

8/17/93

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of)
HARMON ELECTRONICS, INC.,) RCRA Docket No. VII-91-H-0037
Respondent)

ORDER

I

Reference is made to complainant's status report served July 19, 1993. IT IS ORDERED that the orders served May 19 and June 29, 1993, staying the subject proceeding be VACATED.

II

FURTHER ORDERS

In the interest of clarity, complainant's motions to strike certain respondent's affirmative defenses and for a declaratory judgment on the issue of jurisdiction will be addressed separately under "A" below. Following a ruling on these, the Administrative Law Judge (ALJ) shall turn to complainant's motion for a partial accelerated decision under "B" and other issues under "C" and "D".

For the reasons stated in its motion served August 21, 1992,¹ complainant seeks an order to strike certain portions of respondent's answer and for a declaratory judgment on the issue of

¹ Unless indicated otherwise, all dates are for the year 1992.

jurisdiction. Specifically, complainant seeks an order to strike paragraphs E.2, E.3, E.4 and E.5 from the answer and, also, as a matter of law, that complainant's jurisdiction in this matter is exercised properly. Respondent served its response to the motion on October 7. Complainant's reply to the response was served October 21. A sur-response, designated by respondent as a surreply, was served by respondent on November 23. Complainant's sur-reply to the sur-response followed December 4.

A.

Motion to Strike

The portions of Section E of the answer, asserted as defenses to all counts, which complainant seeks to strike are set out verbatim below.

2. Complainant lacks jurisdiction and authority to commence this action because the State of Missouri has taken timely and appropriate action and has exercised its judgment in a reasonable manner.

3. The Complaint violates the Memorandum of Agreement between MDNR and EPA, Region VII, and must be dismissed as a matter of law.

4. The Complaint was issued in violation of § 3008(a) of RCRA, 42 U.S.C. § 6928(a), the applicable legislative history and the regulations promulgated thereunder and must be dismissed as a matter of law.

5. Complainant lacks jurisdiction to issue the Complaint.

At the threshold, it may be appropriate to recite some of the history in this matter. The complaint in this proceeding was issued on September 30, 1991. For the reasons stated in a motion

served December 4, 1991 upon the Regional Director for Region VII of the U.S. Environmental Protection Agency (sometimes EPA or complainant), respondent sought to dismiss the complaint. In its motion, respondent also sought an award of attorney fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412. Respondent argued that the complaint should be dismissed essentially for the similar reasons stated as affirmative defenses E.2 through E.5 of its answer. Complainant's response to the motion to dismiss, served January 2, is incorporated by reference in this order. Each of the respondent's arguments was met in that pleading and also in complainant's motion to strike, which in substance restated its position taken in response to the motion to dismiss. (By letter May 4, the Regional Administrator denied respondent's motion to dismiss.)

Respondent's arguments in its motion to dismiss and the response to the motion to strike have a core of sand. To the contrary, complainant's arguments in its response to the motions to dismiss and its motion to strike are utterly convincing. At heart, and without attempting to be exhaustive, respondent clings to the claim that EPA is precluded from bringing an enforcement action under section 3008(a)(2), 42 U.S.C. § 6928 of the Resource Conservation and Recovery Act (RCRA). Respondent's position is singularly illusional. The monotonous contention it, as some other respondents often advance, was persuasively laid to rest by complainant in its submissions. On the facts of this case, all complainant is required by law to do is give the State of Missouri

