.[30] Consequently there may well have been no need to analyze the sludge precipitated out of the wastewater prior to putting it in the lagoons, or to conduct other analyses of the wastewater prior to its discharge.

It is true in this case that Respondent has not shown that the analysis it was doing of its waste was specifically devised to comply with 40 CFR 265.13. Respondent's wastewater treatment, however, for complying with its NPDES permit also dealt with removing hazardous constitutents from its wastewater and disposing of hazardous waste in the form of sludge generated from the treatment. Since there does appear to have been an overlap between the analyses Respondent was making under its NPDES permit, and what may have been required under RCRA, there is no reason to assume that the testing Respondent was doing was insufficient for RCRA purposes absent some showing by the EPA to the contrary. The EPA has not made this showing.

The essence of the violation here, then, is not that Respondent was not doing the analyses required for proper management of its waste, but that it had not incorporated its analytical procedures in a written waste analysis plan in the form required by 265.13(b).[31] Respondent's arguments that it does regularly test its waste and keeps records of those tests do not completely answer this issue. As already noted, the waste analysis plan has two purposes. First, it ensures that Respondent will manage its waste properly. Second, it provides the EPA with a ready review mechanism for determining whether the wastes are properly managed.[32] The employees whose regular duties involved

30/ Tr. (June 18) 212-13, 232.

31/ Some of its procedures may have been in writing but it was not shown that they all were or that they were consolidated into a RCRA waste analysis plan, specifically denominated as such, which is what the rule plainly contemplates.

32/ See supra at 11.

carrying out these procedures and keeping records of the results may well have known what to do without the need for reducing the procedures to a written plan. The presence of a written plan, however, would have made more certain that the testing would be carried out when the regular employees were not available or if new persons had to take over the duties. The written plan would also have facilitated the work of the EPA inspector in determining Respondent's compliance with RCRA. It may be that the EPA inspector's investigation of what Respondent was doing in this instance to comply with its NPDES permit should have given him sufficient information to also determine whether the waste was being properly managed, but it does not always follow that this will be the case. Changes can be made in the waste-water treatment for NPDES purposes, which may leave gaps in the testing for RCRA purposes. Furthermore, while in this case the inspection was both a RCRA and NPDES inspection, it doesn't follow that this will always be so in future investigations. The EPA inspector is entitled to have available to him the plan showing what analyses are being done under RCRA, and not be required to search out what Respondent is doing under another statute in order to determine compliance. Drawing up a written waste analysis plan, moreover, should not really put any significant burden upon Respondent. If Respondent is already making an adequate analysis of its waste in connection with monitoring its NPDES permit, it need only incorporate these procedures in a written plan in the form required by 40 CFR 265.13(b).

Accordingly, notwithstanding the fact that Respondent does appear to have been adequately testing its wastes, I find that there was still a violation of 265.13(b), since there was no specific written plan of analysis as required by that regulation.

C. The Alleged Failure to Maintain Proper Security

The Interim Standards, 40 CFR 265.14, require that to prevent the unknowing entry and to minimize the possibility for the unauthorized entry of persons or livestock onto the "active portion" of the facility, the facility must have a 24-hour surveillance system, an artificial or natural barrier which completely surrounds the active portion, and a means to control entry such as a locked entrance or controlled roadway access. Signs with the legend "Danger-Unauthorized Personnel Keep Out" must be posted at each entrance to the active portion of the facility. "Active portion" is defined, 40 CFR 260.10, to include that portion of the facility where the waste is treated or stored. Such security measures do not have to be undertaken if the following conditions exist, 40 CFR 265.14(a)(1), (2):

1. Physical contact with the waste, structures, or equipment with the active portion of the facility will not injure unknowing or unauthorized persons or livestock which may enter the active portion of a facility, and

2. Disturbance of the waste or equipment, by the unknowing or unauthorized entry of persons or livestock onto the active portion of a facility, will not cause a violation of the requirements of this part.

The complaint charges Respondent with failing to maintain adequate security around the active portion of the facility where a pile of sludge was stored and where two lagoons were located. The evidence is undisputed that on the date of the inspection there was no fence or other security measure specified in 40 CFR 265.14, to guard against unknowing or unauthorized entry and there were no signs posted.

Respondent contends that the EPA has no grounds for claiming that the sludge pile and waste in the lagoons are hazardous because the EPA did not take tests to determine how hazardous they were. Such tests are unnecessary, however, in view of the fact that the evidence establishes, and Respondent does not deny, that the sludge in the sludge pile and lagoons was derived from plating bath solutions. Such sludge is a hazardous waste under the Interim Standards, and is listed as hazardous not only for its reactive properties but also because it contains toxic constituents.[33/] This classification of a hazardous waste does not depend on whether the sludge has been mixed with dirt, or on whether the sludge is in liquid form or has congealed or solidified.[34/] Consequently the sludge in the sludge pile and lagoons are hazardous wastes under the Interim Standards and the portion of the facility where the sludge pile and lagoons were located is an "active portion" under the Interim Standards.

Respondent additionally contends, that by proving that the sludge pile was a mixture of sluge and dirt with a layer of dirt over it and seeded with grass, and that one of the lagoons was dry to the point of being a hardened surface, Respondent, has either proved that physical contact with the sludge will not injure persons or livestock, or at least has shifted to the EPA the burden of showing the contrary. There is some support in the record for

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33/ Complainant's Exhibits 2, 3, 4; Tr. (June 17) 51-52. Such sludge is listed in 40 CFR 261.31 under hazardous waste No. F008.. Toxic constituents are those substances which scientific studies have shown to have toxic, or other adverse effects on humans or other life forms. See 40 CFR 261.11(a)(3).

34/ See 40 CFR 261.3(a)(2)(iv) defining a hazardous waste as including a mixture of solid waste (in this case dirt) and one or more hazardous wastes listed in 40 CFR Subpart D, in which subpart Respondent's sludge is listed, and 40 CFR 260.10 defining "sludge" as any solid, semi-solid or liquid waste.

