UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Lackland Training Annex San Antonio, Texas	)	Docket No. RCRA VI-311-H
	)	
	)	
Respondent	)	

ORDER ON MOTIONS

This proceeding was initiated on June 30, 1993, by a complaint issued under section 3008(a) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(a), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), and as further amended by the Federal Facility Compliance Act of 1992, Pub. Law No. 102-386 (FFCA). The complaint, as amended by order dated April 7, 1994, charged Respondent with operating a hazardous waste treatment unit without a permit or without interim status, in violation of Title 31 of the Texas Administrative Code (TAC) § 355.43(a) and section 3005(a) of RCRA, 42 U.S.C. § 6925(a).

Background

Respondent is located one mile west of Lackland Air Force Base (the Base), which is approximately nine miles southwest of downtown San Antonio, Texas. The Base has served as a training complex since 1941. In 1961, the Base acquired from the Atomic Energy Commission the parcel of property known as the Medina Annex, which became Respondent's facility, the Lackland Training Annex.

On August 15, 1980, the Base filed a Notification of Hazardous Waste Activity, pursuant to section 3010 of RCRA, identifying itself as a hazardous waste generator and as a hazardous waste treatment, storage and disposal (TSD) facility. The Base filed its Part A RCRA permit application for the storage of hazardous waste on November 19, 1980. The notification and Part A application included a description of the property known as the Medina Annex, which is now the Respondent's facility, but it did not identify any hazardous waste treatment units. However, in 1982, the Base declined to submit information for Part B of the permit application because it was no longer storing hazardous waste for longer than 90 days, and in correspondence dated May 14, 1985, related that it had therefore forfeited interim status for hazardous waste storage.

On August 23, 1989, the Base submitted a revised Part A application, identifying two open burning/open detonation (OB/OD) units, known as Site 6 and Site 7, located at the Annex, for treatment of hazardous waste. Site 6, described as presently inactive, was used for the treatment of explosive ordnance from 1966 to 1981. The Site 7 unit, described as presently active, began operation in 1982.

On or about November 8, 1990, Respondent filed Part A of the permit application, dated October 22, 1990, and a Notification of Hazardous Waste Activity as a hazardous waste generator and an operator of a hazardous waste TSD facility. According to the application, hazardous wastes coded D001, D008, F003 and F005 were stored by Respondent. Reactive hazardous waste, coded D003, was

listed as being "processed" (treated) but no treatment units or treatment activities were identified. Part B of the permit application, dated October 1990, requested a permit for treatment of hazardous waste in Sites 6 and 7. The complaint alleges that Respondent "obtained interim status with respect to the Facility." (Complaint ¶ 15.)

On January 22, 1993, an inspection of Respondent's facility was conducted, pursuant to section 3007(a) of RCRA and section 361.003 of the Texas Solid Waste Disposal Act. On April 27, 1993, the State of Texas issued Respondent a permit to process (treat) waste explosives and ordnance.

Complainant alleges that Respondent failed to obtain interim status for the operation of a thermal treatment unit. Although Site 6 was in operation on November 19, 1980, no hazardous waste treatment activities or thermal treatment units were included in the November 19, 1980 Part A permit application. The 1989 revised Part A permit application did not meet applicable regulatory requirements for changes during interim status with respect to the Site 7 treatment unit, Complainant alleges. The 1990 Part A permit application was allegedly submitted merely to transfer operational control of the Annex to Respondent. During the interim status period, a facility is prohibited from employing processes not stated in its Part A permit application.

The Site 7 unit was allegedly operated for thermal treatment of D001 (ignitable) and D003 (reactive) hazardous wastes from 1982 until 1992, when Respondent stopped sending waste munitions to the

unit. Complainant further alleges that, due to the fact that the Site 7 unit was not closed after the unit ceased receiving hazardous waste, it continued to operate. Therefore, it is alleged to be liable for operation of the Site 7 hazardous waste management unit without a permit or interim status.

The amount of civil penalty proposed for this violation is $346,500, based upon each day of operation of the unit after October 6, 1992, the effective date of the FFCA. The complaint orders Respondent to immediately cease the use of the OB/OD unit and any other unpermitted thermal treatment unit, and to prepare, submit and begin complying with closure plans for such units.