(State) prior notice before issuing an order or commencing a civil action under section 3008. In its motion to dismiss (at 5), respondent states that "EPA failed to give prior notice to Missouri [before issuing the complaint], contrary to what EPA alleges in its Complaint." This statement is flat-out wrong and leaves the ALJ dazed in disbelief. The record shows that EPA gave numerous notices, written and oral, to the State of its intent to issue a complaint. (Response to motion to dismiss at 5-7 and supporting Exhibits 1, 2 and 3) A system of dual enforcement is envisioned under RCRA. "This means that even where a State has final authorization, EPA has the option of instituting enforcement proceedings either under federal or state law." In the Matter of Waterville Industries, Inc., Docket No. RCRA-I-87-1086, June 23, 1988, at 5; See also, In the Matter of Southern Timber Products, Inc., d/b/a Southern Pine Wood Preserving Company and Brad Batson, RCRA (3008) Appeal No. 89-2, Final Decision, November 13, 1990, at 9-11; In the Matter of Commonwealth Oil Refining Company, Inc., RCRA (3008) Appeal No. 87-16, Final Decision, September 21, 1989, at 3-4; In the Matter of CID-Chemical Waste Management of Illinois, Inc., RCRA (3008) Appeal No. 87-11, Final Decision, August 18, 1988, at 7. Even though a state is authorized to carry out its own hazardous waste program, the brute fact is EPA is only required to give notice to that jurisdiction before issuance of its complaint for a compliance order. Complainant fulfilled this statutory requirement. This remains the case whether or not, assuming arguendo, and in respondent's words, that "the state has exercised

its judgment in a timely and appropriate manner and within its statutory authority." (Motion to Dismiss at 7.)

Respondent's argument and defense based upon the Memorandum of Agreement (MOA) must also fail. The black and white of the MOA states that "Nothing in this Agreement shall be construed to restrict in any way EPA's authority to fulfill its oversight and enforcement responsibilities under RCRA" (MOA at 1, emphasis added.)

At this juncture, it may be appropriate to address Northside Sanitary Landfill, Inc. v. Thomas, 804 F.2d 371 (7th Cir. 1986) and In the Matter of BKK Corp. (BKK), RCRA (3008) Appeal No. 84-5, Final Decision, May 10, 1985, cited by respondent in its motion to dismiss. Reliance upon these and other cases cited by respondent is misplaced. In its response to the motion to dismiss, complainant puts the cases in their proper perspective, and they do not uphold the principle for which they are cited by respondent. It cannot go unmentioned that in citing BKK, a matter of which the ALJ is not unfamiliar, respondent failed to give the complete history of the case. Complainant, however, related the total and accurate picture of BKK in its response to the motion to dismiss (at 23). In the interest of time and space, the ALJ will not engage in the unnecessary herculean effort of examining in detail and distinguishing other cases put forward by respondent which purportedly support its position. It is sufficient to state that complainant has done this successfully.

Respondent's affirmative defense E.4 also cannot stand. For the reasons mentioned above, complainant complied completely with section 3008(a)(2). Respondent, however, has other arrows remaining in its quiver. It asserts that the complaint was issued in violation of "the applicable legislative history and regulations promulgated thereunder." Concerning legislative history, it is elementary and a firmly etched principle of statutory interpretation that where the language of a statute is clear, as with section 3008(a), further inquiry beyond the plain words of the statute is unnecessary and, indeed, an arid exercise.

Concerning the regulations, respondent also refers to 40 C.F.R. § 272.1300(a). It maintains that this regulation precludes the issuance of the complaint by EPA in this matter. (Respondent's answer to motion to strike, at 4-6.) Respondent notes, this regulation grants the State the authority to "administer and enforce a hazardous waste program in lieu of the Federal program" and that the State has "primary responsibility for enforcing its hazardous waste program." Significantly, the same section of the regulations provides: "However, EPA retains the authority to exercise its enforcement authorities under sections . . . 3008 . . . of RCRA" 40 C.F.R. § 272.1300(c). It is plain as porridge that EPA is not abdicating its rights under section 3008. The sole requirement is that EPA give prior notice to the State. Even if by some tortured construction the meaning of the aforementioned regulation was unclear, respondent's

interpretation cannot prevail. Regulations are designed to supplement not supplant legislation.

In affirmative defense E.5, respondent employs the all-embracing phrase and broadside that "Complainant lacks jurisdiction to issue the Complaint." Again, the only statutory requirement for EPA to issue the complaint in this matter was to provide prior notice to the State before filing the complaint. Having met this prerequisite, it may proceed against respondent. It is concluded, as a matter of law, that complainant's jurisdiction in this matter is exercised properly.

