UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| In the Matter of | ) | |
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| Triangle Metallurgical, Inc. and L.C. Metals, Inc., | ) | Docket No. RCRA-V-W-87-R-009 |
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| Respondents | ) | |

Resource Conservation and Recovery Act - Authorized State Hazardous Waste Programs - EPA Enforcement

An authorized state hazardous waste program under § 3006 of the Act is a Subtitle C Hazardous Waste Management Program and thus, in accordance with § 3008, the Administrator in effect has jurisdiction to enforce as Federal law RCRA regulations promulgated under state law.

Appearance For Respondent: Robert F. Van Voorhees, Esq.
Carol Lynn Green, Esq.
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Appearance for Complainant: T. Leverett Nelson, Esq.
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OPINION AND ORDER DENYING
MOTION TO DISMISS

The Complaint, Findings of Violation and Compliance Order (complaint) in the instant proceeding under § 3008 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA) (42 U.S.C. § 6928), issued November 20, 1986, charges Respondents, Triangle Metallurgical, Inc. and L.C. Metals, Inc. with violations of the Act and applicable regulations issued under the Illinois Administrative Code, specifically 35 Ill. Adm. Code Parts 703, 722 and 725. Triangle Metallurgical, Inc. (Triangle) operates a facility which allegedly stores hazardous waste in containers and deposits the waste in a landfill. L.C. Metals apparently owns the land upon which the mentioned facility is located. Wastes involved are allegedly EP toxic for lead (Hazardous Waste No. D008) and possibly cadmium (Hazardous Waste No. D006).

It is alleged that Respondents failed to file a Notification of Hazardous Waste Activity as required by 35 IAC § 703.153(a), failed to file a Part A permit application as required by 35 IAC § 703.150(a), failed to provide documentation required by 35 IAC § 722.111 showing that a hazardous determination had been made for waste present in the area and failed to comply with numerous provisions of the Interim

Status Standards, 35 IAC Part 725. For these alleged violations, it was proposed to assess Respondents a penalty totaling $135,000.

Respondents' answer denied the alleged violations and, inasmuch as the State of Illinois had been granted final authorization to administer a hazardous waste program in lieu of the federal program,[1/] denied that EPA had jurisdiction to pursue this action. By letter, dated January 21, 1987, the parties, failing settlement, were directed to exchange certain prehearing information. Because settlement discussions were reportedly in progress, the time for accomplishing the prehearing exchange has been extended several times, the most recent extension having been granted by an order, dated October 6, 1987.

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1/ The State of Illinois was granted final authorization to operate its hazardous waste program in lieu of the Federal program subject only to limitations imposed by the Hazardous and Solid Waste Act Amendments of 1984, Public Law 98-616, November 8, 1984 (51 FR 3778, January 30, 1986) effective January 31, 1986. The mentioned notice provided in pertinent part:

> As a result of HSWA, there will be a dual State/Federal regulatory program in Illinois. To the extent the authorized State program is unaffected by HSWA, the State program is authorized to operate in lieu of the Federal program. Where HSWA-related requirements apply, however, U.S. EPA will administer and enforce them in Illinois until the State receives authorization to do so. Any State requirement that is more stringent than a HSWA provision also remains in effect; thus, the universe of the more stringent provisions in HSWA and the approved State program defines the applicable Subtitle C requirements in Illinois.

Under date of November 2, 1987, Respondents filed a motion to dismiss or, in the alternative, for a stay. In support of the motion to dismiss Respondents point out the complaint alleges violations of state law and argue that under RCRA, EPA has no authority to enforce state law (Memorandum In Support Of Motion at 1, 2). Respondents rely upon CID-Chemical Waste Management of Illinois, Inc., RCRA-V-W-86-R-77 (Order, April 2, 1987), hereinafter "CID," appeal pending, wherein Judge Yost accepted the argument that the Administrator's authority to issue an order under § 3008(a) of the Act,2/ assessing a penalty for violations

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2/ Section 3008(a) of the Act (42 U.S.C. 6928) provides:

> (a) Compliance Orders--(1) Except as provided in paragraph (2), whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subtitle, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both, or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.
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> (2) In the case of a violation of any requirement of this subtitle where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 3006, 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.
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> (3) Any order issued pursuant to this subsection may include a suspension or revocation of any permit issued by the Administrator or a State under this subtitle and shall state with reasonable specificity the nature of the violation. Any penalty assessed in the order shall not exceed $25,000 per day of noncompliance for each violation of a requirement of this subtitle. In assessing such a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

"of this subtitle,"[3/] or requiring compliance immediately or within a specified time, or both, was limited to Federal law and did not include state law.

