UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

In the Matter of	
VENTURE INDUSTRIES CORPORATION	Docket V-W-88-4-007
Respondent	Judge Greene

Resource Conservation and Recovery Act, Section 3008, 42 U.S.C. §6928:

The United States Environmental Protection Agency has jurisdiction to enforce the Resource Conservation and Recovery Act in the State of Michigan, has jurisdiction to enforce the hazardous waste program of the State of Michigan as approved by the EPA Administrator, and may assess penalties against respondent for the violations alleged.

Appearances:

Thomas P. Mintz, Esquire, Assistant Regional Counsel, United States Environmental Protection Agency, Region 5, 230 South Dearborn Street, Chicago, Illinois, for the complainant;

Philip R. Rosi, Esquire, Post Office Box 1826, Traverse City, Michigan, for the respondent.

Before: J. F. Greene, Administrative Law Judge

On April 12, 1989, an Order Denying Motion for Default Judgment and Granting, in Part, Motion for "Accelerated Decision" was issued in this matter, together with a Compliance Order relating to violations found to have occurred. Two issues remain to be decided: (1) the amount of civil penalty to be assessed, if any, and (2) whether respondent violated Michigan Administrative Code R 299.11003(1)(m), which adopts 40 CFR §265.16 (a)-(d) by reference, as charged in the complaint, by

> . . . . failing to provide a hazardous waste management training program requiring successful completion by employees working on hazardous waste management within 6 months of employment or assignment to a hazardous waste facility; and failure to maintain written job titles and job descriptions for each position at the facility related to hazardous waste management, a written description of the introductory and continuing hazardous waste training given to each employee, and records of such training as required by MAC R 299.11003(1)(m) which adopts 40 CFR 265.16(a) through (d) by reference. At the time of the inspection, respondent had no training program and could not produce employee records which included job titles, job description, or descriptions of the introductory and continuing hazardous waste training. 1/

The penalty and 7-d questions are now the subject of a motion for "accelerated decision" from complainant 2/. Respondent, in turn, moved to dismiss the complaint 3/ on the grounds

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1/ Paragraph 7-d of the complaint.
2/ Motion for an Accelerated Decision, received July 5, 1989.
3/ Motion to Dismiss and in Opposition to the Complainant Environmental Protection Agency's Motion for an Accelerated Decision, filed July 17, 1989.

that the United States Environmental Protection Agency (EPA) lacks jurisdiction to enforce the Resource Conservation and Recovery Act ("RCRA," "the Act"), 42 U.S.C. §6921, et seq., in the State of Michigan; that EPA lacks jurisdiction to enforce the State's hazardous waste program [Hazardous Waste Management Act, Mich. Comp. Laws §§ 299.501 et seq., and the Michigan Administrative Code (MAC)]; and that EPA may not assess a fine for activities not punishable by fines under the State's hazardous waste program. Complainant's reply to the motion to dismiss, as filed September 8, 1989, 4/ points to numerous decisions that, in complainant's view, confirm EPA's authority to enforce both the federal and State programs, and to assess the civil penalty of $31,750 proposed in the complaint. 5/ In reply to respondent's opposition to the motion for "accelerated decision" respecting paragraph 7-d of the complaint, complainant reasserts its view that no genuine issue of material fact exists in connection with paragraph 7-d.

RESPONDENT'S MOTION TO DISMISS

Taking first respondent's argument that EPA may not enforce the Act in a State which has been authorized by EPA to operate

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4/ Opposition to Respondent's Motion to Dismiss and Reply to Respondent's Opposition to Complainant's Motion for an Accelerated Decision, September 8, 1989.

5/ Complaint at p. 10, Proposed Civil Penalty.

its own hazardous waste program, it is noted that the wording of RCRA §3008(a)(2), 42 U.S.C. §6928(a)(2) makes clear beyond argument that EPA may enforce the Act in authorized States, provided only that notice be given to the State:

> In the case of a violation of any requirement of this subchapter where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 6926 of this title, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.

The clarity of these provisions is such that there can be no doubt that EPA retains RCRA enforcement authority in States which EPA authorized programs.

In its second argument, respondent asserts that EPA lacks jurisdiction to enforce the Michigan hazardous waste program. This view has been the subject of numerous trial level decisions within the Environmental Protection Agency. Two appeals decisions, which are controlling precedent here, have been issued recently. They hold squarely that EPA may enforce the programs of authorized States, because "RCRA section 3008(a) brings them within the scope of federal enforcement authority." 7/ The

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6/ See also United States v. Conservation Chemical of Illinois, 660 F. Supp. 1236(N. D. Ind., 1987).