B.

Motion for Partial Accelerated Decision

For the reasons stated in its motion served August 21, complainant, pursuant to 40 C.F.R. § 22.20(a), seeks a partial accelerated decision (sometimes PAD) on the issue of liability. Respondent served its response in opposition to the motion on October 7. On October 21, complainant served its reply to the response. Respondent served a sur-response (designated sur-reply) on November 23 and complainant's sur-reply followed on December 4. By order of January 11, 1993, further pleadings from the parties were foreclosed unless prior written approval was received from the ALJ.

An accelerated decision is governed by 40 C.F.R § 22.20. This section of the Consolidated Rules provides, in pertinent part, as follows:

(a) General. The Presiding Officer, upon motion of any party . . . may . . . render an accelerated decision in favor of the complainant or respondent, as to all or any part of the proceeding, . . . if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law (emphasis added).

Oral hearings should be used to resolve issues of material facts. An accelerated decision is similar to that of summary judgment, and not every factual issue is a bar. Minor factual disputes would not preclude an accelerated decision. Disputed issues must involve "material facts" or those which have legal probative force as to the controlling issue. A "material fact" is one that makes a difference in the litigation.² Thus, a party is not necessarily entitled in all contested cases to an oral hearing. Further, administrative agencies are not bound by the standards of the Federal Rules of Civil Procedure (Fed. R. Civ. P.); they traditionally enjoy "wide latitude" in fashioning their own rules of procedure.³ Although administrative agencies, speaking broadly, are not bound by the technical or formal rules of procedure, such as Fed. R. Civ. P., the latter often provide guidelines in the administrative context.

There is some duty upon a party opposing a motion for summary judgment to produce controverting materials. Roberts v. Browning,

² Words and Phrases, "Material Fact."

³ See, e.g., In the Matter of Katzson Brothers, Inc., FIFRA Appeal No. 85-2 (Final Decision November 13, 1985); Oak Tree Farm Dairy, Inc. v. Block, 544 F. Supp. 1351, 1356 n.3 (E.D. N.Y. 1982); and Silverman v. Commodities Futures Trading Commission, 549 F.2d 28, 33 (7th Cir. 1977).

610 F.2d 528, 536 (8th Cir. 1979), citing Fed. R. Civ. P. 56(e). The mere assertion of conclusory allegations or denials, without setting forth concrete particulars, is insufficient to defeat a motion for summary judgment. Soler v. G & U, Inc., 615 F. Supp. 736, 740 (S.D.N.Y. 1985); Securities and Exchange Commission v. Research Automation Corp., 585 F.2d 31, 33 (2d Cir. 1978) Also, "[w]hen a motion for summary judgment is made and supported . . . , an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise . . . , must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." United States v. Conservation Chemical Company of Illinois, 733 F. Supp. 1215, 1218 (N.D. Ind. 1989).

In a section of the complaint (Compl.), common to all counts of that pleading, it is alleged that respondent disposed of hazardous waste "on the ground on-site" at its facility in Grain Valley, Missouri, "from the beginning of operations in 1973 until approximately the end of 1987." (Compl. at 4.) The complaint contains four counts. The first count alleges, in pertinent part, that respondent has not filed a Part A or Part B RCRA permit application for the disposal of hazardous waste pursuant to section 3005 of RCRA, 42 U.S.C. § 2925, and therefore is not a RCRA permitted facility which may operate pursuant to interim status; that the hazardous waste disposed of on-site included 1,1,1-