Respondent's claim that covering the wastepile with grass did secure it from contact from persons or livestock.[35/] Nevertheless, the evidence also establishes that part of the waste pile was not covered with grass.[36/] So far as the sludge in the lagoon is concerned, there is simply no basis on this record for assuming that dried sludge does not present a hazard. Even if Respondent's premise that dry sludge is less dangerous than liquid sludge were true, the lagoon is exposed to the elements and rainwater lying in the lagoon and coming into contact with the sludge may well create the same hazards as that presented by the liquid sludge. In sum, it is found that Respondent has not shown either conclusively or presumptively that the waste in the sludge pile or in either of the lagoons was in a form which would make it unlikely that unknowing or unauthorized persons or livestock coming into contact with the sludge would not be injured as a result of such contact.

The record also shows that at one time the lagoons had been surrounded by a fence, but that about two months prior to the inspection part of the fence had been taken down to permit the construction of a new building.[37/] It does not appear, however, that the part taken down had to be left down for the entire period, or if it did, that temporary fencing with a warning sign could not have been put up in its place until the construction had

35/ See Tr. (June 17) 192.

36/ See Tr. (June 17) 192, 194; Complainant's Exhibit 5(f).

37/ Tr. (June 18) 236; Tr. (June 17) 197. The EPA contends that the fence was probably removed about four months prior to inspection when Mr. Bass testified the "site work" first began. There is no reason, however, to question Mr. Bass' testimony that the fence was taken down about two months prior to inspection.

reached a stage where more permanent fencing could have been constructed.[38] Consequently, the fact that the absence of a fence was a temporary condition caused by the ongoing construction at the plant does not excuse the violation.

Respondent finally points to the presence of a stream and swamp in the rear of the property as providing site security. The record indicates, however, that these natural features were not close enough to Respondent's facility to serve as a barrier.[39] Moreover, they would only guard against entry from the rear, so that persons could still enter into the active portion from other directions.

It is found, accordingly, for the reasons stated above, that Respondent did not maintain the security over its hazardous waste which is required by 40 CFR 265.14.

D. The Appropriate Penalty and Order Requiring Compliance

The EPA requests in this case a penalty of $3,150 for each of Respondent's alleged violations or a total penalty of $9,450.

RCRA, Section 3008(c), 42 U.S.C. 6928(c), provides that the penalty assessed shall be one which is "reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements."

38/ See Tr. (June 18) 252. Respondent in fact, put up temporary fencing after the inspection. See Tr. (June 18) 237-38; Respondent's Exhibit 23.

39/ Tr. (June 17) 212; Tr. (June 18) 228-29. Respondent also refers to the active presence of its personnel and to police visitation and viewing of the site as providing security. The record, however, does not provide any details as to these measures which would permit a reliable evaluation as to how effective they are in providing 24-hours protection against unauthorized entry.

The criteria for determining the penalty was discussed in my initial decision in the case of Cellofilm Corporation, Docket No. II RCRA-81-0114 (August 5, 1982). In that case the EPA relied upon a draft penalty policy which has not been officially adopted by the EPA. Here the EPA merely asserts that its penalty is justified by the claimed severity of the violation and Respondent's asserted lack of good faith efforts to comply with the requirements. Nevertheless, the draft policy sets down more precise guidelines for determining the seriousness of the violation and a respondent's good faith efforts, and in the absence of any better guidance will be followed here. The policy set down in the draft penalty policy, in general, considers two factors in determining the seriousness of the violation for the purpose of assessing a penalty. The first is the potential for harm to human health and environment. That is, the penalty should not depend on whether actual harm has occurred, because the existence or lack of harm may have been the result of good fortune on the part of the violator, and it should not be the policy of the EPA to reward lucky violators by assessing lower fines. The second is the conduct of the violator, i.e., whether there has been only a minor deviation from regulatory requirements or a general disregard of the requirements. In addition, as also bearing upon the size of the appropriate penalty, the draft penalty policy would consider such other factors as the efforts made by the noncomplying firm to comply with the goals of RCRA in general, the noncomplying firm's voluntary efforts to rectify the damage, the noncomplying firm's control or lack of control over the circumstances leading to the violation, the recalcitrance of the noncomplying firm in complying with the Act, the noncomplying firm's history of violation, whether the violation was

willful, and the noncomplying firm's ability to pay.[40/]

As to the potential for harm of the violations found here, operating the 200 gallon treatment tank with inadequate freeboard and leaving the waste pile and lagoons unsecured are the more serious violations. The evidence showed that the tank was close to overflowing, a condition which was not only dangerous to those near the tank, but could also lead to contaminating the soil around the tank. The unsecured waste pile and lagoons were a hazard to anyone who came into the area and was not aware of the toxic properties of the waste. The failure to have a written waste analysis plan, on the other hand, created little danger to the health or environment, since Respondent does appear to have been managing its waste properly.

As to Respondent's conduct, the fact that both the EPA and the State of Connecticut had been making frequent investigations of Respondent's compliance with its NPDES permit makes it unlikely, contrary to what the EPA argues, that Respondent was deliberately flouting either the Interim Standards, or the specific requirements found here to have been violated. Respondent seems to argue that it was justified in assuming that it would be told by the EPA if it was doing anything wrong under RCRA, and would be given the opportunity to correct whatever was being questioned, since it appeared to Respondent that this was how its compliance with its NPDES permit was handled. That argument,

40/ See Cellofilm Corporation, supra at 6-7. Similar criteria have also been used to determine the appropriate penalty under other statutes administered by the EPA. See e.g., the EPA's guidelines for assessing penalties under the Federal Insecticide, Fungicide and Rodenticide Act, Section 14(a), 7 U.S.C. 136 l(a), 39 Fed. Reg. 27712 (July 31, 1974). The statute there requires the Administrator to consider the "gravity of the violation" but "gravity" and "seriousness" are close enough in meaning to justify use of the same criteria in determining the one as the other.

however, would have been more persuasive as a mitigating factor, if Respondent had shown that it at least had made some effort specifically directed to complying with the Interim Standards. In the absence of such a showing, it can only be concluded that Respondent simply ignored the standards. Consequently, the penalty should be set in an amount sufficient to impress upon Respondent the need to manage its waste in accordance with the Interim Standards, and in particular, to remove any economic incentive for not complying with the standards.

