11/9/87

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
E.G. Smith Division, Cyclops Corp.,	)	Docket No. RCRA-V-W-87-R-87-002
	)	
	)	
Respondent	)	

Resource Conservation and Recovery Act - Rules of Practice - Accelerated Decisions - Questions of Fact.

Where applicability of RCRA to inactive surface impoundments, which had last received hazardous wastes prior to (November 19, 1980), effective date of RCRA regulations, turned on factual issue of whether Respondent intended to "dispose of" as distinguished from "store" the wastes prior to final disposal, and available evidence on that issue was equivocal, neither party was entitled to an accelerated decision in its favor.

Resource Conservation and Recovery Act - Applicability of Regulation - Surface Impoundments - Storage or Disposal.

Because storage is a continuing activity, inactive surface impoundments into which hazardous wastes were last placed prior to November 19, 1980, effective date of RCRA regulations, were subject to RCRA, if the wastes were merely stored prior to final disposal, while RCRA is inapplicable to the impoundments, if the placement of wastes constituted disposal.

Appearance for Respondent:

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Appearance for Complainant:

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OPINION AND ORDER DENYING MOTION
FOR AN ACCELERATED DECISION

This proceeding under § 3008 of the Solid Waste Disposal Act, as amended (RCRA) (42 U.S.C. § 6928), was commenced on October 20, 1986 by the issuance of a Complaint, Compliance Order, and Notice of Opportunity for Hearing by the Director, Waste Management Division Region V, U.S. EPA, Chicago, Illinois, charging Respondent, E.G. Smith Division, Cyclops Corporation,1/ with violations of the Act and regulations and corresponding sections of the Ohio Administrative Code.2/ For the alleged violations, a penalty of $94,700 was proposed to be assessed against Respondent. Respondent answered, denying the alleged violations and requesting a hearing.

1/ Respondent's answer indicates its present name is "E.G. Smith Construction Products, Inc," which is a wholly owned subsidiary of Cyclops Corporation.

2/ Section 3008 provides in pertinent part:

> Section 3008(a)(1): "[W]henever on the basis of any information the Administrator determines that any person is in violation of any requirement of this subtitle [C] the Administrator may issue an order requiring compliance immediately or within a specified time. . . ."
>
> Section 3008(g): "Any person who violates any requirement of this subtitle [C] shall be liable to the United states for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall for purposes of this subsection, constitute a separate violation."

Under date of May 22, 1987, counsel for Respondent submitted a petition for an expedited decision of legal issues, contending that the RCRA regulations apply only to hazardous waste management facilities in active operation on or after November 19, 1980. It appearing that a decision on this issue would eliminate or substantially narrow issues to be decided at a hearing, Respondent was directed to file a motion for an accelerated decision and a briefing schedule was established by an order, dated June 15, 1987. Respondent filed a motion for an accelerated decision on July 17, 1987, to which Complainant responded on August 21, 1987. Respondent's reply to this response was filed on September 10, 1987.

It appears that the following facts, principally taken from the memoranda and exhibits filed by the parties, are undisputed:

Respondent manufactures metal panels and insulated siding at a facility located at 530 North Second Street, Cambridge, Ohio. Prior to 1980, Respondent's manufacturing process resulted in the generation of two separate and distinct waste streams. One waste stream consisted of used paints and solvents which were drummed and stored on the south side of the

facility. On August 18, 1980, Respondent submitted a Notification of Hazardous Waste Activity[3] and under date of November 15, 1980 Respondent submitted a Part A permit application. The latter document indicated that Respondent handled hazardous waste in containers and tanks and identified the wastes as F017, paint residue and F018, sludge.[4] It appears to be uncontested that Respondent qualified for interim status with respect to the used paint and solvent wastes.[5]

Respondent's second waste stream results from the industrial process for the chemical conversion coating of aluminum.[6] Prior to October 24, 1980, Respondent pumped wastewater to one

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3/ The Notification is not in the file available to the ALJ.

4/ Hazardous Waste Nos. F017 and F018 were not included in the initial list of "F" wastes, hazardous wastes from nonspecific sources published on May 19, 1980 (45 FR 33123, 40 CFR § 261.31). Hazardous Waste No. F017, paint residue or sludges from industrial painting in the mechanical and electrical products industry and No. F018, wastewater treatment sludges from industrial painting in the mechanical and electric products industry, were proposed for listing in interim final form on July 16, 1980 (45 FR 47832-836), temporarily suspended on January 16, 1981 (46 FR 4614) and apparently never reproposed in that form.