trichloroethane, freon, methylene chloride, toluene, and xylene; and that respondent operated a hazardous waste landfill without a RCRA permit and without having obtained interim status in violation of section 3005 of RCRA and 40 C.F.R. Part 270. (Compl. at 5, ¶¶ 10-13.) In its answer to the complaint, respondent admits that it has not filed a Part A or Part B permit application. (Answer at 3, ¶ B.7.) Further, in its response in opposition to the motion for a PAD (at 3), respondent "does not dispute" that unknown to management, its employees had previously disposed of spent solvents by pouring them on the ground or into an open drum. A party's admissions made in an answer can establish the requisite basis for a summary judgment. Smith v. Chapman, 436 F. Supp. 58, 62 (W.D. Tex. 1977), aff'd, 614 F.2d 968 (5th Cir. 1980), where the court, in granting the plaintiff's motion for summary judgment, noted that "[i]t is a settled rule of law that what the Defendant admits in his answer is binding on him." See also, O'Bryant v. Allstate Insurance Co., 107 F.R.D. 45, 48 (D. Conn. 1985); Donovan v. Carls Drug Co., Inc., 703 F.2d 650 (2d Cir. 1983). Standing alone, respondent's admissions are sufficient to grant the motion for a PAD concerning count one on the issue of liability.

Count two of the complaint relates to 40 C.F.R. Part 265, Subpart F. In pertinent part, this regulation provides that an owner or operator of a hazardous waste landfill is required to install and operate a groundwater monitoring system capable of determining the facility's impact on the quality of groundwater in the uppermost aquifer underlying the facility; and that such system

must include at least one well placed hydraulically upgradient from the limits of the facility. (Compl. at 6, ¶ 15.) It is alleged that prior to 1989, respondent had no groundwater monitoring system in place; that in 1989 it installed three monitoring wells at the facility; and that respondent has never installed any wells upgradient from the limits of the facility. (Compl. at 6, ¶ 16.) In its answer, respondent "denies paragraph 16, and states that it has installed a groundwater monitoring program in accordance with direction and authority from the Missouri Department of Natural Resources (MDNR)." Complainant's arguments for a PAD on the second count are supported by the documentation and affidavits accompanying the motion. The documents show the following: That respondent began operating the facility in 1973; that it was operating a hazardous waste landfill in 1980; that waste containers were emptied onto the ground in the rear of the building; that respondent did not provide notification of its activities as a generator of waste until August 1988; that respondent designated the hazardous waste disposal area as a "hot spot;" that the groundwater flow in the area is generally in a westerly direction and that no wells were placed east of the "hot spot;" that there was discussion of future installation of such wells; that as late as June 1991, and based upon documents submitted by respondent and reviewed by Gene A. Williams, an engineer of the MDNR, respondent did not have sufficient downgradient wells to fully characterize the extent of possible contamination from the landfill disposal area; and that no monitoring wells had been installed hydraulically

upgradient from the area respondent used as a hazardous waste landfill. (Motion at 5-8; Exhibits 2-7, attached.)

In responding to the motion for PAD, with specific reference to count two, respondent again does a pirouette around the factual allegations asserted by complainant. It recites the history of its groundwater problems, but respondent's argument is essentially a profusion of reasons and excuses why it took so long to establish a groundwater monitoring program. The response concedes that respondent's "initial groundwater monitoring plan [was] submitted to MDNR in October of 1988," and that it "began monitoring the groundwater at the site in mid-1989." (Response at 8.)

The pertinent regulations pertaining to groundwater monitoring were published in final form on May 18, 1980, at 40 C.F.R. § 265.90(a). The regulations required, in part, that within one year after the effective date of regulations, the owner or operator of a landfill must implement a groundwater monitoring program. Respondent's response dwells upon current and future groundwater monitoring operations. The pleadings show that it is undisputed that prior to 1989 respondent had absolutely no groundwater monitoring system in place. There exists no genuine issue of material fact concerning count two of the complaint. It is concluded that respondent is in violation of 40 C.F.R. Part 265, which regulation, in part, addresses groundwater monitoring.