In the case of the freeboard violations, the EPA's requested penalty of $3,150, was predicated on both the 200 gallon and 1,200 gallon tanks being operated with insufficient freeboard. Since violation was found only with respect to the 200 gallon tank, and the volume of waste involved appears to have been relatively small, it is found that $1,000, is an appropriate penalty.

As to the failure to have a written waste analysis plan, since this has been shown to be only a minor violation, which can probably be remedied by incorporating its analytical procedures in a written plan, it is believed that a penalty of $500 is appropriate.

Finally, as to the failure to keep its hazardous waste secure, it does appear that this violation was probably only of a relatively short duration and occassioned by the disruption attendant upon its new construction. A penalty of $1,000, consequently, is regarded as appropriate for this violation.

No objections having been raised to the compliance order other than the objections leveled at the imposition of a civil penalty, the compliance order will be issued in the form proposed except for modifications required by the findings made herein. The requirement with respect to obtaining chemical and physical analyses of its wastes is also modified to make clear that Respondent may include in its data base existing published or documented data, as permitted by 40 CFR 265.13(a)(2).

CONCLUSION

It is concluded that Respondent has violated the Interim Status Standards for Hazardous Waste Treatment, Storage, and Disposal Facilities, 40 CFR 265.192(c), 40 CFR 265.13(b), and 40 CFR 265.14(a). It is further concluded that $2,500 is an appropriate penalty for these violations and that an order in the form hereafter set forth should be issued.

ORDER[41/]

Pursuant to the Solid Waste Disposal Act, as amended, Section 3008, 42 U.S.C. 6928 (Supp. IV 1980), the following order is entered against Respondent, The Bass Plating Company:

1. (a) A civil penalty of $2,500 is assessed against Respondent for violations of the Solid Waste Disposal Act found herein.

   (b) Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days after service of this order upon Respondent by forwarding to the Regional Hearing Clerk a cashier's check or certified check payable to the United States of America.

2. (a) Immediately upon its receipt of this order, Respondent shall:

   - remove sufficient hazardous waste from its 200 gallon tank used to treat cadmium cyanide solution so as to ensure at least 60 centimeters (2 feet) of freeboard; and
   - develop, and begin to follow, a written waste analysis plan which complies with the requirements of 40 CFR 265.13(b);

41/ Unless an appeal is taken pursuant to 40 CFR 22.30 of practice or the Administrator elects to review this decision on his/her own motion, the initial decision shall become the final order of the Administrator. See 40 CFR 22.27(c).

(b) Within sixty (60) days of its receipt of this order, Respondent shall obtain a detailed chemical and physical analysis of a representative sample of each waste treated, stored, or disposed of at the Bloomfield Facility. The analysis may include existing published or documented data on such waste or on waste generated from similar processes. Respondent shall also bring the Bloomfield Facility into compliance with the site security requirements of 40 CFR 265.14.

(c) Within five (5) days of each date established by the preceding clauses (a) and (b), above, of this order, Respondent shall certify to EPA the status of its compliance with said clauses. This certification shall be in writing, addressed to:

Director, Enforcement Division
U.S. Environmental Protection Agency
John F. Kennedy Federal Building
Boston, MA 02203
Attn: RCRA Compliance Clerk

If the certification reports noncompliance with a requirement, the Respondent shall also report the reasons for the noncompliance, and the date on which Respondent expects to be in compliance. Such a report will not, however, excuse the noncompliance.

Gerald Harwood
Gerald Harwood
Administrative Law Judge

Dated: April 13, 1983

APPENDIX

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In the Matter of The Bass Plating Co., Respondent	)	Docket No. 82-1024

ORDER GRANTING COMPLAINANT'S MOTION TO AMEND COMPLAINT, DENYING RESPONDENT'S MOTION TO DISMISS THE COMPLAINT, AND DENYING RESPONDENT'S MOTION FOR FURTHER DISCOVERY

This is a proceeding under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (hereafter "RCRA"), Section 3008, 42 U.S.C. 6928, for assessment of a civil penalty for alleged violations of the Act and for issuance of a compliance order. The proceeding was instituted by a complaint issues by the United States Environmental Protection Agency ("EPA") against Respondent, The Bass Plating Co. Respondent answered and denied the violations and raised several procedural objections. A hearing was then held in Hartford, Connecticut on June 17 and 18, 1982. At the hearing, certain procedural matters were raised on which I reserved decision pending receipt of the transcript and the submission of memoranda on the matters. These matters were the following:

1. Respondent's motion to dismiss Count I of the complaint predicated on the claims that Respondent had not been given proper notice of the violation charged in Count I,

and that Complainant failed to prove a violation of Count I, since there was no evidence of violations with respect to uncovered steel tanks of 3,000 gallons and 500 gallon capacity respectively.[1/]

2. The EPA's motion to amend Count I of the complaint to conform to the proof.[2/]

3. Respondent's request for discovery on its claim that it had been unfairly singled out for enforcement.[3/]

It was also ruled at the request of Respondent that briefs on the merits would not be submitted until after the motion to dismiss and the motion to amend the complaint had been decided.[4/]

The parties have now submitted memoranda in support of their respective positions. Respondent has expanded its motion to dismiss to include the claims that the EPA's evidence has been illegally obtained and that the EPA is engaging in impermissible rulemaking.[5/] On consideration of these memoranda and of the record, the motion to amend Count I of the complaint is granted, the motion to dismiss Count I, is denied, and Respondent's motion for further discovery is denied, for the reasons hereafter stated.

1/ See transcript of hearing ("Tr") for June 17, 1982, at 239-44.

2/ Tr. (June 18) at 177-178 (The June 18th volume of the transcript is described on the cover as "June 17 and 18, 1982.")

3/ Tr. (June 18) 253-55). I denied Respondent's request for discovery at the start of the hearing but stated I would reconsider the question at the close of the hearing in light of whatever facts may have been brought out during the hearing. Tr. (June 17) at 17-21. Respondent accordingly renewed the request at the close of the hearing.