Respondent answered the complaint, denying the alleged violation, asserting several defenses, and requested a hearing. Respondent timely filed its prehearing exchange on April 4, 1994, pursuant to the prehearing exchange letter of January 24, 1994. Subsequently, Complainant moved to amend the complaint to request that the prehearing exchange be delayed until after the answer to the amended complaint was filed. Such answer was received on June 6, 1994. By an order dated August 25, 1994, the parties were ordered to complete the prehearing exchange by September 23, 1994. On August 31, 1994, Complainant filed a request to "delay pre-hearing exchange." Complainant filed its prehearing exchange, including a statement that it "withdraws its Motion to Delay Pre-hearing Exchange," on December 16, 1994.

Motions

Under date of August 31, 1994, Complainant filed a motion to strike affirmative defenses and a motion for partial accelerated decision on liability (Motion), as well as a request to delay the prehearing exchange (Request to Delay).

Opposing those motions, Respondent submitted, on September 15, 1994, a cross-motion for accelerated decision and motion to dismiss for failure to establish a prima facie case and no right to relief on the part of Complainant (Cross-motion). Under date of September 26, 1994, Respondent moved to dismiss the complaint for Complainant's default in failing to file its prehearing exchange documents pursuant to the August 25 order (Motion for Default).

Complainant responded to those pleadings on September 26, 1994 (September 26 Response). Respondent replied to the Motion for default and Cross-motion on October 6 and 12, 1994, respectively.[1/]

[1/] Respondent asserts that the Complainant's September 26 response was untimely and Complainant may be deemed to have waived any objection to the granting of the Motion, pursuant to Rule 22.16(b) of the Consolidated Rules of Practice, 40 C.F.R. Part 22. In support, it alleges that the response was not date stamped until 4:54 p.m. on the date the response was due, which is after the Regional Hearing Clerk's normal business hours of 8 a.m. until 4:30 p.m. The certificate of service of the response indicates it was filed on September 27. (Reply n. 2.) The negligibility of any untimeliness, coupled with the lack of a showing of prejudice, requires no discussion. Respondent's request for holding the Complainant to have waived any objection to the granting of the motions for accelerated decision and to dismiss is denied. *See*, Asbestos Specialists, Inc., TSCA Appeal No. 92-3 (EAB, Oct. 6, 1993)(improper to base dismissal of complaint upon waiver of objection to motion pursuant to Rule 22.16(b), where it was clear that complainant opposed the motion).

Respondent filed a supplement to its motion to dismiss for default on December 30, 1994.

DISCUSSION

I. Request to Delay and Motion for Default

Complainant requested that the prehearing exchange be delayed until its Motion for Partial Accelerated Decision is ruled upon. Grounds stated are to avoiding unnecessary duplication of effort and/or unneeded photocopying, because the resolution of the Motion will materially affect the scope of the issues to be addressed in the prehearing exchange.

The request was not ruled upon and Complainant's prehearing exchange was not filed by the date it was due, September 23, 1994. Consequently, Respondent moved for dismissal of this proceeding on the basis of Complainant's default. Respondent argues that Complainant failed to comply with the prehearing order dated August 25, 1994, and should therefore be found in default.[2/]

[2/] Respondent cites several cases finding a respondent in default, and argues that complainants should not be treated any differently. In the cases cited, unlike the present case, the respondent did not file a motion for extension of time and did not submit a prehearing exchange. In re Microsoft Systems Int'l Holdings, S.A. and Alfred Waldner Co., Docket No. FIFRA-93-H-03 (Default Order, July 15, 1994); In re Microdot, Inc., Docket No. RCRA-09-93-0002 (Default Order, June 23, 1994); In re David Webb and Prairie Estates, Docket No. [SDWA] 8-PWS-VIII-92-13 (Default Order, May 31, 1994; In re G.S. Service Corp., Docket No. V-W-90-R-07 (Order on Default, December 30, 1993); In re Dworkin Electroplaters, Inc., Docket No. RCRA-III-187 (Order on Default, December 31, 1992).