Count three of the complaint relates that 40 C.F.R. Part 265, Subpart H, requires, in part, that operators of hazardous waste landfills obtain, establish and maintain a financial assurance

mechanism for closure and post-closure and maintain insurance coverage for sudden and nonsudden accidental occurrences. The count alleges that respondent has not obtained, established or maintained financial assurances for closure and post-closure at its facility. (Compl. at 7, ¶¶ 19-20.) The PAD motion (at 8) alleges that respondent has failed to establish financial assurances for closure and post-closure care and for sudden and nonsudden accidental occurrences in violation of the aforementioned regulation. Affidavits attached to the motion for the PAD disclose that respondent did not obtain financial assurance for closure and post-closure care until November 22, 1991, a date subsequent to the complaint in the proceeding. Also, as of August 19, 1992, the date of one of the affidavits, EPA files contained no record of respondent having obtained coverage for sudden and nonsudden accidental occurrences at the facility. (Exhibits 8, 9) It is stated further that as of the time of the motion, respondent has yet to obtain coverage for sudden and nonsudden accidental occurrences. The absence of the latter is reflected in Revised Closure and Post-Closure Plan prepared for respondent by IT Corporation dated February 1992, a date subsequent to the issuance of the complaint. In that document, it is stated that "Harmon [respondent] has investigated the availability of liability insurance coverage for sudden and nonsudden accidental occurrences." (Motion at 9; Exhibit 2, sec. 4-1.)

With regard to count three, in its response to the motion, respondent admits that it established a trust fund for closure and

post-closure care on November 22, 1991. Respondent attributes the delay in obtaining this financial assurance to the following: Before financial assurance can be determined, the estimated cost of closing the facility must be determined; that before closure estimates can be made, a site investigation must be performed and a site characterization developed; that only after this occurs can a closure and post-closure plan be developed; and that this necessarily involves time and effort. Respondent relates that it was not until May 1990 that MDNR made a final determination that it was a RCRA land disposal facility, and that "[I]t is entirely unrealistic for EPA to expect Harmon to obtain financial assurance immediately after it had been classified as a land disposal facility." (Response at 11-12.)

Concerning financial assurance for sudden and nonsudden accidental occurrences, some initial thoughts are necessary. Paragraph 19 of the complaint relates that the regulations require financial assurance for closure and post-closure, and to maintain insurance coverage for sudden and nonsudden accidental coverage. However, as respondent observes correctly, paragraph 20 of the complaint charges respondent only with failure in obtaining financial assurance for closure and post-closure of the facility. Respondent stresses that it ceased waste disposal practices in 1987 and that it has not generated waste since 1988; and that the facility, for all practical purposes, is a "closed facility." It is respondent's position that the pertinent regulations are 40 C.F.R. §§ 265.147 and 265.147(b), and that these speak of

occurrences "arising from the operations of the facility" (Response at 13-14, emphasis added.) Respondent relates that, in any event, it has been unable to obtain liability coverage in the insurance market.

In replying, complainant notes that though respondent "currently" may have obtained financial assurances for closure and post-closure care, the latter did not have assurances for approximately 10 years prior to coming into regulatory compliance in November 1991. Prior to that time, there was no genuine issue of material fact concerning respondent's failure to comply with 40 C.F.R. Subpart 265 concerning financial assurances for closure and post-closure care for the facility. Whatever may have been the reasons why respondent was in violation is a consideration to be weighed in assessing an appropriate penalty--it does not go to the liability issue.

As noted above, count three of the complaint does not charge respondent with failure to obtain liability coverage for sudden and nonsudden accidental occurrences. In its reply, complainant states that "Count III of EPA's Complaint was intended to cover both [respondent's] failure to obtain financial assurances for closure and post-closure care and [respondent's] failure to obtain coverage for sudden and nonsudden accidental occurrences." (Reply at 6, emphasis added.) Notwithstanding complainant's intention, it cannot move for an accelerated decision concerning a non-existing allegation.