4/ See Tr. (June 18) at 179-187. This ruling was confirmed by a telephone prehearing conference held after the hearing. It was also agreed that I would rule on Respondent's discovery request. See my letter of August 13, 1982, to the parties.

5/ Respondent's motion to amend its motion to dismiss is granted.

A. The EPA's Motion to Amend

Count I of the complaint alleges that on the date of inspection (July 28, 1981), Respondent was violating 40 CFR 265.192(c), in that it was using two steel tanks of three thousand gallons and five hundred gallons capacity respectively to treat hazardous waste, which tanks were uncovered, were being operated with less than one inch of freeboard, and were not equipped with a containment structure, a drainage control system or a diversion structure. The EPA's proof, however, dealt with two steel tanks, one of twelve hundred gallons capacity and the other of two hundred gallons capacity.

The EPA contends that Respondent was not really misled by the incorrect gallonage figures since Respondent must have known from its knowledge about its operations which tanks were actually in violation. It is extremely doubtful, however, that Respondent knew from the complaint which tanks were allegedly in violation. The five hundred and three thousand gallonage figures were apparently based on information furnished by Respondent in its application for a hazardous waste permit.[6/] According to Mr. Bass, Respondent's president, however, the permit referred to different tanks than those for which the violations are now claimed.[7/] The notice requirements in administrative proceedings, nevertheless, are not rigorous. Even though the complaint may be defective, due process is satisfied if at the hearing the party knows the claims of the opposing party in the proceeding and is given the opportunity to meet them. Avnet, Inc.v. Federal Trade Commission, 511 F. 2d 70 (7th Cir.), cert. denied, 423 U.S. 833 (1975). Respondent at

6/ Complainant's Ex. 2; Tr. (June 18) at 167-71.

7/ Tr. (June 18) 210. The two tanks on Respondent's Part A application were listed as storage tanks and not treatment tanks.

the hearing knew the tanks which were at issue, and was given ample opportunity to meet the claims with respect to the tanks, as is evidenced by the facts that counsel for Respondent extensively cross-examined Mr. Granz, the EPA's only witness, about the tanks and presented evidence in its own behalf concerning the alleged violations by those tanks.

Respondent contends that notice at the hearing was not sufficient to permit it to adequately defend itself. Indeed it argues that not even the Complaint itself was adequate notice in this case since it was not issued until four months after the inspection. Respondent prior to that time had no notice that the EPA would charge it with violations of RCRA. As a result after the inspection and prior to the receipt of the complaint, Respondent had discontinued the use of and disassembled the tanks and treatment system at issue, so that it has been unable to document developments and collect or retain evidence with respect to the tanks. That the EPA did not issue its complaint earlier, it is further contended, is evidence that the EPA has acted in bad faith in bringing this proceeding against Respondent. Respondent's claims of prejudice and of bad faith and undue delay by the EPA, which would seem to apply even if the complaint were amended, are found to be without merit.

Neither due process nor RCRA would seem to require that Respondent must be notified of the violations at the time of inspection or, in fact, at any time prior to issuance of the complaint.[8/] In any event, the EPA's

8/ RCRA, Section 3007, 42 U.S.C. 6927, does provide that if the EPA obtains any samples during an inspection, the inspector must give the party being inspected a receipt for the sample, and, if requested, a portion of the sample. Mr. Granz obtained no samples during this inspection.

A former provision in RCRA, Section 3008(a), requiring 30 days' notice before instituting an action for a compliance order, was deleted by the Solid Waste Disposal Act Amendments of 1980. See Pub. L. No. 96-482, Sec. 13, 94 Stat 2339 (1980). For Section 3008(a) at it now reads, see 42 U.S.C. 6928 (Supp IV, 1980). The EPA's applicable rule of practice, 40 CFR 22.37, was also amended to delete the requirement of notice before instituting a suit for a compliance order. See 45 Fed. Reg. 79808 (Dec. 2, 1980).

inspector, Mr. Granz, testified that he did orally tell Respondent's president, Mr. Bass, at the time of the inspection about the RCRA violations he had found. There is no reason to doubt Mr. Granz' testimony, although as discussed below, it is questionable whether Mr. Granz effectively communicated his findings to Mr. Bass so as to put Respondent on notice that it may be desireable to preserve evidence relevant to the violations.[9/] Thus, if Respondent was unaware that Mr. Granz had found RCRA violations, it was not because Mr. Granz deliberately withheld or concealed such information, which is what seems to be implied in Respondent's accusation of bad faith against the EPA, but because Mr. Granz' oral notification was inadequate to accomplish its purpose. Nor can it be inferred that the EPA was unduly dilatory or attempting to gain some unfair advantage because the complaint was not issued sooner than four months after the inspection. Four months cannot on its face be called an unreasonable length of time in view of the administrative process entailed in drafting a complaint and having it approved and issued.[10/]

The facts accordingly do not support Respondent's claim that the EPA has acted in bad faith or unreasonable delay in notifying Respondent about the violations. Respondent has also failed to show that it was prejudiced by the EPA's failure to notify it of the violations prior to issuance of the complaint. In its prehearing exchange, Respondent explained its claim of prejudice as it related to Count I by stating that as a result of removing the tanks, Respondent has been unable to measure or analyze any fluid in the

9/ See infra at 9-11.

10/ See Tr. (June 17) at 187-88. The EPA knew that Respondent was putting in a new system, and it could be argued that it should have known, therefore, that evidence with respect to the old system including the tanks may be destroyed. The EPA does not appear to have known, however, when construction would be started. See Tr. (June 18) at 50. In any event, since the EPA's inspector believed that he had made Respondent aware of the violations at the inspection, there is no reason to assume that the EPA was put on notice that it should have acted more expeditiously in issuing the complaint than it did.

tanks. Respondent has not shown however, that these fluid analyses and measurements are crucial to its defense, and that Respondent cannot adequately defend itself notwithstanding the unavailability of such evidence. Indeed, it would appear from this record that Respondent has been able to adequately defend itself without having to rely on such analyses or measurements.