5/ The drums of inflammable wastes have been the subject of a separate RCRA enforcement proceeding, Docket No. RCRA-V-W-85-R-002 (Initial Decision, June 25, 1986), presently on appeal.

6/ The waste of concern here, F019, wastewater treatment sludges from the chemical coating of aluminum was allegedly included in the initial interim final listing conversion of "F" wastes (45 FR 33123, May 19, 1980), EPA claiming that it was within the scope of Hazardous Waste No. F006 - wastewater treatment sludges from electroplating operations - becoming final and effective on November 19, 1980 (45 FR 7884, November 12, 1980). The validity of this dubious claim is discussed infra at 15, 16.

of two surface impoundments on the north side of the facility, allowing the solids to settle out and then discharged the effluent to either a nearby stream in accordance with an NPDES permit, or, since 1976, to a publicly owned treatment works (POTW). No wastewater of any kind has entered the surface impoundments since October 24, 1980. Respondent has, however, installed a clarifying tank to collect the chemical conversion solids prior to discharge to the POTW.7/ The surface impoundments allegedly are and, since their use was discontinued, have been dry and covered with vegetation.8/

In December 1982, the U.S. EPA requested Respondent to submit Part B of its hazardous waste permit application. By letter, dated May 10, 1983, Respondent requested an extension of the due date for filing the Part B application. Although the letter was primarily concerned with Respondent's activities directed to the removal of some 2,000 drums of flammable liquids which had accumulated in the drum storage area, it referred to the two inactive lagoons at issue here. Among other things, the letter stated that an environmental concern had been employed to

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7/ The Part A permit application filed by Respondent identifies, inter alia, a settling tank, a treatment plant, a storage area for drums containing waste paint and a chrome reduction unit. Pertinent here are what have been labeled as two "abandoned sludge lagoons," near the northeast property line and an adjacent stream, Wills Creek.

8/ A 1981 Industrial Waste Survey, filed by Respondent with the OEPA, refers to an abandoned sludge lagoon, which was in use from 1967 to 1980, and which is said to contain 30,000 cubic feet of dried sludge from metal pretreatment. This reference is in under a heading asking for descriptions and approximate quantities of any wastes previously disposed in a closed or inactive on-site facility.

evaluate sedimentary residue from the inactive lagoons and that laboratory analysis for the characteristic of EP toxicity would be performed. Respondent expressed confidence that the results would be below EP toxicity limits.9/ Of course, if the materials are in fact properly determined to be listed wastes, results of EP toxicity tests are not relevant.

This proceeding had its inception in inspections of Respondent's facility conducted by representatives of OEPA on November 20, 1984, and November 20, 1985. Respondent was allegedly storing Hazardous Waste No. F019 in the surface impoundments, having failed to identify the impoundments as hazardous waste storage facilities in its initial or amended Part A permit applications10/ and having failed to identify F019 as a hazardous waste treated, stored or disposed of at the facility. This is alleged to be a violation of § 3005 of RCRA and 40 CFR § 271.71(a).

In its answer to the complaint, Respondent has denied the applicability of RCRA regulations to the surface impoundments

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9/ Attached to Respondent's letter of May 10, 1983, as Exhibit "A" is a document entitled "Two Year History Mud Sample." The document purports to list the results of a series of chromium tests conducted by Coshocton Environmental Services on samples, source not stated, during the period 4/28/81 through 4/20/83. Although all concentrations are below the five milligrams per liter EP toxicity limits for chromium specified by 40 CFR § 261.24, the results are stated as "Chromium Total" and it is not clear whether the tests were for EP toxicity as distinguished from total metals.

10/ The amended Part A application is not in the file available to the ALJ.

in question. Elaborating on this argument, Respondent asserts that EPA's hazardous waste facility standards, closure requirements and permitting rules do not apply to existing surface impoundments which did not receive any waste after November 18, 1980 (Motion For An Accelerated Decision To Dismiss Complaint, filed July 16, 1987). Asserting that RCRA is primarily prospective, the only exception being the imminent hazard provision (§ 7003), Respondent quotes from the preamble to the initial RCRA regulations, 45 FR 33170 (May 19, 1980), providing in pertinent part:

> RCRA is written in the present tense and its regulatory scheme is prospective. Therefore, the Agency believes Congressional intent to be that the hazardous waste regulatory program under Subtitle C of RCRA is to control primarily hazardous waste management activities which take place after the effective date of these regulations. Thus, the proposed Subtitle C regulations did not by their terms apply to inactive (either closed or abandoned) disposal facilities.[11/]

11/ Additionally, Respondent quotes from the preamble of the proposed RCRA regulations (43 FR 58984, December 18, 1978) providing in pertinent part:

> RCRA is written in the present tense and its regulatory scheme is organized in a way which seems to contemplate coverage only of those facilities which continue to operate after the effective date of the regulations. The Subpart D standards and Subpart E permitting procedures are not directed at inactive facilities. Enormous technical, legal, and economic problems would arise if these standards were to be directly applied to inactive facilities and all such facilities were required to upgrade. Such an approach also does not seem equitable because of the enormous difficulty of bringing a closed facility into compliance, and because the present owner of land on which an inactive site is located might have no connection (other than present ownership of the land) with the prior disposal activities.

