UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	**)**
	)
Pioneer Engineering Chemical	**) Docket No. RCRA-6-006-99**
Company,	**)**
	)
Respondent	**)**

Order On EPA's Motion For Accelerated Decision

In this action brought pursuant to the Resource Conservation and Recovery Act ("RCRA"), Section 3008, 42 U.S.C. § 6928(a), as amended, Complainant, EPA, alleges that the Respondent, Pioneer Engineering Chemical Company ("PENCCO"), violated Section 3007 of RCRA by its failure to respond to EPA's second request for information relating to Respondent's hazardous waste. A Compliance Order, directing the Respondent to provide the information, was included in the Complaint. EPA seeks a proposed penalty of $29,920.00. On October 15, 1999, EPA filed a Motion for Accelerated Decision on Liability and Penalty, together with supporting papers.

In its Answer, as well as in its Response to the present Motion, Respondent has denied that it handles hazardous waste. It has also denied that it has failed to furnish information or refused to permit access.

The RCRA Section alleged to have been violated, as applicable here, provides:

> For purposes of ... enforcing the provisions of this chapter, any person who generates, stores, treats, transports, disposes of, or otherwise *handles or has handled hazardous wastes shall*, upon request of any officer, employee or representative of the Environmental Protection Agency, duly designated by the Administrator, or upon request of any duly designated officer, employee or representative of a State having an authorized hazardous waste program, *furnish information relating to wastes and permit such person at all reasonable times to have access to, and to copy all records relating to such wastes....*

42 U.S.C. §6927 (emphasis added).

In the Complaint EPA states that Respondent manufactures ferrous sulfate at its Sinton and Brookshire, Texas facilities and that in November 1997 EPA made an information request

pertaining to this product. Respondent, it is alleged, informed EPA that, in manufacturing the product, it uses sulfuric acid, which was supplied from Sherman Wire and Cargill Steel and Wire. This led EPA to inspect the Sherman and Cargill facilities in June and July 1998 and during those inspections EPA documented records showing the transportation of sulfuric acid to Respondent.

Both in Respondent's documents and in documents from Sherman and Cargill, the sulfuric acid was described as "spent," being taken from steel cleaning operations at those facilities. This, EPA avers, means the sulfuric acid is considered spent "pickle liquor," and as such meets the listed hazardous industrial waste definition for K062. EPA further relates that Respondent used the sulfuric acid in producing commercial fertilizer, which product, being applied to land and not exempted from regulation, is a regulated hazardous waste. EPA also states that the sulfuric acid may be a solid waste, a hazardous waste, and an industrial hazardous waste. Further, EPA states that the Respondent may have transported and then stored this hazardous waste in tanks at its Sinton and Brookshire facilities. This information led EPA to send a second information request to the Respondent, pursuant to RCRA Section 3007, which was sought for purposes of evaluating the Respondent's activities and enforcing RCRA. EPA subsequently extended the time for Respondent to respond to the information request to October 28, 1998, but that the only response from PENCCO was an assertion that it does not handle hazardous waste.

EPA's Motion for Accelerated Decision

EPA, after noting that Section 3007 provides authority for it to obtain information relating to the generation, storage, treatment, transportation, disposal or handling of hazardous[1] wastes, asserts, in a turnaround from the typical assertion, that one is not limited to the EPA regulations in determining what is a hazardous waste, but that the "expansive statutory definitions for solid and hazardous waste found in RCRA Section 1004 [also] apply." In support of this position it points to 40 C.F.R. § 261.1(b)(2), which provides that "[t]his part [referring to Part 261 -- Identification and Listing of Hazardous Waste] identifies only some of the materials which are solid wastes and hazardous wastes under sections 3007..." This Section goes on to note that, even if a material is not defined as a solid waste nor identified or listed as a hazardous waste in that part, it is still one if, where Section 3007 is concerned, "EPA *has reason to believe* that the material may be a solid waste within the meaning of section 1004(27) of RCRA and a hazardous waste within the meaning of section 1004(5) of RCRA;..." Id. at §261.1(b)(2)(i) (emphasis added). Following this trail, section 1004(5) provides "[t]he term 'hazardous waste' means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may– (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed."

[1]EPA's Motion omits the critical modifying word "hazardous" in quoting from Section 3007. EPA Motion at 9.

Referring to this language, EPA maintains that its statutory authority extends to any solid waste that may "pose a ... hazard ... when improperly ... managed." However, while maintaining that "[t]he statutory definition of hazardous wastes, includes, for example, solid wastes containing hazardous constituents listed in Appendix VIII to Part 261[2]," and referring the Court to that Appendix, EPA ultimately shifts back to the RCRA Section 1004 definitions for its authority.