Whether or not the complaint should be dismissed because of prejudice said to arise from delay, would, like the analagous claim of laches, seem to depend on striking a balance between the EPA's interest in protecting the public against the mismanagement and improper disposal of hazardous waste, and the unfairness to Respondent in proceeding with the case.[11/] Here, the EPA has not been shown to have acted in bad faith or with unreasonable delay. It should, therefore, be allowed to proceed with its case unless it is unfair to Respondent to do so. Respondent has not shown that it is unfair to do so.

Respondent's opposition to the amendment to the complaint is based solely upon the prejudice claimed to have been created by the lack of notice of the violations prior to issuance of the complaint. There is no claim of any other prejudice such as, for example, that the amendment comes as a surprise and will require Respondent to meet an entirely different case than the one it has directed its defense to. Since it is found that Respondent has not been prejudiced by any delay in issuing the complaint, the amendment to Count I of the complaint is allowed.[12/]

11/ For balancing of equities in laches see e.g. Goodman v. McDonnel Douglas Corp., 600 F. 2d 800 (8th Cir. 1979) cert. denied, 446 U.S. 913 (1980).

12/ For the same reasons, the motion to dismiss Count 1 because of the prejudice claimed to be created by the delay in issuing the complaint is denied.

B. Respondent's Motion to Dismiss Count I

Respondent in its motion to dismiss Count I of the complaint raises several due process objections which would seem to be directed not simply to dismissing the unamended Count I but to dismissing Count I, if not the entire complaint, even if the amendment is permitted. One claim, that the failure to notify Respondent of the freeboard violations at the time of inspection or prior to the issuance of the complaint has prejudiced its right to defend itself, has already been considered and rejected for the reasons noted above. Other objections are: first, that Respondent never consented to the RCRA inspection and therefore the evidence obtained from the inspection should be suppressed; second, that the EPA has been guilty of bad faith toward Respondent in prosecuting the complaint; and, third that the EPA is engaging in improper retroactive rulemaking. For the reasons hereafter noted all these contentions are rejected.

1. The Claim that there was no consent to the EPA's Inspection and the Evidence obtained Thereby Should Be Suppressed.

Respondent contends that the evidence acquired by the EPA from the inspection should be suppressed because the EPA's inspection was done without Respondent's consent. The lack of consent is predicated upon the claim that Respondent was never told about the RCRA inspection, and believed that the only inspection intended by the EPA was of Respondent's compliance with its NPDES permit issued pursuant to the Clean Water Act, Section 402, 33 U.S.C. 1342. The EPA's investigator, Mr. Granz, contends that he did tell Respondent's president, Jack Bass, that the inspection concerned Respondent's compliance with both the NPDES and RCRA programs. The evidence on this issue can be summarized as follows:

Mr. Granz testified that he called Mr. Bass on the telephone between two and ten days prior to the inspection and said that he would like to conduct a RCRA hazardous waste inspection and also an NPDES inspection at Respondent's facility.[13/] On the date of the inspection, Mr. Granz, before beginning his inspection, met with Mr. Bass. Mr. Granz said that he again told Mr. Bass that Respondent was being inspected for both NPDES compliance and RCRA hazardous waste compliance.[14/] According to Mr. Granz, he first did NPDES inspection, and filled out his NPDES inspection checklist. During this inspection, he also toured the facilities with Mr. Bass. Following the NPDES inspection, which took about three hours, Mr. Granz then did his RCRA inspection and filled out his RCRA checklist based on information furnished to him by Mr. Bass. After the inspection, Mr. Granz sat down with Mr. Bass and told him where he was lacking in RCRA requirements. On leaving, Mr. Granz gave Mr. Bass a notice of deficiency with respect to his NPDES permit, but did not supply anything in writing with respect to the observed RCRA deficiencies.[15/]

Respondent's testimony is that Mr. Granz did not tell Mr. Bass the purpose of the inspection, when he telephoned Mr. Bass before the inspection. Respondent, however, already had had two previous NPDES compliance inspections by the EPA, including one in 1979 by Mr. Granz, and Mr. Bass assumed, therefore, that it would be another NPDES inspection.[16/] Nothing said or done by Mr. Granz during the inspection itself indicated that this time Mr. Granz was inspecting

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13/ Tr. (June 17) at 42.

14/ Tr. (June 17) at 44-45.

15/ Tr. (June 17) 44, 60-61, 148, 215, 223.

16/ Tr. (June 17) at 79, 105; Tr. (June 18) at 193-195.

not only Respondent's NPDES compliance, but also its RCRA compliance. The business card Mr. Granz presented when he showed up identified Mr. Granz as an environmental engineer with the EPA's water section. The areas that were looked at in the NPDES inspection were also the areas which Mr. Granz inspected for RCRA compliance, and the questions asked by Mr. Granz appeared to pertain to Respondent's NPDES compliance. When Mr. Granz left the only written report he left had to do with Respondent's compliance with its NPDES permit.[17/]

Tending to support Mr. Bass' testimony that he did not know about the RCRA part of the investigation is the fact that Respondent's hazardous waste was generated during the treatment of its wastewater, and that the tanks and the sludgepile and lagoons, which are alleged in the complaint as being used to treat or store hazardous waste were, in fact, a part of its wastewater treatment system.[18/] This could well have led Mr. Bass to misunderstand the purpose of the EPA's investigation, unless the separate RCRA purpose had been made clear to him. Mr. Granz' testimony, however, indicates that this may not have been done. The following testimony illustrates why this is so:

> Q. What did you do during the RCRA examination?
>
> A. [Mr Granz] The RCRA inspection, I filled out the trip checklist and - -
>
> Q. Was Mr. Bass with you?
>
> A. Yes, he was.

17/ Tr. (June 17) at 45; 123, 138-39, 151-153; Tr. (June 18) at 203-206, 251. The card presented by Mr. Granz was one he had had printed himself and was offered for the purpose of providing Respondent with Mr. Granz' telephone number and address. Tr. (June 17) at 138-40.

18/ See e.g., Tr. (June 17) at 45.

Q. And you asked him questions:

A. I asked him questions.

Q. Did you say, "I'm filling out a different form?"

A. I don't recall saying those exact words. I made him aware that I was there dealing with the hazardous waste portion of the facility, specifically.