Respondent says that the only tool available to EPA under RCRA for environmental ills associated with past disposal activities is the imminent and substantial endangerment provision, § 7003 (Memorandum at 8). It argues that this provision is triggered by releases from old sites rather than their mere existence. Respondent cites several cases, Jones v. Inmont, 584 F.Supp. 1425 (D.C. Ohio 1984), Environmental Defense Fund, Inc. v. Lamphier, 714 F.2d 331 (4th Cir. 1983) and United States v. Price, 523 F.Supp. 1055 (D.N.J. 1981) as supporting its position. Additionally, Respondent points out that the justification for the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) (42 U.S.C. 9601) was that RCRA was not applicable to inactive and abandoned hazardous waste sites.

Respondent quotes the definition of "active portion of a site" in 40 CFR § 260.10. "Active portion means that portion of a facility where treatment, storage or disposal operations are being or have been conducted after the effective date of Part 261 of this chapter and which is not a closed portion." In turn, "inactive portion" means that portion of a facility which is not operated after the effective date of Part 261 of this chapter (40 CFR § 260.10). Respondent therefore asserts that EPA has recognized that a facility can have both an active and an inactive portion and that because no wastes were received

by or handled by the surface impoundments after November 19, 1980, the impoundments are not subject to RCRA standards or closure requirements (Memorandum at 12). For all of these reasons, Respondent says its surface impoundments are not subject to RCRA regulation and argues that the complaint should be dismissed.

Opposing the motion and arguing that it is entitled to an accelerated decision requiring Respondent to close its surface impoundments in accordance with the interim status regulations (40 CFR Part 265), Complainant asserts that Respondent has misstated the issue in this case (Memorandum In Reply to Respondent's Motion for An Accelerated Decision, filed August 21, 1987). According to Complainant, the real issue is not whether Respondent's surface impoundments are "active" or "inactive," but whether the impoundments are "storage" or "disposal" units (Reply Memorandum at 2). Referring to the definitions of storage and disposal in 40 CFR § 260.10,12/ Complainant points out that storage occurs when waste is held for a temporary period--thus implying future management of waste after the storage period is over--while disposal contemplates a final

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12/ Storage and disposal are defined as follows (40 CFR § 260.10). "Storage" means the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed of, or stored elsewhere. "Disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

disposition of the waste. Complainant says that the issue is thus whether Respondent intended to treat, i.e., separate sludge from wastewater, and temporarily store hazardous materials prior to off-site disposal or whether Respondent intended to finally and permanently dispose of the wastes on site (Reply Memorandum at 3).

EPA says that the controlling factor is the intent of the operator at the time the waste was deposited in the lagoons and that EPA has determined that Respondent intended only storage of the wastes. Thus, EPA argues that the lagoons or surface impoundments are RCRA regulated. Facts which EPA contends support this conclusion include the following: First, the impoundments served as treatment units. Wastewater from the chemical conversion coating of aluminum was pumped into the lagoons, the solids were allowed to settle out and then the wastewater was discharged either to a nearby stream or to a POTW. Second, since October 1980, a clarifying tank has served the same purpose of the lagoons. Solids and sludges are allowed to settle out and the wastewater is discharged to a POTW. The solids remaining in the tank are to be sent off-site for final disposal. Third, EPA points out that Respondent has never sought a hazardous waste permanent disposal permit from OEPA. Complainant cites an affidavit of Mr. Brian Blair, an engineer for the OEPA, which is to the effect that plans for the lagoons, approved by OEPA in 1974 and 1975,

indicated the impoundments were only for temporary storage and dewatering of sludge and that permanent disposal, approval of which has not been sought, would have required specific approval of OEPA. EPA asserts that Respondent never treated the impoundments as a location for final disposal alleging that the lagoons were never cleaned out[13/] or covered over. Respondent's letter of May 10, 1983, stated that it would fill in the lagoons as a closed disposal area.