Respondents allege that on August 14, 1986, IEPA issued an Enforcement Notice Letter to Triangle informing it of the very violations alleged herein and, citing Northside Sanitary Landfill, Inc. v. Thomas, 804 F.2d 371 (7th Cir. 1986), argue that under RCRA U.S. EPA is without authority to commence an independent enforcement action as long as Illinois has taken timely and appropriate action.[4/] Respondents cite BKK Corp., RCRA Appeal

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3/ The codification of RCRA uses the term "subchapter" in lieu of "subtitle." As codified, 42 U.S.C. § 6901 et seq., RCRA is Chapter 82, "Solid Waste Disposal," of Title 42 United States Code. Whichever term is used, the reference to this "subtitle," "subchapter" can only refer to "Subtitle C, Hazardous Waste Management," RCRA §§ 3001-3019 inclusive, 42 U.S.C.-Subchapter III, §§ 6921-6939 inclusive.

4/ Memorandum at 2, 15-17. This is in accordance with the spirit, if not the letter, of the Memorandum of Understanding executed by the State of Illinois on July 26, 1985, and U.S. EPA on January 26, 1986, which provides in pertinent part:

> 7.1.3 The Regional Administrator may take enforcement action against any person determined to be in violation of RCRA in accordance with Section 3008(a)(2). However, U.S. EPA will normally take enforcement action only when requested to do so by the State, or upon determining that the State has not taken timely and appropriate enforcement action. Except in emergency situations, the State will be given at least 30 days to initiate its own action or respond to the notice of inadequate enforcement action. U.S. EPA will notify the State prior to issuing an order or commencing a civil action under Section 3008(a)(2). In most instances, this notice will be in writing. U.S. EPA also retains its rights to issue orders and bring actions under Sections 3013 and 7003 of RCRA and any other applicable Federal Statute.

No. 84-5 (Order On Petition For Reconsideration, October 23, 1985) wherein the Administrator vacated without finally deciding the issue, an initial decision of an ALJ and the final decision of the Chief Judicial Officer (CJO), holding that EPA was precluded from taking enforcement action under RCRA § 3008(a)(2) in an authorized state where the state had taken timely and appropriate action. Also cited, is Martin Electronics, Inc., RCRA-84-45-R (Decision On Motion For Reconsideration, January 15, 1986), wherein an EPA RCRA complaint was dismissed on the rationale of the final decision of the CJO in BKK.[5/] Respondents acknowledge, however, that for "inexplicable reasons," IEPA referred the instant matter to U.S. EPA for enforcement.

Alternatively, Respondents ask for a stay of this proceeding. Pointing out that the Compliance Order herein directs the submission to U.S. EPA and IEPA of closure and post-closure plans for the landfill and hazardous waste storage areas and alleging that the IEPA, by letter, dated March 17, 1987, approved with modifications Triangle's schedule for closure, Respondents argue on the basis of Northside, supra, that only IEPA can approve any

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5/ The CJO issued an Order For Sua Sponte Review in Martin Electronics, Inc., RCRA (3008) Appeal No. 86-1 (July 28, 1986) and in an Order On Sua Sponte Review (June 22, 1987) vacated the initial decision insofar as it relied on the reasoning of BKK. The CJO adopted an opinion of the Agency's General Counsel, Effect on EPA Enforcement of Enforcement Action Taken By State With Approved RCRA Program (May 9, 1986), which holds that there is no legal impediment to EPA enforcement action in authorized states even though the state has taken action on the identical violations.

cleanup plan (Memorandum at 9, 10, 19-22). Because only IEPA can approve any proposed settlement, Respondents assert that they are foreclosed from even attempting to resolve matters with U.S. EPA at this time. Accordingly, granting a stay herein until settlement discussion with IEPA have been concluded or terminated is allegedly necessary and appropriate.6/

Complainant's response to the motion, dated November 17, 1987, includes a motion for a default order based on Respondents' failure to file the prehearing exchange directed by the ALJ7/ and opposition to the motion for a stay.

Complainant acknowledges that IEPA has the primary authority to review closure plans under RCRA (Memorandum In Support Of Complainant's Response To Respondent's Motion To Dismiss Or, In

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6/ Respondents are apparently awaiting results of analyses of samples and have yet to submit a final cleanup or closure plan to IEPA.