7/ CID-Chemical Waste Management of Illinois, Inc., RCRA (3008) Appeal No. 87-11, August 18, 1988, slip opinion at p. 11. See also Municipal & Industrial Disposal Company, RCRA Appeal (3008) 87-4, November 1, 1988.

reasoning of these cases, which specifically reject Northside Sanitary Landfill v. Thomas 8/ (relied upon by respondent) as being applicable 9/, is as follows:

1. The "obvious and natural" reading of the phrase "any requirement of this subchapter" in §3008(a) must embrace the requirements of the federal program and the requirements of any EPA-approved state program. The reason is that "RCRA requires either the federal or an approved program to be in effect in each state. See RCRA §3006. There is no hiatus in the coverage of subchapter III." The CID-Chemical opinion states, at note 4,

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8/ 804 F. 2d 371 (7th Cir. 1986).

9/ The opinion in CID-Chemical Waste Management of Illinois, Inc., states that:

> EPA's power to enforce state RCRA regulations was not, however, at issue in [Northside]. They involved the issue of whether any legal effect could be attributed to EPA's views on the scope of the closure of a hazardous waste facility located in an authorized state, even though EPA did not itself seek to compel closure and had instead referred the closure issue to the state. Neither the Administrator nor the court faced the situation where (as here) EPA brings an independent enforcement action under the state program. Indeed, a federal district court in the Seventh Circuit has specifically stated that EPA's power to enforce state RCRA programs was not at issue in Northside v. Thomas. Conservation Chemical Co. [of Illinois, Inc.], 660 F. Supp. [1236] at 1244 [N. D. Ind. 1987]. . . . Any dicta in the Seventh Circuit's decision suggesting that EPA has no authority to enforce state RCRA laws is clearly contrary to Section 3008(a) and has no precedential value.

that "(U)nder Section 3006(b), the state program does not take effect until it is approved, and upon approval, it operates 'in lieu of the federal program under this subchapter.'" Thus, the opinion in CID-Chemical continues at page 4, ". . . . an EPA-authorized state regulation is as much a requirement of subchapter III as a regulation issued by EPA."

2. The CID-Chemical opinion takes the view that the phrase "any requirement of this subchapter" does not mean "any rule imposed by EPA pursuant to this subchapter," and continues:

> This interpretation improperly reads into Section 3008(a) a substantial limitation that is not contained in the words or structure of the Act, and must therefore be rejected. See, e. g. Barnes v. Cohen, 749 F. 2d 1009, 1013 (3d Cir., 1985) 10/

3. The phrase "requirements of this subchapter" also appears in RCRA §3006(b), 42 U.S.C. §6926(b),

> ....in a context which shows that it includes state programs . . . (T)his section provides that EPA cannot authorize a state program if 'such program does not provide adequate enforcement of compliance with the requirements of this subchapter.' Because the 'in lieu of' language in RCRA §3006(b) precludes a state from enforcing the superceded federal regulations, the reference to adequate state enforcement of the requirements of this subchapter' can only be to enforcement of the state's authorized regulations. 11/ [Emphasis original]

10/ CID-Chemical Waste Management of Illinois, slip opinion, p. 5.

11/ [Footnote 11 appears on page 7, infra].

4. The fact that Congress did not expressly provide for federal enforcement of state law in RCRA as it did in the Clean Air Air Act, 42 U.S.C. §7413(a)(1), and the Clean Water Act, at 33 U.S.C. §1319(a)(3) does not mean that no such authority is contained in §3008(a) of RCRA, because Congress

> . . . . may express the same legal concept in more than one way. See, e. g. Greenport Basin & Construction v. United States, 260 U.S. 512, 516 (1923) (statutory language that is clear stands independently and is not to be construed by reference to language in another statute). 12/

In view of the CID-Chemical Waste Management of Illinois and Municipal and Industrial Disposal Company opinions, respondent's argument that EPA has no jurisdiction to enforce State hazardous waste management programs must be rejected. 13/

11/ Id. at p. 6. At this point in the opinion, reference is made in note 6 to other enforcement provisions in the Act, such as section 3008(d), which provides federal criminal penalties for violations of "regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter." RCRA §3008 (d)(3)-(4).

12/ Id., at p. 9. Here the text continues: "(A)s previously demonstrated, RCRA §3008(a) unambiguously grants the Administrator the power to enforce any RCRA requirement promulgated in accordance with subchapter III, which includes the power to enforce the requirements of authorized state programs."

13/ It is understood that the CID-Chemical Waste Management matter is on appeal in the Court of Appeals for the District of Columbia Circuit.