Finally, EPA relies on certain testimony of Respondent's plant manager, Mr. A. L. Fetters, at the hearing of the prior RCRA inforcement proceeding (note 5, supra). This testimony is to the effect that the clarifying tank was not the ultimate disposal of sludge, that Respondent intended to legally dispose of the sludge and that the lagoons served essentially the same purpose as the clarifying tank. When asked, however, whether he considered the lagoons to be storage or ultimate disposal facilities, Mr. Fetters replied: "Neither." In other testimony, he referred to the lagoons as having been closed prior to promulgation of RCRA.

Complainant says that the cases cited by Respondent are either distinguishable or support Complainant's position.

13/ This is a curious argument, because the fact Respondent did not clean out the lagoons tends to support the conclusion the lagoons were for disposal rather than storage.

Complainant cites additional cases, Fishel v. Westinghouse Electric Corporation, 640 F.Supp. 442 (M.D. PA 1986) and Wheeling - Pittsburgh Steel Corp., RCRA-III-070 (Initial Decision, February 5, 1985) in support of its contention that storage of hazardous wastes generated prior to the effective date of RCRA regulations is subject to RCRA. Complainant argues that the lagoons cannot properly be characterized as other than storage units and urges that Respondent's motion for dismissal should be denied.

Replying to these contentions, Respondent insists that the lagoons were intended as disposal rather than storage units (Respondent's Memorandum In Reply, filed September 10, 1987). It emphasizes that Complainant has not provided any concrete evidence that Respondent intended to utilize the surface impoundments as storage facilities. Acknowledging that the clarifying tank allows for the same physical separation of solids from effluent (as the lagoons), Respondent asserts that the tank does not, and was not designed to, operate within the same regulatory framework as the surface impoundments (Memorandum at 3). Instead, Respondent says that it ceased using the surface impoundments and began use of the clarifying tank for the very purpose of avoiding RCRA regulation of the impoundments. As to Mr. Fetters' testimony, at the prior hearing, Respondent points to his statements to the effect the lagoons were closed before the promulgation (effective date) of RCRA.

Respondent argues that Mr. Blair's affidavit should be stricken, because his affidavit consists of his interpretation of facts and conclusions of law, which are not supported (Memorandum at 4, 5). It points out that the Ohio EPA records upon which Mr. Blair purportedly relies have not been produced and asserts that, if documents demonstrating Respondent's intent to utilize the surface impoundments for storage exist, the documents should be introduced into evidence.

Emphasizing facts which allegedly demonstrate Respondent's intent to use the surface impoundments as disposal facilities. Respondent points to the reference to abandoned lagoons in its Part A permit application and to the listing of a lagoon as a disposal site in the 1981 Industrial Waste Survey (note 8, supra). Respondent notes that its letter of May 10, 1983, relied upon by Complainant, referred to the impoundments as disposal areas and alleges that it always intended to use the impoundments as disposal areas and never intended to transport the accumulated sludge for disposal elsewhere.

Respondent asserts that EPA has not cited any authority demonstrating that a permit to dispose of treatment sludges in surface impoundments was necessary during the period Respondent's impoundments were in operation (Memorandum at 7). Disputing Mr. Blair's assertion that a permit would have been required to convert disposal units, Respondent says there was no attempt or intent to convert as the impoundments were

always considered disposal sites. Respondent argues that the cases it cited and the cases cited by Complainant support the proposition that RCRA closure requirements are not applicable to disposal activities which took place prior to the effective date of RCRA. Respondent further argues that these cases are easily distinguished from the factual situation herein and that its motion for an accelerated decision dismissing should the complaint be granted. Alternatively, Respondent argues that if resolution of the matter is determined to turn on its intent prior to November 19, 1980, then an appropriate course of action is to deny Respondent's motion, commence formal discovery and set the matter for hearing.

D I S C U S S I O N

There is no real dispute as to the applicable law, i.e., if, the deposit and collection of wastes in the lagoons constituted disposal, which activity was discontinued prior to the effective date of RCRA regulations, then the lagoons are not subject to RCRA. On the other hand, if the wastes in the lagoons were merely in storage and final disposition was to be elsewhere, such storage continuing after the effective date of RCRA, then the lagoons are subject to RCRA regulation, notwithstanding the fact additional wastes were not deposited or accumulated in the lagoons after November 19, 1980. Nothing in the

cases cited by the parties is contrary to this statement of the applicable law.