The fourth, and last, count of the complaint relates that section 3010(a) of RCRA, 42 U.S.C. § 6930, requires, among others, that a generator of hazardous waste must notify EPA of such activity within 90 days of the promulgation of regulations under section 3001 of RCRA, 42 U.S.C. § 6921. Section 3010(a) of RCRA also states that no hazardous waste subject to the regulation may be transported, treated, stored or disposed of unless the required notification is given; that the regulations were first published on May 19, 1980, codified in 40 C.F.R. Parts 260 through 265; and that in most instances notification to EPA of hazardous waste activity was required no later than August 18, 1980. Count four alleges that respondent generated hazardous waste from 1973 to approximately the end of 1987, but failed to register as a hazardous waste generator during that period.

In its motion for a PAD, complainant sets out verbatim the pertinent portion of section 3010 of RCRA. As found above, respondent has been operating its hazardous waste landfill since 1980. The sole notification of hazardous waste activities filed by respondent for the facility, contained in EPA's files, is dated August 12, 1988. (Exhibit 4, figure 2; Exhibit 5, attached to motion.)

Respondent's answer to the complaint regarding count four states merely that it "denies each and every allegation of Count IV not specifically admitted herein." The response to the motion does not oppose, or even make reference to count four. If no response is made to a motion, a party "may be deemed to have waived any

objection to the granting of the motion." 40 C.F.R. § 22.16(b). Additionally, the documentation submitted by complainant with its motion establishes that there exists no genuine issue of material fact concerning the allegations in count four.

C.

Affirmative Defenses

Respondent also urges that the motion for a PAD must be denied because complainant did not address two affirmative defenses raised in the answer to the complaint: In its answer, respondent argues that "The Complaint is barred by the statute of limitations at 28 U.S.C. § 2462 and must be dismissed as a matter of law." (Answer at 8, ¶ 9.) This is repeated again by respondent in its response to the motion for a PAD where the statement "EPA fails to address the other affirmative defenses raised in Harmon's Answer of May 15, 1992. Namely, Harmon contends that EPA's Complaint is barred by the statute of limitations at 28 U.S.C. § 2462" (Resp. at 3.) This is in essence a motion and will be treated in this portion of the order.

Respondent's answer also raises some constitutional questions to the complaint. In short, respondent maintains that the complaint seeks to impose criminal sanctions in an administrative forum, and that the complaint and compliance order seeks to deprive respondent of all economic value in its property and constitute a taking under the Fifth Amendment for which just compensation must be paid. (Answer at 7-8, ¶¶ 8-10.) In its response to the motion

for a PAD, respondent raises the issue again, contending that complainant did not address its defense that the complaint "violates Harmon's rights under the United States Constitution." (Resp. at 3) As with the statute of limitations question, this will be treated as a motion and addressed under section D. of this order.

With regard to the five-year statute of limitations stated in 28 U.S.C. § 2462 (hereinafter section 2462), the time limitation begins to run from the date the claim first "accrued." Respondent's position is that the complaint alleges that it disposed of hazardous waste at the facility in violation of RCRA, from the beginning of 1973 until November 1987; that EPA's complaint was filed on September 30, 1991; and that EPA is precluded from assessing penalties for violations occurring before September 30, 1986. (Sur-response at 3.)

Complainant's thinking is that respondent first reported its violations to MDNR in July 1988, at which time it can be argued that EPA should have discovered the existence of the violations; that in order to file a proceeding within the five-year time frame of section 2462, EPA would have to file its complaint by July 1993; and that this pleading was filed on September 30, 1991, within the time frame of the aforementioned section. Stated otherwise, EPA's position is that the date for tolling the statute of limitations is the time complainant discovered, or should have discovered, the violations, rather than the date the infraction occurred. (Reply at 10.) The statute of limitations issue was addressed previously