7/ The motion for a default order is based upon Respondents' failure to file the prehearing exchange in accordance with the most recent order (ante at 3). In accordance with that order, the prehearing exchange was to be filed 20 days after Respondents' receipt of IEPA's determination regarding the sampling plan submitted April 1, 1987. According to Complainant, the IEPA determination was received on October 12, 1987, making November 2, 1987, the due date for the prehearing exchange. Instead of the prehearing exchange, Respondents filed the instant motion to dismiss or, in the alternative, for a stay. Respondents argue that inasmuch as IEPA has primary jurisdiction over the closure and inasmuch as the instant action cannot be concluded absent a conclusion of discussions with IEPA, it is a useless exercise to conduct the prehearing exchange in view of the real prospects for settlement. Although this position is not accepted in its entirety, there is nothing to indicate a lack of good faith and the motion for a default order is denied.

The Alternative, To Stay at 2). Complainant emphasizes, however, that enforcement of this matter was referred to it by IEPA and states that the understanding U.S. EPA was to proceed with enforcement was confirmed in a letter to the State, dated October 9, 1986.

On the merits, Complainant asserts that the fact Illinois has received final authorization to operate its hazardous waste program in lieu of the Federal program does not deprive U.S. EPA of jurisdiction in this matter. It relies upon two decisions by Judge Vanderheyden, Inland Metals Refining Co., Docket No. V-W-85-R-59 (November 5, 1987) and National Standard Company, Docket Nos. RCRA-V-W-86-R-30 and RCRA-V-W-86-R-31 (January 14, 1987), wherein it was concluded that a system of dual enforcement was envisaged under RCRA and that Northside Sanitary Landfill, supra, was confined to EPA's authority to oversee closure plans and did not address EPA's authority to bring enforcement actions in states authorized to administer their own hazardous waste programs.

Complainant also relies upon U.S. v. Conservation Chemical Co. of Illinois, 660 F.Supp. 1236 (N.D. Ind. 1987) (CCCI), wherein it was held that the only limitation in § 3008 upon EPA's authority to bring an enforcement action in a RCRA authorized state was that EPA must first provide notice to the state. The CCCI court emphasized that Northside was not concerned with enforcement, but with standing and the court's jurisdiction under § 7006(b) to

review a claimed permit denial and EPA comments concerning the scope of closure. CCCI held that the statutory provisions could not be more clear and that even after a state had received authorization to implement its own hazardous waste program, Congress intended that EPA retain independent enforcement authority at least where the state fails to act.8/

Complainant contends that it retains jurisdiction over this matter regardless of any action IEPA has taken or is taking (Memorandum at 5). Citing Martin Electronics, supra, Complainant says that there is nothing in the statute which precludes overfiling, i.e., U.S. EPA and IEPA enforcement actions for the same violations, and that, in any event, the IEPA enforcement agenda postulated by Respondents simply does not exist. Acknowledging that the IEPA issued an Enforcement Notice Letter on August 14, 1986, Complainant points out that the IEPA referred this matter to U.S. EPA on August 26, 1986. Complainant says this action is fully consistent with the Memorandum of Understanding between IEPA and U.S. EPA (note 4, supra).

Complainant also opposes Respondents' motion for a stay (Memorandum at 8-10). Complainant points out that it seeks two

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8/ This is based on legislative history, House Committee on Interstate and Foreign Commerce (September 9, 1976), Report No. 94-1461, reprinted U.S. Code Cong. & Admin. News (1976) at 6269 providing in part: "Although the Administrator is required to give notice of violations of this title to states with authorized hazardous waste programs, the Administrator is not prohibited from acting in those cases where the states fail to act, or from withdrawing approval of the state hazardous waste plan and implementing the federal hazardous waste program pursuant to Title III of this Act."

things in this proceeding, i.e., compliance with applicable State RCRA requirements and payment of a penalty. Denying that the dialogue between IEPA and Respondents concerning the items to be included in the closure plan can properly be termed "settlement discussions," Complainant says that any settlement negotiations should be between Respondents and Complainant. Complainant alleges that on July 9, 1987, it forwarded a draft Consent Agreement and Final Order (CAFO) to Respondents, which envisioned submission of an approvable closure plan and payment of a penalty. According to Complainant, Respondents have not proposed a penalty they are willing to pay. Complainant says that it can only conclude Respondents are not serious about settling this matter.

Contrary to Respondents' contentions, Complainant asserts that the ALJ has authority to require Respondents to comply with State law in regard to closure and to pay a penalty. It therefore argues that a stay at this juncture would serve no useful purpose.