It is EPA's position that PENCCO is within the ambit of Section 3007 because it transports, stores, handles and uses hazardous waste at its Sinton and Brookshire facilities. It asserts that the primary process at these facilities is the production of ferrous sulfate, which product is then sold to farmers as a fertilizer and to wastewater treatment plants to control corrosion and odor from hydrogen sulfide. While acknowledging that the Respondent takes the position it uses only **raw materials** in its manufacturing process, central to EPA's claim that Respondent is handling hazardous waste, is its position that PENCCO acquires **spent sulfuric acid**[3] from certain generators in the iron and steel industry, which after first storing it in tanks, it then employs the spent acid, together with "virgin" sulfuric acid and other ingredients, in a reactor tank to produce the ferrous sulfate.

EPA also takes issue with PENCCO's assertion that it is required by the Department of Transportation to use the word "spent" on the sulfuric acid it acquires from the generators in the iron and steel industry, and with PENCCO's further assertion that such required description is in fact a misnomer. In effect, EPA maintains that these arguments are beside the point[4] for two reasons. First, it asserts that the sulfuric acid fits within the definition of "spent material," as described at 40 C.F.R. 261.1(c)(1):

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[2]As the cited statutory definition of hazardous wastes nowhere refers to Appendix VIII, it is assumed that EPA was not speaking literally, but rather intended to convey that the definition of "hazardous waste" is broad enough to capture wastes containing the hazardous constituents listed in that Appendix

[3]EPA, relies upon the affidavit of Dorothy A. Crawford, which in turn is based upon invoices and bills of lading from these steel industry producers, to establish that spent acid was shipped to PENCCO.

[4]EPA, while raising PENCCO's assertion that it must use the word "spent" because the Department of Transportation mandates that misnomer, does not directly address the contention. Thus, the Court interprets EPA's response as inferring that what the Department of Transportation may or may not require is beside the point, as it looks to EPA's regulations and the generators' description of the shipments to support its position that the sulfuric acid is "spent."

(c) For the purposes of §§ 261.2 and 261.6[5]:
(1) A "spent material" is any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing;

Second, it notes that PENCCO's iron and steel industry providers described the material as "spent" on the invoices and bills of lading.

EPA also takes issue with PENCCO's position that it is conditionally exempt from EPA regulation under 40 C.F.R. 261.**2**(e)(1). That section provides:

(e) *Materials that are not solid waste when recycled*. (1) Materials are not solid wastes when they can be shown to be recycled by being:
(i) Used or reused as ingredients in an industrial process to make a product, provided the materials are not being reclaimed; or
(ii) Used or reused as effective substitutes for commercial products; or
(iii) Returned to the original process from which they are generated, without first being reclaimed or land disposed.

EPA contends that "PENCCO's reliance upon 40 C.F.R. 261.**1**(e)(1) must fail because EPA specifically excludes from this regulatory exemption the spent sulfuric acid used in the manner by PENNCO (sic)-- applied to the land or 'used in a manner constituting disposal' as specified in 40 C.F.R. § 261.1(e)(2)." EPA Motion at 14, 15. The Court notes that there is no Section 261.**1**(e)(1) and that if EPA is referring instead to Section 261.**2**(e)(1) the quoted language does not appear.[6]

EPA next addresses PENCCO's contention that Section 261.2 (a)(1)[7] and (f) provide authority for exempting its material from EPA regulation, asserting, as to the former regulation, that its spent sulfuric acid is not excluded from the definition of a solid waste nor has Respondent sought a

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[5]Section 261.2 defines "solid waste" while 261.6 sets forth the requirements for "recyclable materials."

[6]A court should not be required to engage in excessive guesswork in trying to figure out what a party is trying to convey. This is particularly true where the Court is confronted with a Motion for Accelerated Decision, attempting to divine the moving party's position, with so much riding on the outcome, in this instance, for the Respondent. Here, it seems that EPA is referring to Section 261.2(e)(2)(i), which Section provides that some materials are solid wastes, even if the recycling involves use, reuse, or return to the original process, as described in (e)(1)(i) through (iii) of that section, if the materials are "used in a manner constituting disposal, or used to produce products that are applied to land;..." 40 C.F.R. § 261.2(e)(2)(i).

[7]Continuing its penchant for misciting, EPA variously refers to the section it actually quotes as 261.**1**(a)(**i**), 261.2(a)(**i**) and 261.**1**(a)(1). EPA Motion at 15. Based on the language it quotes, EPA is actually referring to Section 261.2 (a)(1). Similarly, there is no § 261.**1**(f).

variance[8]. As to the latter regulation, (i.e. Section 261.2(f)), EPA asserts that PENCCO has not provided any documentation that there is a known market or disposition for the material nor that they meet the terms of the exclusion or exemption.

Further, pointing to Section 261.2(e), which addresses "*Materials that are not solid waste when recycled*," EPA contends that PENCCO's spent sulfuric acid are outside of this provision because, as per 261.2(e)(2)(i), the materials are used in a manner constituting disposal or used to produce products that are applied to land. Examining the obverse provision, Section 261.2(c), "Materials are solid wastes if they are *recycled*--, " EPA contends that PENCCO's product is used in a manner constituting disposal, because its products, PenGreen fertilizer and the left over material from its production, are both used for agricultural purposes, and therefore either applied to land or used to produce products that are applied to land.