The Consolidated Rules of Practice provide as follows, with regard to default, in pertinent part: "A party may be found to be in default . . . (2) after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer . . . . Default by the complainant shall result in the dismissal of the complaint with prejudice." 40 C.F.R. § 22.17(a).

The word "may" indicates that a finding that a party is in default is discretionary with the Administrative Law Judge (ALJ). Thus, the ALJ weighs the circumstances of the case and considers whether such a finding is warranted.

Respondent admits that two of eleven items originally ordered to be provided by Complainant in the prehearing exchange are no longer germane to the proceeding. (Motion for Default) Also, Complainant provided several exhibits as attachments to its Motion prior to September 23. However, that is no reason for failing to file timely the required prehearing exchange documents. It is appropriate in such a situation to provide an explanation in the prehearing exchange statement identifying items that are no longer relevant to the case or that were already provided as attachments to another document.

Furthermore, the absence of a ruling on the motion to delay by the date the documents were due must not be assumed to constitute a granting of the motion. It is incumbent upon the movant on or before the due date either to comply with the prehearing exchange

order or to obtain a ruling in its favor from the ALJ upon the motion for extension of time.[3/]

Complainant may be commended for expressing its interest, consistent with the mission of the EPA, in conserving paper and avoiding unnecessary photocopying. However, it is necessary to submit timely the documents, statements and explanations required by a prehearing exchange order, unless a motion for extension of time has been granted. Complainant's failure to do so, its disinclination to provide Respondent with documents it considers "discovery" (September 26 Response at 19), and its suggestion that the Presiding Officer "should follow the guidelines of 40 C.F.R. § 22.19(a)(4) and require an exchange that is designed to avoid unnecessary proof" (September 26 Response at 17), suggest a casual attitude toward compliance with orders of the ALJ.[4/]

Nevertheless, in the circumstances of this case, including the ample margin of time between the filing of the motion to delay and the due date, the fact that a ruling on the motion to delay was not issued before that date, and the fact that a prehearing exchange was eventually filed, a finding of default on the part of

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[3/] A telephone call to the ALJ's secretary as the due date becomes imminent would be an appropriate method of obtaining an oral ruling on a motion for extension of time in the event such a ruling has not been received.

[4/] It is observed that in federal court, discovery is strongly favored before summary judgment is granted. Bryant v. O'Connor, 671 F.Supp. 1279, 1282 (D. Kan. 1986), *aff'd*, 848 F.2d 1064 (10th Cir. 1988); Miller v. United States, 710 F.2d 656, 666 (10th Cir. 1983).

Complainant is unwarranted. Accordingly, Respondent's Motion for Default will be denied.

II. Motion to Strike

As a general matter, motions to strike affirmative defenses are not favored and will be denied "unless the legal insufficiency of the defense is 'clearly apparent' . . . . The underpinning of this principle rests on a concern that a court should refrain from evaluating the merits of a defense where . . . the factual background of a case is largely undeveloped." Cipollone v. Liggett Group, Inc., 789 F.2d 181, 188 (3rd Cir. 1988); *on remand*, 649 F.Supp. 283, *motion denied*, 802 F.2d 658, *on remand*, 649 F.Supp. 664, *cert. denied*, 107 S.Ct. 907. If the sufficiency of the defense depends upon disputed questions of law or fact, then a motion to strike will be denied. Oliner v. McBride's Industries, Inc., 106 F.R.D. 14, 17 (E.D. Mo. 1981). A motion to strike will not be granted "unless it appears to a certainty that the plaintiffs will succeed despite any state of facts which could be proved in support of the defense." William Z. Salcer v. Envicon Equities, 744 F.2d 935, 939 (2d Cir. 1984).

Complainant moved to strike all of Respondent's sixteen defenses listed in its answer, denominated by Complainant as "affirmative defenses," on grounds that they are insufficient as a matter of law, immaterial, and/or frivolous. Each such defense is listed and separately discussed below.

1. Burning and detonation of military munitions is not subject to RCRA requirements until regulations are promulgated defining when munitions become hazardous waste.