Q. Weren't you dealing with the hazardous waste as part of your NPDES, also?

A. Indirectly, yes. 19/

Discussing facilities which had in prior inspections been inspected in connection with Respondent's NPDES permit would not necessarily put Respondent on notice that the EPA was now specifically focusing on Respondent's compliance with RCRA, and not just conducting another NPDES inspection.

If specific RCRA violations had been pointed out to Respondent, then presumably Respondent would have been at least alerted to the possibility that the EPA was questioning Respondent's RCRA compliance in some respects even though Respondent may not have viewed the inspection as a general investigation of Respondent's RCRA compliance. There is the same uncertainty, however, about how effectively Mr. Granz informed Mr. Bass about the actual violations. Thus, for example, Mr. Granz testified as follows:

Q. Does that mean when you found what you perceived to be a freeboard violation, that Mr. Bass was standing next to you when you found it?

A. [Mr. Granz] Yes.

19/ Tr. (June 17) 1952-53.

Q. When you found it, did you turn to Mr. Bass and say, "I believe that's a freeboard violation," sir?

A. I don't believe I phrased it that way. I think it was more a case of something that the requirements state that you must have two feet up to sixty centimeter's, two feet, whatever is stated, . . . to qualify in compliance with the regulation.[20/]

Mentioning RCRA requirements would not necessarily put Respondent on notice that the freeboard of any specific tank was being questioned.[21/]

Mr. Bass, of course, was familiar enough with RCRA and its requirements to have obtained a Part A permit. Consequently, his disclaimer that he did not know the RCRA purpose of the inspection would be given little weight if the EPA had shown that it was made clear to Respondent or Mr. Bass that the inspection was not like Respondent's previous inspections concerned only with Respondent's wastewater treatment under its NPDES permit, but now involved its RCRA compliance as well. The EPA has not really been able to show this. It is assumed, therefore, for purposes of deciding this motion, that Respondent did misunderstand the dual purpose of Mr. Granz' inspection to cover both Respondent's RCRA and NPDES compliance. I find, however, that this is not grounds for suppressing the evidence.

20/ Tr. (June 18) at 176.

21/ There also appears to be an inconsistency between Mr. Granz' testimony that he told Mr. Bass about the freeboard violations of both the 1200 gallon tank and the 200 gallon tank, and his memoranda made at the time of inspection (none of which were shown to Respondent), In his memoranda, Mr. Granz mentions a freeboard violation by one unidentified tank only. Complainant's Ex. 3; Tr. (June 17) at 235; (June 18) at 31-32. Mr. Granz testified that the reference was intended to be to the 200 gallon tank. Tr. (June 18) at 31-32. If Mr. Granz did not consider the freeboard violation with respect to the 1200 gallon tank important enough to note in his memoranda, he could also have been mistaken in his recollection that he told Mr. Bass about such a violation.

The record shows that Respondent consented to the inspection that was made, including the inspection of the tanks and of the waste pile and sludge lagoons areas cited in the EPA's complaint, and that Respondent voluntarily furnished the information about the tanks, waste pile and lagoons as well as about its waste analysis plan, which complainant contends support the allegations of the complaint. Respondent would make it appear that Mr. Granz had entered Respondent's plant without permission and over Respondent's objection. That, however, is the inference Respondent attempts to draw from certain remarks made by Mr. Bass to Mr. Granz. The more likely interpretation of Mr. Bass' remarks as well as what the evidence shows about his conduct during the investigation is that Mr. Bass, while annoyed with what he regarded as the failure of the EPA to inspect his competitors in in other states, still consented to the inspection and cooperated with Mr. Granz in the inspection.[22/]

Nor does the evidence indicate that the EPA procured Respondent's consent to the inspection by concealing the RCRA purpose of the inspection under the guise of conducting an NPDES inspection, as Respondent appears to contend. Mr. Granz does appear to have asked Mr. Bass about Respondent's management of its hazardous waste treatment and storage facilities. The fault seems to be in the fact the Mr. Granz was unaware that Mr. Bass did not understand from what was being investigated or said by Mr. Granz that Respondent was being inspected for more than its NPDES compliance, and that he did not appreciate that the circumstances were such as to confuse Mr. Bass about the purpose of the investigation. There is, of course, no question about the NPDES inspection being done in good faith, and not as a pretext.

22/ Tr. (June 17) at 120-24, 137; Tr. (June 18) at 80-81, 194-98, 200-205.

That Mr. Granz' business card identified him as an "Environmental Engineer, Water Section" from the EPA's Surveillance Analysis Division. Region I, and that the only written report furnished by the EPA with respect to the inspection had to do with the NPDES inspection, could well strengthen the impression that only an NPDES inspection had been made. They do not, however, show an intent to conceal the RCRA investigation. Mr. Granz explained that his card had been printed by himself and not by by the EPA. He offered it not as his "credentials" to conduct the inspection, but to provide the other party with his telephone number and the address at which he could be reached.[23/] No written report as to the RCRA inspection or deficiencies was furnished either at the time of inspection or subsequent thereto, because unlike the EPA's procedure with respect to furnishing written reports of the results of NPDES inspections, it was not the EPA's practice to routinely furnish a party with a written report of the RCRA deficiences found or a copy of the RCRA inspection report.[24/]

It is true, of course, that Respondent cannot be said to have consented to an inspection for RCRA violations if it did not know that to be a purpose for the inspection. In this case, however, where the violations were observed as part of an inspection which had been consented to, and where there was no evidence of bad faith on the part of the EPA, neither the Fourth Amendment, nor the cases cited by Respondent would seem to require that the absence of actual consent makes the RCRA inspection invalid and the evidence obtained from it inadmissible.

23/ Tr. (June 17) at 138-39.

24/ Tr. (June 17) at 215-16, 218-19, 222. The EPA would furnish a party with a copy of RCRA checklist filled out at the time of the inspection, if one was requested. Tr. (June 17) at 222.