## D I S C U S S I O N

CID, supra, is based on the view that the reference to "this subtitle," "subchapter" in § 3008(a) of the Act (42 U.S.C. § 6928(a)) (note 2, supra) does not include state programs which are to operate in lieu of the Federal RCRA program. As indicated (note 3, supra), there is no room for controversy that the reference to this "subtitle" refers to "Subtitle C, Hazardous Waste Management," RCRA §§ 3001-3019 inclusive, 42 U.S.C. Subchapter III, §§ 6921-6939 inclusive. The General Counsel concluded without elaboration

(note 5, supra) that "(t)he requirements of an authorized state program are considered Subtitle C requirements" (Id. at 2, note 1). More recently, in SCA Chemical Services, Inc., Docket No. V-W-87-R-056 (Order Denying Motion To Dismiss, November 19, 1987), Judge Frazier concluded that "(i)n those circumstances [an authorized state program under § 3006][9/] the state program

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9/ "Authorized State Hazardous Waste Programs

Sec. 3006. * * *

(b) Authorization of State Program--Any State which seeks to administer and enforce a hazardous waste program pursuant to this subtitle may develop and, after notice and opportunity for public hearing, submit to the Administrator an application, in such form as he shall require, for authorization of such program. Within ninety days following submission of an application under this subsection, the Administrator shall issue a notice as to whether or not he expects such program to be authorized, and within ninety days following such notice (and after opportunity for public hearing) he shall publish his findings as to whether or not the conditions listed in items (1), (2), and (3) below have been met. Such State is authorized to carry out such program in lieu of the Federal program under this subtitle in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste (and to enforce permits deemed to have been issued under section 3012(d)(1)) unless, within ninety days following submission of the application the Administrator notifies such State that such program may not be authorized and, within ninety days following such notice and after opportunity for public hearing, he finds that (1) such State program is not equivalent to the Federal program under this subtitle, (2) such program is not consistent with the Federal or State programs applicable in other States, or (3) such program does not provide adequate enforcement of compliance with the requirements of this subtitle. In authorizing a State program, the Administrator may base his findings on the Federal program in effect one year prior to submission of a State's application or in effect on January 26, 1983, whichever is later.

(c) Interim Authorization--(1) Any State which has in existence a hazardous waste program pursuant to State law before the date ninety days after the date of promulgation of regulations under sections 3002, 3003, 3004, and 3005, may submit to Administrator evidence of such existing program

is substituted for the federal program and any requirement of the state program, in effect, becomes 'any requirement of this subchapter' which the Administrator may enforce pursuant to § 3008(a)(1) and (2))" (Id. at 10). He relied in part on the fact that under § 3008(a)(3) any order issued by the Administrator under § 3008 may include the suspension or revocation of a permit issued by the Administrator or a state "under this subtitle" and upon the fact § 3008(d) provides criminal penalties for, inter alia, knowing submission of false statements in documents required for compliance with regulations issued by the Administrator or an authorized state.10/

State RCRA programs are authorized under § 3006 of the Act, 42 U.S.C. § 6926. In accordance with § 3006(c), states with existing hazardous waste programs may receive interim authorization to carry out the state program in lieu of the Federal program if it is determined that the state progam is "substantially

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Footnote 9/ continued

> and may request a temporary authorization to carry out such program under this subtitle. The Administrator shall, if the evidence submitted shows the existing State program to be substantially equivalent to the Federal program under this subtitle, grant an interim authorization to the State to carry out such program in lieu of the Federal program pursuant to this subtitle for a period ending no later than January 31, 1986.

10/ CID, supra, would limit the Administrator's authority under § 3008(a) to bringing an action to enforce Federal law, or to commencing a proceeding to withdraw the state's authority to administer its own program pursuant to § 3006(e). This appears to overlook the fact that § 3008(a)(3) authorizes the Administrator to suspend or revoke a permit issued by the Administrator or a state. Because the suspension or revocation is accomplished by an "order," which may include a penalty, authority to impose penalties for violations in authorized states is clearly implied.

equivalent to the Federal program." Likewise, in accordance with § 3006(b), a state may be granted final authorization to carry out such [hazardous waste] program in lieu of the Federal program under this subtitle," if it is determined, inter alia, that the state program is equivalent to the Federal program. Section 3006(d) provides:

> "(d) Effect of State Permit--Any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under this subtitle."

Among the requirements of an authorized state program under § 3006(b) is "* *adequate enforcement of compliance with the requirements of this subtitle."[11/] This language coupled with § 3006(d), quoted above, makes it eminently reasonable to conclude that an authorized state program is in fact a Subtitle C requirement. The General Counsel concluded (note 5, supra) that "(i)ts [§3006(d)] principal purpose is plainly to assure not only that a state will have authority to issue permits, but also that those permits have the same effect, and are enforceable to the same extent, as if they had been issued by EPA."[12/]

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11/ Although phrased in the negative in terms of findings the Administrator must make in order to deny a state authority to administer its own hazardous waste program, it is reasonable to consider the converse to be a requirement of an authorized state program.