This defense is based upon section 3004(y) of RCRA which states in pertinent part, "Not later than 6 months after October 6, 1992, the Administrator shall propose . . . regulations defining when military munitions become hazardous waste for purposes of this subchapter." Final regulations have not yet been promulgated pursuant thereto.

Complainant asserts that the defense is "patently frivolous," and insufficient as a matter of law, arguing that this provision does not indicate or create any exemption from RCRA for military munitions. Open burning and open detonation of military explosives have been regulated under RCRA since May 19, 1980, when 40 C.F.R. Part 265 Subpart P was promulgated, governing thermal treatment of hazardous waste. The regulation, 40 C.F.R. § 265.382, provides in part, "Waste explosives include waste which has the potential to detonate and bulk military propellants which cannot safely be disposed of through other modes of treatment."

This defense is neither insufficient as a matter of law nor frivolous and will not be stricken. The parties agree that insufficiency means that the defense could not be valid under any set of facts proved. If the facts call into question when Respondent's military munitions became hazardous waste, then the defense may be valid. The facts are reserved for analysis below, in the discussion of the motions for accelerated decision.

2. EPA failed to obtain consultation between the Agency and the Administrator as mandated by the FFCA, and failed to promulgate rules to implement procedures for such consultation.

Respondent refers to the provision of section 6001(b)(2) of RCRA, which states, "No administrative order issued to such [federal facility] shall become final until [it] has had the opportunity to confer with the Administrator."

Complainant asserts that the second defense is irrelevant to liability and immaterial. It argues that EPA has interpreted the provision to require consultation only after all other administrative measures have been completed, including appeal to the Environmental Appeals Board. (Motion, attachment 1, Memorandum, dated July 6, 1993, from Steve Herman, Assistant Administrator for Enforcement, "Final Enforcement Guidance on Implementation of Federal Facility Compliance Act," 3-5, 58 Fed. Reg. 49044 (September 12, 1993)). EPA is in the process of revising 40 C.F.R. Part 22 to include a provision reflecting such an interpretation (Motion, attachment 2, Memorandum dated May 27, 1994 from Sally M. Dalzel).

This interpretation has not yet become a final rule, so it is not binding. However, it has been announced in the Federal Register, and is in the process of becoming a final rule. When an agency has only expressed its interpretation informally at the time an interpretation becomes an issue in an adjudicative proceeding, the fact that it is not binding should not entitle an adjudicator to tell the agency what view to adopt. It has been suggested that

a determination should be made merely as to whether the interpretation is invalid on its face, so a decision not to strike down the informal interpretation does not invest it with the force of law. Robert A. Anthony, Which Agency Interpretations Should Bind Citizens and Courts?, Yale J. on Reg. 1, 40-42 (1990); Ayuda v. Thornburgh, 880 F.2d 1325, 1343 (D.C. Cir. 1989) ("[A] court should not interpose its own interpretation of the term *before* the agency has an opportunity to consider the issue and fix its own statutory construction.")

The interpretation in the memorandum dated July 6, 1993, does not appear to be invalid on its face. Therefore, the motion to strike will be granted with respect to the second defense.

3. EPA failed to give notice of deficiency of the Part A permit application pursuant to 40 C.F.R. § 270.70.

Complainant asserts that this defense is also patently frivolous and insufficient as a matter of law. Section 270.70(b) states, in part:

> Failure to qualify for interim status. If EPA has reason to believe upon examination of a part A application that it fails to meet the requirements of 270.13 [required contents of Part A applications], it shall notify the owner or operator in writing of the apparent deficiency. Such notice shall specify the grounds for EPA's belief that the application is deficient. The owner or operator shall have 30 days . . . to explain or cure the alleged deficiency . . . . If, after such notification and opportunity for response, EPA determines that the application is deficient it may take appropriate enforcement action.

Complainant argues that the provision only applies to irregularities on the face of the Part A application and that Respondent's deficiency was latent. The violation could not have been determined from the facts which were included in the Part A application.