Marshall v. Barlow, 436 U.S. 305 (1978), cited by Respondent, is clearly distinguishable. In Barlow, the government inspector was refused entry unless he had a search warrant. 436 U.S.C. at 310. Here, Respondent allowed the inspection without first demanding that a search warrant be procured. Further, there is no evidence that Respondent objected to or refused to permit Mr. Granz' inspection of any area or equipment or refused to answer any of Mr. Granz' questions. In short, Respondent is not really complaining about an unauthorized invasion of privacy, which is what the Fourth Amendment was intended to protect. See Marshall v. Barlow, 436 U.S. at 312. Rather, Respondent's complaint is that it was not adequately warned that the inspection could result in a RCRA enforcement action. There is nothing in Marshall v. Barlow to indicate that Miranda type warnings must be made in civil administrative investigations. 25/

2. The Claim That The EPA's Proceeding Has Been Brought in Bad Faith.

Respondent's claim that the EPA has acted in bad faith in bringing and prosecuting this proceeding, while not expressly so stated in its memorandum, would appear to be closely linked to the claim made during the hearing that the EPA is biased against Respondent because of Mr. Bass' criticism of the

25 / Respondent has cited nothing in the Environmental Protection Agency Memorandum on Inspection Procedures dated April 11, 1979, from the Assistant Administrator for Enforcement, which would be contrary to the interpretation of Marshall v. Barlow made here. Also, since it is found that Respondent's consent was sufficient to dispense with the need for a warrant, no determination is made here whether, in fact, RCRA inspections require a warrant. Cf, Biswell v. United States, 406 U.S. 311 (1972) (warrant not required for searches under the Gun Control Act, 18 U.S.C., Sections 912-960 (1976)).

EPA for what he regards as the EPA's inequitable enforcement of the law against Connecticut metal finishers in general and against Respondent in particular. This latter claim was the subject of a request for discovery which discovery was denied, but with the understanding that it could be renewed at the close of the proceeding.[26/] Consequently, two questions will be considered with respect to Respondent's claim that the EPA has acted in bad faith: first, whether it has been established on this record that the EPA has brought this proceeding in bad faith and the complaint should, therefore, be dismissed; and second, whether if bad faith has not been actually established, there is at least a sufficient evidence tending to show bad faith to justify granting Respondent discovery on that issue.

The gravamen of Respondent's claim of bad faith seems to be that the EPA has been overly zealous in inspecting Respondent and that this evidences a vindictive attitude toward Respondent.

Respondent, to support its claim, argues that the EPA has not shown that its inspection was in accordance with a "neutral inspection scheme."[27/] This argument is apparently based on the Supreme Court's statement in Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), as to what would justify the issuance of an administrative search warrant. There the Court said that a "warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example,

26/ See Tr. (June 17) at 17-21.

27/ Memorandum in Opposition to Complainant's Motion to Amend Complaint and Supplemental Memorandum in Support of Respondent's Motion to Dismiss Complaint at 5.

dispersion of employees in various types of industry across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employee's Fourth Amendment rights." Marshall v. Barlow, 436 U.S. at 321. That standard applies only where a party has not consented to an inspection and the tribunal before whom a warrant is sought has to decide the question of whether a warrant should be issued. Where a party consents to the inspection, as is the case here, it is irrelevant whether the EPA has such a plan or whether it simply selects individuals to inspect because it has reason to believe that the inspection will be productive in achieving compliance with the law. In short, the question here is whether the facts show or indicate a "patent abuse of discretion" by the EPA in inspecting Respondent and bringing this enforcement action. See Moog Industries v. Federal Trade Commission, 355 U.S. 411 (1958).

It may well be, as Respondent claims, that no other metal finishing facilities were inspected as frequently as Respondent. The numerous inspections, however, had to do with Respondent's compliance with its NPDES permit. The inspection done on July 28, 1981, was the EPA's first RCRA inspection of Respondent.[28/] Respondent's NPDES compliance is not an issue in this proceeding, except as Respondent points to the numerous NPDES inspections as evidence of bad faith. On that question, the record indicates, that there have been problems with Respondent's discharge of effluents into the waterways.[29/] This is not to say that Respondent has not attempted to correct these problems and comply with the permit, and it may disagree with the necessity for as many inspections as have been made. It cannot be said

28/ Tr. (June 18) at 81.

29/ See Respondent's Ex. 10. Certain deficiencies appear also to have been found in the prior inspections as well as in the inspection on July 28, 1981. See Respondent's Exs. 26, 27, 29, 31.

on this record, however, that these previous NPDES inspections were so entirely without reason as to suggest that they had some purpose other than to oversee Respondent's compliance with the law.

As to the RCRA inspection, this being the first such inspection of Respondent by the EPA, sufficient reason for it is shown by the fact that Respondent does generate, treat and store hazardous waste.[30/]

Respondent seems to feel that its claim that the EPA has acted in bad faith is supported by the fact that Mr. Granz, before inspecting Respondent, examined the Connecticut Department of Environmental Protection files which contained an anonymous complaint that Respondent was going to improperly dispose of hazardous waste in the process of doing construction on its site.[31/] Mr. Granz said that it was his practice to look at the state records to find out whether there had been problems which he should look for.[32/] This seems reasonable enough. Mr. Granz, moreover, concluded during his inspection that there was no substance to the charge and did not pursue the matter further.[33/] Certainly, the EPA cannot be said to have acted arbitrarily simply because the EPA's inspector came across an anonymous complaint which he later dismissed as without merit.

Although not expressly stated in the motion, Respondent also has apparently attempted to link the assertedly numerous investigations by the EPA to the fact that Mr. Bass has been outspoken in criticizing the EPA for not enforcing the Clean Water Act and RCRA against metal finishers in other states as vigorously as it did against metal finishers in Connecticut.[34/]

30/ Complainant's Ex. 2.

31/ See Respondent's Ex. 37.

32/ Tr. (June 18) at 96.

33/ Tr. (June 18) at 100-101.

34/ Tr. (June 18) at 196-98. See also Respondent's Exs. 2, 15.