12/ Id. at 4. Because § 3006(b) clearly authorizes a state, which has been authorized to carry out its hazardous waste program in lieu of the Federal program, "* *to issue and enforce permits for the storage, treatment, or disposal of hazardous waste* *" the conclusion that the purpose of § 3006(d) is "* *plainly to assure that a state has authority to issue permits* *" seems questionable. This, however, does not detract from the conclusion a state program authorized under § 3006 is a Subtitle C requirement or program.

Accordingly, it is concluded that a state hazardous waste program authorized under § 3006 is a RCRA Subtitle C program and that the reference to this "subtitle" in § 3008 includes such state programs. The Administrator in effect is authorized to enforce as Federal law state RCRA program requirements and to assess a penalty for the violation thereof.13/ While it is true that Wyckoff Co. v. EPA, 796 F.2d 1197 (9th Cir. 1986), involved EPA orders under § 3013 of RCRA, the court nevertheless concluded that "* *were § 3008(a)(2), the requirement for prior notice to the state, eliminated from the Act, the apparent effect would not be to withdraw federal authority whenever authorized state programs were in effect, but to free federal section 3008 authority of the notice requirement" (Id. at 1201).

If it be said that there is more than one reading of §§ 3006 and 3008 of RCRA, it is well settled that an agency's permissible interpretation of such a statute is entitled to deference. See,

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13/ CID, supra, rests in part on the proposition that it is novel and unprecedented for a Federal agency to collect fines for violations of state laws. This overlooks an analogous situation in the Assimilative Crimes Act (18 U.S.C. § 13), various versions of which have been in effect since 1825. The Act essentially makes crimes on Federal enclaves actions which would be crimes in the state in which the enclave is located. The constitutionality of the Act has been upheld over the contention that it represented an unlawful delegation of congressional power as to actions which were not crimes in the State involved (Texas) at the time the Act was passed. United States v. Sharpnack, 355 U.S. 286 (1958). Detailed procedures for revision of state programs are contained in 40 CFR § 271.21 and approval of a state program does not constitute approval of future revisions of that program.

e.g., Chevron USA v. Natural Resources Defense Council 467 U.S. 837 (1984). EPA has clearly and repeatedly interpreted § 3008 as authorizing the Agency to bring enforcement actions notwithstanding the existence of authorized state programs which are to operate in lieu of the Federal program. See the Memorandum of Understanding between EPA and the State of Illinois (note 4, supra). See also 51 FR 3954 (January 31, 1986) ("* * *EPA has decided to codify its approval of State programs in a new Part 272 of Title 40, Code of Federal Regulations and to incorporate by reference the state statutes and regulations that EPA will enforce under Section 3008 of RCRA"). Accordingly, even if 3006 and 3008 of RCRA be regarded as doubtful or ambiguous, the Agency's interpretation should control.

The IEPA's action in forwarding this matter to U.S. EPA for enforcement forecloses any contention that this action is barred, because of enforcement by IEPA. The motion to dismiss is lacking in merit and will be denied.

This brings us to the motion for a stay. The foregoing discussion reveals that there is no legal impediment to proceeding with this action and the motion for a stay will be denied. It is nevertheless true that the essence of the compliance order, if any, issued herein will require closure in accordance with

IEPA requirements and, as far as Respondents are concerned, this matter will not be finally resolved until closure is accomplished in accordance with directives of the IEPA. Under the circumstances, Respondents will be granted an additional 30 days to file their prehearing exchange. In addition to information specified by my letter, dated January 21, 1987, Respondents' prehearing exchange will include a complete and up-to-date report on the status of activities and discussions with IEPA regarding closure.

O R D E R

The motions to dismiss and for a stay are denied. Respondents will file their prehearing exchange on or before January 8, 1988.14/

Dated this 9th day of December 1987.

Spencer T. Nissen
Administrative Law Judge

14/ Complainant may, of course, supplement its prehearing exchange by the same date, if it desires so.

## CERTIFICATE OF SERVICE

I hereby certify that the original of this Opinion & Order Denying Motion to Dismiss, dated December 9, 1987, in re: Triangle Metallurgical, Inc. & L.C. Metals, Inc., was mailed to the Regional Hearing Clerk, Reg. V, and a copy was mailed to each party in the proceeding as follows:

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Secretary

December 9, 1987