Before considering the evidence bearing on the disposal versus storage issue, a brief discussion of the status of the wastes in the impoundments is in order. As indicated previously (note 6, supra), EPA's claim that sludge from the chemical conversion coating of aluminum was a listed hazardous waste as of November 19, 1980, is based on the contention it was within the scope of Hazardous Waste No. F006--wastewater treatment sludges from electroplating operations--listed in interim final form on May 19, 1980 (45 FR 33123). No discussion is seemingly required, however, to demonstrate that electroplating and chemical conversion coating are different operations and that notice sludge from electroplating operations is considered a listed hazardous waste is not notice sludge from chemical conversion coating is so considered.14/ Section 3010(b) of the Act provides that regulations issued thereunder become effective six months after promulgation. The consequences of this conclusion would seem to be that F019, wastewater treatment sludges from the chemical conversion coating of aluminum, became a listed hazardous waste six months from the date of publication of the notice (November 12, 1980), or

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14/ See U.S. Nameplate Company, RCRA (3008) Appeal No. 85-3 (Final Decision, March 31, 1986)(description of electroplating operations in Hazardous Waste No. F006 not sufficiently specific and particularized to put generators of sludge from chemical etching operations on notice sludge from such operations was a listed hazardous waste).

May 12, 1981. Accordingly, if Complainant is to establish that Respondent violated RCRA during that period by storing hazardous waste without a permit or interim status,[15/] it seemingly must be prepared to prove the waste exceeded EP toxicity limits set forth in 40 CFR 261.24.

Discussion of the evidence need not long detain us. As Respondent points out, available documentary evidence tends to support the view that the lagoons were intended as disposal rather than storage facilities. First, the Part A permit application filed by Respondent referred to the lagoons as abandoned. Second, the 1981 Industrial Waste Survey submitted by Respondent referred to an abandoned sludge lagoon under a heading asking for information as to wastes previously disposed in a closed or inactive on-site facility. Third, Respondent's letter of May 10, 1983, described the lagoons as a "disposal area." Mr. Fetters' testimony in the prior proceeding refers to the lagoons as having been closed prior to the "promulgation of RCRA" and appears to establish only what is not disputed, i.e., that the clarifying tank serves the same purpose as the lagoons and that sludge in the tank is stored rather than disposed.

Complainant's contrary case rests on the presumption or inference it would have us draw from the fact the lagoons formerly served the same purpose as presently served by the

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15/ Although Complainant contends that Respondent's failure to achieve interim status with respect to the lagoons does not relieve it of the obligation to comply with interim status standards in 40 CFR Part 265, the Agency has acknowledged that the initial regulation created uncertainty in this regard (48 FR 52719, November 22, 1983).

clarifying tank and the affidavit of an OEPA employee, Brian Blair. While the plans and other documents cited by Mr. Blair, which allegedly support his assertion the impoundments were only for temporary storage and treatment of sludge, have not been produced, it is concluded that Complainant's evidence is sufficient to preclude an accelerated decision in Respondent's favor. Respondent's motion for an accelerated decision dismissing the complaint will be denied and Complainant will be permitted to prove, if it can, that the lagoons were storage rather than disposal facilities. To the extent Complainant's memorandum in opposition to Respondent's motion can be interpreted as a cross-motion for an accelerated decision in Complainant's favor, the cross-motion will also be denied.

O R D E R

Respondent's motion for an accelerated decision dismissing the complaint is denied. Complainant's cross-motion for an accelerated decision ordering Respondent to close the lagoons in accordance with 40 CFR Part 265 is also denied.

The parties are directed to proceed with the prehearing exchange ordered by my letter, dated January 21, 1987.16/

16/ Except for the exchange of witness lists, summaries of testimony and proposed exhibits, contemplated by Rule 22.19 (40 CFR Part 22), the Rules of Practice do not encourage discovery. The prehearing exchange directed by the ALJ is, however, intended to obviate the need for discovery.

In addition to documents previously directed to be furnished, Complainant will furnish copies of the amended Part A permit application filed by Respondent, copies of any NPDES permits and amendments thereto covering discharges to Wills Creek issued to Respondent and copies of plans, correspondence and other documents in the files of OEPA relied upon to support the contention the lagoons were intended as storage facilities. Additionally, Complainant is directed to explain fully the provisions of Ohio law allegedly requiring a permit for disposal facilities prior to the effective date of RCRA regulations.

Respondent is directed to furnish copies of any and all test reports or analyses on samples drawn from the lagoons.

It is further ordered that the prehearing exchange directed herein and in my letter, dated January 21, 1987, be filed on or before December 11, 1987. After receipt of the parties' filings, the ALJ intends to confer telephonically with counsel for the purpose of establishing a mutually agreeable date and location for a hearing.

Dated this 9th day of November 1987.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that the original of this Opinion and Order Denying Motion For An Accelerated Decision, dated November 9, 1987, in re: E.G. Smith Division, Cyclops, Corp., 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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November 9, 1987

Helen F. Handon
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