What seems to have been involved is the question of what effluent limitations the EPA should promulgate for the metal finishing industry, a subject which the EPA apparently has been considering since 1974.[35/] Respondent apparently has been operating under limitations set by an NPDES permit issued by the State of Connecticut under an approved state program.[36/] Connecticut metal finishers have complained that Connecticut has been more active in requiring metal finishers to clean up their wastewater than have other states. This has resulted in imposing upon Connecticut metal finishers the expense and burden of dealing with the hazardous waste generated from their wastewater treatment, while under the assertedly more lax standards in other states, metal finishers have continued to dump their waste in the water. The Connecticut metal finishers, including Mr. Bass, have blamed the EPA for allowing this to happen.[37/] It is most difficult to believe that this kind of criticism to the extent it became known to the EPA's Region I, would be taken so personally as to incite it to take some retribution against Respondent.[38/] Indeed, the presumption to which the EPA officials are entitled that they will perform their duties in accordance with law mitigates against drawing any such conclusion. See Kalvar Corp. v. United States, 543 F. 2d 1298 (Ct. Cl. 1976), cert. denied, 434 U.S. 830 (1977).

35/ See preamble to proposed regulation to limit the effluent that metal finishing industries may discharge to waters of the United States or to publicly owned treatment works, 47 Fed. Reg. 38462, 28463 (Aug. 21, 1982).

36/ Respondent's Ex. 10.

37/ See Respondent's Exs. 2, 15.

38/ If the tenor of Mr. Bass' public remarks, however, was similar to that contained in the Hartford Courant for November 23, 1981, the EPA might be led to believe that Mr. Bass was unwilling to comply with RCRA's requirements, which, of course, would be a reason why the EPA considered it desirable to inspect Mr. Bass' RCRA compliance. See Respondent's Ex. 21.

It is found, therefore, that the facts in this record do not establish that the EPA has acted in bad faith.

Respondent has also pending a motion for discovery by way of interrogatories and the production of documents on the question of whether the EPA unfairly singled out Respondent for enforcement. Under the EPA's rules of procedure, 40 CFR 22.19(f), such discovery is granted only upon a showing that it will not unreasonably delay the proceeding, that the information cannot be obtained by alternative means, and that the information has significant probative value. In denying this discovery at the beginning of the hearing, I pointed out that Respondent had produced no facts indicating that the EPA had acted unfairly, but was merely proceeding on the basis of its suspicion of unfair treatment, and that this should not be a basis for granting a discovery that could well be lengthy and extend into collateral issues regarding the EPA's discretionary determinations as to whom it should or should not proceed against. I further ruled, however, that Respondent could, so far as it was able, make its record at the hearing on the issue of whether it had been unfairly treated, and that I would reconsider the motion at the close of the hearing on the basis of whatever facts had been developed at the hearing.[39/]

To prevail on its due process claim of unfair enforcement, Respondent must show that the EPA has exceeded the broad discretion vested in it with respect to how it enforces the law. Moog Industries v. Federal Trade Commission, 355 U.S. 411 (1958). Respondent has not pointed to any new facts brought out at the hearing to support its discovery request, and presumably relies on the "facts" which it claims establish bad faith or dilatory motive. The merits of Respondent's request for discovery

39/ See Tr. (June 17) at 17-21, 29-30.

accordingly should be judged by whether those facts, if not actual proof of bad faith or dilatory motive, at least demonstrate a possible abuse of discretion by the EPA in its treatment of Respondent. I find that they do not, and provide no basis for assuming that discovery is likely to produce any information of significant probative value in resolving Respondent's due process claim. Under these circumstances, delaying these proceedings to allow Respondent's discovery is unwarranted, and its request for discovery is denied.[40/]

3. Respondent's Claim that the EPA is Engaging in Impermissible Retroactive Rulemaking

Respondent contends that the violations charged by the EPA rest upon "definitional interpretations . . . [which] go beyond the realm of mere regulatory interpretations and are tantamount to rulemaking."[41/] Presumably, what is being claimed is that the EPA's position as to what is required by

40/ Respondent also requested discovery for the purpose of inquiring into whether the EPA followed its procedures in its handling of this case, claiming that this also raises a due process question. Tr. (June 17) at 27, 31. This request was not specifically ruled on at the hearing, and is presumably still pending, although Respondent has not presented any further arguments in support of it. There has been no showing by Respondent that the EPA has acted contrary to any of its published procedures, which procedures anyway would seem to be available to Respondent even in the absence of any discovery. As to the EPA's internal nonpublic procedure, it is extremely doubtful that due process extends to requiring an agency to abide by such procedures. In any event, Mr. Granz was questioned about the EPA's internal procedures (see Tr. (June 17) at 221-224). That testimony showed that the EPA's action in this matter have not contravened any internal procedures. Consequently, insofar as Respondent still seeks further discovery on the claim the EPA has not followed its procedures, that discovery is also denied.

41/ Memorandum in opposition to Complainant's motion to amend complaint, and supplemental memorandum in support of Respondent's motion to dismiss the complaint at 6.

the RCRA regulations is not consistent with the wording of the regulations. The EPA has not really responded to this claim and it is understandable why this is so. What is being objected is not the EPA's procedure but the validity of the EPA's interpretation of the regulations. This is one of the substantive issues to be decided in this case.[42/] The purpose of preliminarily considering the EPA's motion to amend the complaint and Respondent's motion to dismiss was to deal with procedural questions whose determinations could dispense with the need for more extensive briefing on the merits, and not to permit piecemeal consideration of the merits of the EPA's case. Consequently, if Respondent wishes to press this claim that the EPA is engaging in impermissible retroactive rulemaking it should do so in connection with its brief on the merits. It would be premature to consider the claims here.[43/]

Conclusion

Complainant's motion to amend the complaint to conform to the proof is granted. Respondent's motions to dismiss and further discovery are denied.

The parties shall submit their proposed findings of fact, conclusions of law and a proposed order together with supporting brief within twenty (20) days after service of this order. Reply briefs may be filed within 14 days after service of the main briefs.

Gerald Harwood
Gerald Harwood
Administrative Law Judge

Dated:

42/ Arguably a regulation which has a retroactive effect does raise a due process procedural question. Respondents argument, however, is that the retroactive effect is not created not by the wording of the regulation itself, but by the EPA's interpretation.

43/ See Tr. (June 18) at 182-87.