EPA also maintains that case law supports its position that Respondent's spent sulfuric acid is used in a manner constituting disposal and, accordingly, falling within the definition of a solid waste. Pointing to In the Matter of Royster Company, Docket No. RCRA III 195, 1993 EPA ALJ LEXIS 234, December 17, 1993, ("Royster"), a case involving sulfuric acid used in process of refining gasoline, the judge found that the material was "spent" and, because it was used in a manner constituting disposal within the meaning of Section 261.2(c)(1), it was a solid waste when it was shipped to the respondent, a manufacturer of fertilizer.[9] Applying Royster to the present matter, EPA observes that the generators notified the state of Texas that the spent sulfuric acid was characteristic and listed hazardous waste in the form of K062 and spent pickle liquor. Additionally, EPA states that its sampling confirmed that the spent sulfuric acid is both a characteristic and a listed hazardous waste. Complainant's Prehearing Exchange Exhibits 44 and 47, EPA Motion at 18.

EPA also points to U.S v. Charles George Trucking Company, Inc.,624 F. Supp. 1185 (D. Mass 1986) for the proposition that "EPA's request need not be confined solely to descriptions of hazardous waste...but must somehow relate to the [hazardous waste] substances." Motion at 20. However, unlike the present action, the premise of the George Trucking action was not in dispute; there was no genuine dispute concerning whether the defendants handled hazardous waste.

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[8]Section 261.2(a)(1) defines a solid waste as "any discarded material that is not excluded by §261.4(a) or that is not excluded by variance granted under §§ 260.30 and 260.31." However, Section 261.4, entitled "Exclusions," spans nearly eleven pages and is divided into materials which are not solid wastes, solid wastes that are not hazardous wastes, and hazardous wastes that are exempted from certain regulations, together with other categories, primarily dealing with samples and dredged materials.

[9]In the context of the present Motion, two observations are made about Royster. First, the determination that the sulfuric acid was a solid waste was made not in the context of a Motion for Accelerated Decision, but rather *after* a two day hearing had been held. Second, the focus of the decision involved a determination of whether the Royster had violated 40 C.F.R. § 268.50(a), and accordingly was not about whether it had violated Section 3007 of RCRA.

PENCCO's Response

PENCCO maintains that it has not been handling hazardous waste and that there is a dispute under the regulations as to the definition of hazardous waste. It continues to assert that the product it purchases from Sherman and Cargill is not hazardous waste under the EPA regulations. Response at 2, 3. PENCCO asserts that the material EPA describes as spent material and waste is actually raw material and "black iron." Additionally, it suggests that bureaucratic muscle, applied for its own sake, is involved, as it relates that EPA has threatened that unless it complies with its demands, heavy fines, injunctions and plant closure will ensue. Id. at 4.

Respondent also challenges the extent of EPA's authority under Section 3007, posing whether the provision only authorizes EPA to enter and copy such information as it seeks or whether the provision requires Respondent to "exhaustively research through all its records and make expensive copies and furnish them in some far distance (sic) place." Id. at 5. In this regard Respondent maintains that it has "repeatedly invited EPA...to inspect any and all operations of records it possesses.[10] Noting that EPA has filed seven "large volumes of exhibits produced at PENCCO's plants for inspection and copying," and that EPA has done this without restriction and yet EPA is still demanding that PENCCO, INC. copy or recopy vaguely described records involving "Hazardous Waste... refus[ing] to be more specific as to what is being sought." Id.at 6.

Having considered EPA's Motion and PENCCO's responses thereto, the Motion is DENIED. Although the Court has reservations about the merits of PENCCO's defense, it is extremely reluctant to deny Respondent the opportunity at a hearing to contest the alleged violation of RCRA Section 3007, challenging EPA's assertion that it is dealing with hazardous waste as well as the extent of EPA's authority under that section to require written narrative responses or the submission of records or documents to its Second Request. Apart from these liability issues, it appears to the Court that, should a violation be established, a full explication of the circumstances surrounding these events is necessary to arrive at an appropriate penalty, the determination of which must take into account the seriousness of the violation and any good faith efforts to comply. 42 U.S.C. 6928 (a) (1) and (3). In the Matter of: Environmental Protection Corporation, Docket No. RCRA 09-86-0001, 1989 EPA ALJ LEXIS 19, October 24, 1989.

So Ordered

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William B. Moran
United States Administrative Law Judge

Dated: December 14, 1999

[10]In denying EPA's Motion for Accelerated Decision, the Court has also considered the factual issues raised by the affidavits of R.L. Horne, President of PENCCO.

In the Matter of Pioneer Engineering Chemical Company, Respondent
Docket No. RCRA-6-006-99

CERTIFICATE OF SERVICE

I certify that the foregoing **Order on EPA's Motion For Accelerated Decision**, dated December 14, 1999, was sent this day in the following manner to the addressees listed below:

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Dated: December 14, 1999