Respondent points out that section 270.13 requires the applicant to supply information regarding past applications and some historical information about the facility. See 40 C.F.R. § 270.13(g), (h) and (k). The facts upon which Complainant bases the alleged violation could have been determined from a comparison of the 1989 or 1990 Part A applications with the application filed in 1980, or with other documents the base provided over the years, Respondent asserts. The 1989 application included a cover letter describing the Site 7 OB/OD unit as "active," the original 1980 Part A did not mention thermal treatment, and the revised 1989 Part A added thermal treatment.

Respondent's argument overlooks the fact that the TWC did notify Respondent of deficiencies in its Part A and Part B permit applications. For example, with regard to Part A, Respondent was directed to provide permit information for the Annex and delete that for the Base. For Part B, Respondent was directed to update the status for Sites 6 and 7. (Cross-motion, exhibit S). Respondent failed to respond. (Cross-motion, exhibit T.)

Furthermore, the alleged violation of operating Site 7 without a permit or interim status is based upon Respondent's failure to submit timely notification under section 3010(a) of RCRA, and Part

A of a permit application, for Site 7 prior to the date it began operating. It did not arise from a deficiency in the Part A application as submitted in 1990. Therefore, Respondent's defense number three is insufficient as a matter of law as a defense to liability and will be stricken.

4. The complaint fails to state a claim upon which relief may be granted.

Complainant asserts that this defense is frivolous and insufficient as a matter of law, on the basis that the complaint fully complied with the required elements of a complaint under 40 C.F.R. § 22.14(a). As to a defense analogous to Federal Rule of Civil Procedure (FRCP) 12(b)(6), Complainant argues that the facts alleged in the complaint, if true, constitute the alleged violation, that the complaint must be liberally construed in its favor and all facts alleged regarded as true for purposes of the motion.

Respondent claims technical defects in the complaint. Specifically, it does not contain a sufficient statement explaining the reasoning behind the proposed penalty, and it fails to incorporate by reference paragraphs 17 through 21 of the complaint into Count I.

Complainant's statement in the complaint concerning the penalty is essentially a listing of the factors required to be considered under RCRA § 3008(a)(3), along with the factors "threat of harm to public health or the environment, Respondent's ability to pay and the 1990 RCRA penalty policy." The penalty policy

condones such pleading as sufficient, as it cites a similar paragraph and declares that enforcement personnel may use such language in the complaint. (1990 RCRA Penalty Policy at 7). Such a declaration is certainly not binding on the ALJ. Failure to provide the factual basis for the violations alleged as required by Consolidated Rule 22.14(a)(3), and failure to provide an adequate statement of the reasoning behind the proposed penalty, as required by Rule 22.14(a)(5), have resulted in dismissal of a complaint. In re BCM Engineers, Inc., Docket No. TSCA-III-694 (Order Granting Motion to Dismiss, June 24, 1994).

However, in such cases, leave may be granted to amend the complaint. Id. The general principle is that mere technical defects in pleading should not prevent a disposition of the proceeding on the merits. Procedural irregularities in administrative pleadings will not invalidate them unless the irregularities were so serious as to prejudice a party. In re Bethenergy (Bethlehem Steel Corporation), Appeal No. CAA (120) 90-01 (Final Decision, June 20, 1990) at 17, n. 6, Order on Motion for Reconsideration (February 10, 1992) n. 2, p. 20; E.G. Usery v. Marquette Manufacturing Co., 568 F.2d 902 (2nd Cir. 1977).

Complainant's motion to strike defense number four will be granted. Even if the amount of penalty proposed was not properly explained or calculated, such deficiency is curable and does not negate liability. To prolong an already complex and lengthy proceeding by dismissing the complaint and allowing time for the complaint to be amended is not justified in this case.

5-8. Laches, estoppel, detrimental reliance.

> EPA is estopped from claiming that Respondent was in violation of RCRA requirements because the Texas Water Commission (TWC), the State agency empowered to enforce the RCRA permit program, acknowledged and communicated to Respondent that it had interim status to operate Site 7 as a hazardous waste treatment facility.
>
> EPA is estopped from claiming that Respondent was in violation of RCRA requirements because Respondent reasonably relied to its detriment upon the representations of TWC that it had interim status to operate Site 7 as a hazardous waste treatment facility.
>
> [In] August and September 1992, EPA informed Respondent it never had interim status to operate an OB/OD unit. In the event Respondent was required to perform any duties relating to interim status or loss of interim status after August 1992, EPA is estopped from claiming Respondent was in violation of such duties because Respondent reasonably relied to its detriment upon these representations.