Respondent's third argument is that complainant may not assess fines under the RCRA civil penalty policy schedule for infractions of authorized State hazardous waste programs where the state programs do not provide for penalties. The decision on this point must also be governed by the CID Chemical opinion, which, as noted above, is controlling precedent here until such time as it may be overturned elsewhere. The issue of penalties was determined implicitly by the holding there because the authorized State program which the complaint there sought to enforce contains no penalty authority. 14/ Nevertheless, the complaint had proposed $39,500 in civil penalties pursuant to the federal RCRA penalty schedule. Consequently, it must be held based upon the reasoning of CID-Chemical that where EPA seeks to enforce an authorized state program and to impose RCRA civil penalties, it is the "requirements of this subchapter" (see RCRA §3008 and p. 4, slip opinion in CID-Chemical) that are at issue. Thus, following CID-Chemical, it is consistent to seek RCRA civil penalties for violations of State programs, since such programs are "requirements of of this subchapter" of RCRA. The violations of Michigan law charged in this case could have been restated as allegations of violations of RCRA, because the Michigan Administrative Code (MAC) either incorporates by reference or restates

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14/ See CID-Chemical Waste Management slip opinion, p. 2.

in the text each of the corresponding federal regulations. Indeed, each charge of the complaint does cite the federal regulation incorporated by reference or restated in the MAC text.

PARAGRAPH 7-d OF THE COMPLAINT

Paragraph 7-d of the complaint charged respondent with failure to provide a continuing hazardous waste management training program to employees at the facility who are engaged in hazardous waste management, in violation of MAC R 299.11003(1)(m), incorporating by reference in its entirety 40 C. F. R. Part 265. It was previously held 15/ that respondent had denied the charge in its response to the complaint, 16/ and had raised an issue of fact. Consequently, complainant's earlier motion for "accelerated" decision" was denied as to paragraph 7-d. Complainant's latest motion for "accelerated decision" restates its view and contains additional argument, but provides insufficient basis upon which to base a finding that violations of 40 CFR §265.16 occurred. Complainant argues that an April 29, 1987, letter from the Michigan Department of Natural Resources to respondent, in-

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15/ See Order Denying Motion for Default Judgment and Granting, in Part, Motion for "Accelerated Decision," April 12, 1989.

16/ Respondent, who was unrepresented by counsel at the time, stated in response to the charge that "(W)e believe that the recent worker Right to Know training conducted at Venture fulfills many of the requirements for hazardous waste management training." This was held to constitute a denial of the paragraph 7-d charge, and to raise an issue of fact.

forming respondent that "personnel training programs have not been prepared as required by 40 CFR §265.16," 17/ 18/ establishes the violation. However, the letter in fact contains no more than a conclusion that no such records had been prepared, based upon an April 21, 1987, inspection -- much as paragraph 7-d of the complaint states that same conclusion. While this letter is suggestive that personnel training records had not been been prepared because apparently none were obtained during the inspection, it does not constitute proof particularly since respondent denied the charge. Further, this letter does not address the question of whether the training itself -- as opposed to records of training -- may have taken place. Therefore, the letter pertains only to subparagraph (d) of 40 CFR §265.16, although the complaint charges a violation of the whole section, i. e. 40 CFR §265.16 (a), (b), and (c), which pertain to training, as well as (d), recordkeeping.

17/ Arguably, the choice of words in the letter is significant, suggesting that Michigan officials, too, regard personnel training records as a requirement of "this subchapter" of RCRA [see RCRA §3008(a), and the CID-Chemical opinion at p. 4, slip opinion].

18/ 40 CFR Part 265 is incorporated by reference in its entirety at MAC R 299.11003(1)(m), the regulation alleged in paragraph 7-d to have been violated by respondent. 40 CFR Part 265, however, is nearly one hundred pages long in the Code of Federal Regulations. Were it not for the fact that paragraph 7-d of the complaint also states that it is §265.16 (a) through (d) of Part 265 that is at issue, it would be most difficult for a respondent, particularly one unrepresented by counsel, to determine what the charge is. See page 2, supra, for text of paragraph 7-d.

Counsel for complainant also points to an affidavit executed by an EPA geologist, who avers that compliance with the Emergency Planning and Community Right to Know Act (EPCRA), Title III of the Superfund Amendments and Reauthorization Act (SARA) of 1986, which may be the "right to know" reference in respondent's answer (see note 16, supra) cannot constitute compliance with 40 C.F.R. §265.16. Among the reasons for the geologist's conclusion is that

> . . . . because Title III training requirements did not exist before 1986, respondent in this action could not possibly provide documentation that adequate training to satisfy RCRA requirements occurred between 1980 and 1986.

However, it is noted that all of the charges of paragraph 7 of the complaint, including those in paragraph 7-d, are based upon the state of affairs at respondent's facility during an inspection on April 21, 1987. It may noted, as well, that geologists may not be in the best position to reach conclusions regarding the application of statutory or regulatory criteria.