by this ALJ In the Matter of Waterville Industries, Inc. (Waterville), Docket No. RCRA I-87-1086, (June 23, 1988), a case to which both parties refer. The holding in that case, as it pertains to section 2462 was narrow, and stated simply that "the statute of limitations [under RCRA] began to run when the violations were first discovered" (Waterville at 8.) A cause of action "accrues" when a suit may be maintained thereon. Black's Law Dictionary 21 (6th Ed. 1990). In those instances where a plaintiff may be unaware when the actual injury occurs, courts apply the "discovery rule" to determine when the statute begins to run. Albert v. Maine Central Railroad Company, 905 F.2d 541, 543 (1st Cir. 1990); See also, Gibson v. United States, 781 F.2d 1334, 1344 (9th Cir. 1986); Chevron U.S.A., Inc., et al v. United States, 923 F.2d, 830, 834 (Fed. Cir. 1991); Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn, 913 F.2d 64, 75 (3d Cir. 1990); United States v. Hobbs, 736 F. Supp. 1406, 1409 (E.D. Va. 1990); Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp., 635 F. Supp. 284, 288 (N.D.N.Y. 1986). The latter involved an action under the Clean Water Act, 33 U.S.C. §§ 1251 to 1387, where, in pertinent part, the court stated: "To hold that the statute begins to run when violations actually occur, as opposed to when they are discovered, would impede, if not foreclose, the remedial benefits of the statute."

However, respondent does not end its argument but turns to the appropriate penalty period. As understood, it makes the conceptual leap that section 2462 also forecloses the assessment of a civil

penalty for violations occurring more than five years before the filing of the complaint, or that no penalties may be assessed for violations occurring before September 30, 1986. (Sur-response at 3.) Respondent relies, in part, upon the following cases: One of these is United States v. SCM Corporation, 667 F. Supp. 1110, 1123 (D. Md. 1987). This was a judicial proceeding under the Clean Air Act 42 U.S.C. §§ 7401 to 7671q. The other case, In the Matter of District of Columbia (Lorton Prison Facility) (Lorton), Docket No. TSCA-88-H-05, (August 30, 1991), was an administrative proceeding under the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601 to 2671. Following Lorton, in two other matters, the Environmental Appeals Board (EAB) held that section 2462 was not applicable to an administrative proceeding under TSCA for the assessment of a civil penalty; and that the five-year statute of limitations was only operative with regard to commencing a judicial action to collect penalties. In the Matter of 3M (Minnesota Mining and Manufacturing), TSCA Appeal No. 90-3, at 25-29, (February 28, 1992); In the Matter of Bethlehem Steel Corporation, TSCA Appeal No. 92-1, at 1, (May 12, 1992).⁴ As understood, respondent is of a mind that EPA is precluded from assessing penalties for alleged violations that occurred more than five years from the filing of the complaint. Respondent has not proffered any authority, or rationale, to support this contention concerning RCRA. However,

⁴ For the information of the parties, the issue of the statute of limitations, as it relates to TSCA, is on appeal currently awaiting argument and a decision. 3M Minnesota Mining and Manufacturing v. Reilly, (D.C. Cir. No. 92-1126).

the issue is moot and does not now have to be reached and decided. The sole issue before the ALJ here is whether or not "The complaint is barred by the statute of limitations at 28 U.S.C. § 2462 and must be dismissed as a matter of law." (Answer at 8, ¶ 9.) It is concluded, as with Waterville, that the statute of limitations in this RCRA matter began to run when the violations were first discovered in 1988; and that the complaint was served within the prescribed time period; and that section 2462 is not a barrier to commencing this action.

D.

Proposed Penalty

Respondent also argues, among others, that the penalties sought to be imposed by EPA constitute criminal penalties and violate respondent's due process rights under the Constitution; that the penalty sought is penal and punitive in nature; and that the penalty is excessive. (Sur-response at 5-8.) Complainant counters with the following cogent and correct arguments: Sections 3008(a) and 3008(g) of RCRA grant EPA authority to assess, or seek judicially, civil penalties, for "any past or current violations." Complainant makes a trenchant point when it observes, with authority, that when Congress designates a provision as calling for a civil penalty, a defendant has a heavy burden to show that the penalty is criminal in nature. Further, it is not without significance that RCRA provides specifically for civil penalties in section 3008(a) and criminal penalties in section 3008(d).