Complainant argues that Respondent failed to inform TWC in its revision to the 1989 Part A application of its forfeiture of interim status, and this negates any equitable estoppel claim. (Complainant's prehearing exchange, exhibits 49, 51.) Complainant further argues that the estoppel defenses are legally insufficient to excuse liability, as only certain statutory criteria determine whether interim status is met, not any statements by TWC or EPA. Affirmative misconduct on the part of the government must be shown to invoke estoppel against the United States, and any acquiescence by the State in Respondent's illegal operation of the OB/OD units does not provide a basis for estoppel, Complainant argues, citing to federal and administrative case law. The general rule is that the United States is "neither bound nor estopped by the acts of its officers or agents in entering into an arrangement to do or cause

to be done what the law does not sanction or permit." United States v. Tull, 615 F.Supp. 610, 624 (D.C. Va. 1983). The government is not subject to the defense of laches in enforcing its rights, Complainant adds, with supporting case law.

Respondent points out that it finds no case law on the point of applying such defenses where both parties are federal agencies. As a matter of first impression, it is premature to strike these as being insufficient as a matter of law.

No rationale has been presented for treating an assertion of estoppel or laches against the government by another federal agency any different than if it was asserted by a non-government entity. However, to the extent that Respondent may present facts, such as affirmative misconduct, to support its claims of estoppel,[3] and that these facts may be relevant to the determination of any penalty, these defenses will not be stricken. Complainant's motion will be denied with respect to defenses numbered five through eight.

9. The proposed penalty is excessive.

Complainant's motion to strike this defense will be denied. Issues relating to the penalty should not be stricken because such issues are more properly considered after discovery and hearing on

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[3] This issue will be addressed below, in the discussion of the motions for accelerated decision, addressing the question of whether Respondent had authorization to operate Site 7 under interim status.

the merits. The ALJ cannot on the basis of the record as it now stands declare that the defenses regarding the penalty are immaterial, frivolous or insufficient as a matter of law. See, Wehner v. Syntex Corp., 618 F.Supp. 37, 38 (D.C. Mo. 1984) (Defendant's motion to strike various elements of plaintiff's claim for relief under the Comprehensive Environmental Response, Compensation and Recovery Act (CERCLA) was denied because the issues were "more properly presented to the court after discovery and trial on the merits.")

10. Upon information and belief, noncompliance with the Paperwork Reduction Act.

Noncompliance by a government agency with the requirements of the Paperwork Reduction Act (PRA) prohibits it from subjecting a person "to any penalty for failing to maintain or provide information to any agency." 44 U.S.C. § 3512.

Complainant argues that this defense is insufficient as a matter of law. The violation that Respondent is charged with is not a failure to maintain or provide information to the agency, but operating a hazardous waste management unit without a permit or interim status. Furthermore, the PRA governs regulatory, not statutory, requirements to maintain or provide information to an agency. Operation without a permit or interim status is a violation of both a statutory requirement (section 3005 of RCRA) and a regulatory requirement, so the violation at issue is unaffected by the PRA. Complainant cites United States v. Great

Lakes Castings Corp., No. 1:92-CV-645, 1994 US Dist LEXIS 5745 (W.D. Mich., March 3, 1994).

Respondent merely argues that it should have the opportunity for discovery on this defense, and that it relates to the penalty and as such should not be stricken.