ADDITIONAL MATTERS RAISED BY RESPONDENT'S MOTION TO DISMISS

In its motion, respondent charges that complainant did not comply with 40 CFR §22.14(a)(5), which requires that a statement "explaining the reasoning behind the proposed penalty" be includ-

ed in the complaint. While it is certainly true that a full explanation of the basis for the calculation was not provided in the complaint, an attachment did set forth the penalty proposed for the alleged violations of each regulation -- applicable State and corresponding federal -- charged in the complaint. While this may not constitute an ideal explanation, it cannot be held that it is legally insufficient as "reasoning behind the proposed penalty." Moreover, complainant's counsel states that he furnished, and resondent's counsel says he received, 19/ penalty calculation sheets and a copy of the RCRA penalty policy. Under these circumstances, it is determined that the "reasoning" was adequately, if not generously, furnished.

In its September 18, 1989, Reply to EPA's Opposition to Venture Industries Motion to Dismiss, respondent raises a question relating to referral of this matter to EPA by the State 20/, in that the referral was "rather casual" and "does not meet the intended spirit and purpose of the [Memorandum of] Agreement" (between the State and EPA). It is suggested further that notice

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19/ Respondent's Memorandum of Points and Authorities in Support of the Respondent Venture Industries Corporation's Motion to Dismiss and in Opposition to the Complainant Environmental Protection Agency's Motion for an Accelerated Decision, at p. 19.

20/ Pp. 1-2.

of the referral to respondent was not adequately given.

The statutory requirement, at §3008(a)(2) of RCRA, is that " . . . . the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action . . . ." There is no requirement of notice to a proposed respondent. Further, complainant's moving papers show that the State did refer this matter to EPA, which is sufficient to constitute notice required by §3008(a)(2) of RCRA. 21/

PENALTY

In the April 12, 1989, Order Denying Motion for Default Judgment and Granting in Part, Motion for "Accelerated Decision," at page 8, the matters remaining in controversy were set forth as follows:

> Remaining in controversy, therefore, by virtue of respondent's denial of alleged violations and allegations which may bear upon the amount of the penalty to be assessed, are paragraph 7-d of the complaint, paragraphs 5, 9-18, and the proposed civil penalty.

It was clear, therefore, that the proposed civil penalty was

21/ See August 26, 1987, letter from the Michigan Department of Natural Resources to Mr. Rick Karl, EPA Region V, stating, inter alia, that EPA should ". . . . contact us for any update information prior to issuing the compliance order. We will be forwarding to you any additional correspondence relating to this facility. Thank you for your assistance".

yet to be determined. In the cross motions dealt with in this opinion, ample opportunity was afforded the parties to offer amplifying or mitigating information relating to the penalty. None was offered. Respondent's briefs were confined to questions of jurisdiction to impose penalties and whether the Rules of Procedure relating to reasoning behind the penalty had been observed. Complainant's motion seeks imposition of the $22,250 civil penalty proposed in the complaint for the violations that that were found in the April 12, 1989, decision (pp. 5-7), attached hereto. Complainant further urges imposition of a civil penalty of $9500 proposed for alleged violations set forth in paragraph 7-d of the complaint. Accordingly, it is determined that the penalty issue is ripe for decision. Therefore, based upon the findings and conclusions made in the April 12, 1989 decision, attached hereto, it is concluded that a penalty in the amount of $22,250 should be assessed. It is further concluded that paragraph 7-d of the complaint should be and it is hereby dismissed, without prejudice, 22/ as not having been established against respondent.

22/ Paragraphs 5 and 9-18 of the complaint, which were determined to remain in controversy at the conclusion of decision of April 12, 1989, did not allege violations of State or federal law. The fact that they were denied by respondent put the allegations in controversy, and raised genuine issues of fact, but a determination regarding these issues need not be made.

Accordingly, the following order is entered:

ORDER

A civil penalty in the total amount of $22,250 is assessed against respondent Venture Industries Corporation for the violations of the Act and regulations found herein and in the Order of April 12, 1989, attached hereto and made a part hereof.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of this order upon respondent unless, within thirty (30) days a motion for reconsideration of the amount of the penalty is received by this office. Payment shall be made by forwarding a cashier's check or certified check payable to "Treasurer of the United States" to the United States Environmental Protection Agency, Region V, Post Office Box 70753, Chicago, Illinois 60673. A copy of the transmittal of payment should be sent to Regional Hearing Clerk, United States Environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago, Illinois 60604.

J. F. Greene
Administrative Law Judge

Washington, D. C.
October 31, 1989