Complainant has also successfully distinguished the decisions proffered by respondent, noting that the latter has failed to come forward with any case where the civil penalty provision of any environmental statute has been held unconstitutional as applied. The seeking of what respondent views as a large civil penalty does not, as if by some form of legal transmutation, convert the penalty sought to be assessed into one that is punitive or criminal in nature. Another thought is apposite here. Respondent urges, for reasons stated in its answer, that the complaint violates certain of its purported rights under the Constitution. The complaint, however, for the reasons mentioned above, was issued in accordance with the pertinent provisions of RCRA. Respondent contends that it does not challenge the constitutionality of the RCRA civil penalty statute itself but contends it in the application of the civil penalty under the statute which raises constitutional questions. (Sur-response at 5.) This has a sophistic note. If the penalty is issued in accordance with RCRA, can it be argued that respondent is questioning the constitutionality of RCRA? In any event, an ALJ is generally precluded from passing upon the constitutionality of the very procedure he is called upon to administer, in that federal agencies have neither the power nor competence to pass on the constitutionality of the administrative action. Weinberger v. Salfi, 422 U.S. 749, 765 (1975); Finnerty v. Cowen, 508 F.2d 979 (2d Cir. 1974); Frost v. Weinberger, 375 F. Supp. 1312, 1320 (E.D.N.Y. 1974).

At the hearing in this matter, the ALJ shall determine the appropriateness of the penalty sought in conformance with the criteria set forth in section 3008(a)(3) of RCRA, and 40 C.F.R. § 22.27(b). The latter is not lapidary in nature. The ALJ in assessing a penalty is required only to "consider" any civil penalty guidelines issued under RCRA.

It is concluded that respondent's arguments, set forth above concerning the penalty sought to be assessed, are without merit.

IT IS ORDERED that:

1. Complainant's motion to strike paragraphs E.2, E.3, E.4 and E.5 from respondent's answer be GRANTED.

2. Respondent's defense, as stated in paragraph 9 of its answer, that the complaint is barred by the statute of limitations at 28 U.S.C. § 2462 be STRICKEN.

3. Respondent's defenses, as stated in paragraphs 8 and 10 of its answer, that the complaint violates due process be STRICKEN.

4. Complainant's motion, pursuant to 40 C.F.R. § 22.20, for a partial accelerated decision on the issue of liability be GRANTED in its entirety with regard to counts one, two and four. With regard to count three, complainant's motion is GRANTED only with regard to the allegations stated in the complaint, that respondent has not obtained, established, or maintained financial assurance for closure or post-closure of the facility. The motion is DENIED with regard to respondent's alleged failure to obtain liability coverage for sudden and nonsudden accidental occurrences.

5. The parties shall engage in good faith efforts to settle this matter.

6. Complainant shall submit a status report to the ALJ within 30 days of these orders. In the event this matter is not settled in principle by that date, complainant shall arrange for a telephone prehearing conference for the purpose of setting a hearing date.

Frank W. Vanderheyden

Frank W. Vanderheyden
Administrative Law Judge

Dated: _____

August 17, 1993

IN THE MATTER OF HARMON ELECTRONICS, INC., Respondent
RCRA Docker No. VII-91-H-0037

Certificate of Service

I certify that the foregoing Orders, dated 8/17/93
were sent this day in the following manner to the below addressees.

Original by Regular Mail to:

Ms. Venessa R. Cobbs
Regional Hearing Clerk
U.S. EPA, Region VII
726 Minnesota Avenue
Kansas City, KS 66101

Copy by Regular Mail to:

Attorney for Complainant:

Belinda Holmes, Esquire
Assistant Regional Counsel
U.S. EPA, Region VII
726 Minnesota Avenue
Kansas City, KS 66101

Attorney for Respondent:

Terry J. Satterlee, Esquire
Sue M. Honegger, Esquire
LATHROP & NORQUIST
2345 Grand Avenue, Suite 2600
Kansas City, MO 64108

Marion Walzel
Marion Walzel
Legal Staff Assistant

Dated: August 17, 1993