If the requirement which was allegedly violated is statutory, rather than regulatory, the PRA does not bar enforcement. United States v. Wunder, 919 F.2d 34, 38 (6th Cir. 1990). If a violation is both statutory and regulatory, a penalty for the statutory violation is not barred simply because a penalty for violation of the regulation is precluded by the PRA. In re Tower Central, Inc., Docket No. CAA-III-030 (Order Ruling on Motion for Reconsideration, December 29, 1994). As the Court of Appeals for the Ninth Circuit stated in United States v. Hicks, 947 F.2d 1356, 1359 (9th Cir. 1991):

> Where an agency fails to follow the PRA in regard to an information collection request that the agency promulgates via regulation, at its own discretion, and without prior express mandate from Congress, a citizen may indeed escape penalties for failing to comply with the agency's request. . . . But where *Congress* sets forth an explicit statutory requirement that the citizen provide information . . . that is another matter. This is a legislative command, not an administrative request.

The question that arises here is whether the requirement to have a permit or interim status for operating a hazardous waste management unit is statutory or regulatory. Section 3005 of RCRA does not directly set forth substantive requirements regarding permits. Among other things, it authorizes the Administrator of

EPA to promulgate regulations requiring owners and operators to have a permit, sets forth information (to be included in regulations) required in permit applications, authorizes the Administrator to issue permits, and sets forth conditions for interim status. It has historically been considered an enabling provision rather than substantive. Jones v. Inmont Corp., 584 F. Supp. 1425 (S.D. Ohio 1984).

However, after section 3005 of RCRA was amended, the court in Great Lakes Castings stated, "Although the issue is not without doubt, it would appear that both Congress and the courts now interpret RCRA as creating substantive requirements," *citing* U.S. v. Production Plated Plastics, Inc., 742 F.Supp. 956 (W.D. Mich 1990); EPA v. Environmental Waste Control, Inc., 917 F.2d 327 (7th Cir. 1990). "As such I am satisfied that under RCRA the duty to obtain a permit is statutorily created," the court continued, concluding that "the PRA does not provide a refuge to Great Lakes for this statutorily imposed duty." United States v. Great Lakes Castings Corp., 1994 US Dist LEXIS 5745 at *18-19.

The complaint alleges a statutory violation, section 3005(a) of RCRA, and a violation of the state regulations, 31 TAC § 335.43(a). It is concluded that no dispute of law exists as to this issue, and no set of facts could be shown to support defense number ten. Therefore Complainant's motion to strike defense number ten will be granted.

11. Respondent acted in good faith at all times to ensure the safety and health of the public and compliance with federal state and local laws.

As Complainant points out, "good faith" is not a defense to liability. However, "good faith efforts to comply with applicable requirements" is required to be taken into account in the assessment of a penalty. Because this defense may bear on the amount of any penalty, it will not be stricken, for the reasons noted in the discussion above of defense number nine.

12-13. EPA exceeded its authority by enforcing portions of the authorized State hazardous waste program.

EPA has no authority to enforce the authorized State program because TWC and its successor responsibly administered the hazardous waste program.

Complainant maintains that the authorization of Texas to administer the hazardous waste management program does not divest EPA of authority to bring an action to enforce RCRA. Complainant asserts that it has given the required notice to the State and provided a copy of the notice in its prehearing exchange, exhibit 54. Respondent contends that the notice is insufficient because it refers to Lackland Air Force Base and the complaint refers to Lackland Training Annex.

However, this distinction is insignificant, especially in view of Respondent's references to Lackland Air Force Base as the "facility" which includes the Lackland Training Annex, and the fact that Lackland AFB, on behalf of the Annex and the Base, submitted the Part A application on November 19, 1980, and the Part B

application in October 1990 (see, e.g. Cross-motion at 7, exhibit L p. I-1, I-2; Reply at 21).

Respondent argues that EPA may maintain the authority to enforce the Texas hazardous waste program by incorporating it into 40 C.F.R. Part 272, but points out that EPA has specifically declined to do so. 59 Fed. Reg. 17273, 17275 (April 12, 1994). According to Respondent, until the Texas program is incorporated into Part 272, EPA cannot enforce requirements of the State program. (Reply at 29-30.)

Respondent has not provided any authority for asserting that in order for EPA to enforce the requirements at issue in this proceeding (RCRA § 3005(a) and 31 TAC § 335.43(a)), EPA must first incorporate the State program into Part 272. It is true that only the sections of Part 272 which incorporate State programs include statements that EPA retains the authority to take enforcement actions, and that the State requirements are made a part of the hazardous waste management program under Subtitle C of RCRA. *E.g.*, 40 C.F.R. §§ 272.400(c), 272.401(a), 272.650(c), 272.651(a).

However, this does not lead to the conclusion that requirements of the State programs, which are not incorporated into Part 272, cannot be enforced by EPA. Neither RCRA nor the applicable regulations set forth such a requirement for EPA enforcement. Indeed, in the Final Rule granting final authorization to Texas to operate its hazardous waste program, EPA announced that, while Texas has primary enforcement responsibilities, EPA retains the right to take enforcement actions

under section 3008 of RCRA. 49 Fed. Reg. 48300, 48305 (December 12, 1984). *See also*, 55 Fed. Reg. 21383, 21385 (May 24, 1990); 57 Fed. Reg. 45719, 45720 (October 5, 1992).

Referring to the pertinent statutory provision, section 3008(a)(2) of RCRA provides, in part:

> 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 . . . 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 question is whether "requirement of this subchapter" (RCRA Subtitle C) includes requirements of EPA-approved State hazardous waste programs. Final Decisions of the EPA have consistently held that it does, even where the state programs are not incorporated in Part 272. In re Southern Timber Products, Inc., d/b/a Southern Pine Wood Preserving Company, and Brax Batson, RCRA Appeal No. 89-2 (Final Decision, November 13, 1990), slip op. at 9-11 (violations of hazardous waste program of State of Mississippi, authorized by EPA but not codified in 40 C.F.R. Part 272 (see Subpart Z)); In re CID-Chemical Waste Management of Illinois, Inc, RCRA Appeal No 87-11 (Final Decision, August 18, 1988), slip op. at 4-6 (violations of hazardous waste program of Illinois, authorized by EPA but not codified in Part 272 until after the Final Decision was issued (54 Fed. Reg. 37651 (September 12, 1989)); In re Martin Electronics, RCRA Appeal No. 86-1 (Order on Sua Sponte Review, June 22, 1987) (violations of Florida hazardous waste program, authorized by EPA but not codified in Part 272 (see subpart K)). This position has

been supported by federal courts. United States v. T & S Bronze Works, Inc., 681 F.Supp. 314, nn. 1, 3 (D.C. S.C. 1988), *aff'd, vacated in part and remanded*, 865 F.2d 1261 (4th Cir. 1988) (violations of South Carolina hazardous waste program, authorized by EPA but not codified in Part 272 (see subpart PP)); Wyckoff v. EPA, 796 F.2d 1197, 1200-01 (9th Cir. 1986) (violations of EPA-approved hazardous waste program in State of Washington, not codified in Part 272 (see subpart WW)); United States v. Conservation Chemical of Illinois, Inc., 660 F.Supp. 1236, 1244 (N.D. Ind. 1987).

No genuine dispute of law has been demonstrated or found with regard to these issues. Thus, the defense that EPA has exceeded its authority by attempting to enforce the TAC is insufficient as a matter of law.

That TWC and its successor responsibly administered the State program has no bearing on EPA's authority to bring this action. The situation which could bring this issue into question would be if the TWC or its successor had previously taken action against Respondent.[6] Here, the State has not taken any such action. Accordingly, Complainant's motion to strike the twelfth and thirteenth defenses is granted.

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[6] Cf. In re The Beaumont Company, Docket No. RCRA-III-238 (Order Granting In Part Motion For Accelerated Decision, October 20, 1994) (partial dismissal based on adjudication of identical issues by West Virginia WQB), presently on interlocutory appeal to the EAB.

14-15. Respondent had no duty to close OB/OD Site 7.

Respondent complied with a requirement to submit a closure plan for OB/OD Site 7 by submitting a closure plan for Site 7 with its Part B application in October 1990 and by subsequently submitting revisions to the closure plan when requested by TWC.

Complainant's position is that Respondent forfeited interim status for its facility because it withdrew its Part A application. At that point, all of Respondent's existing RCRA units were required to have final closure completed within 180 days, under 40 C.F.R. § 265.113(a). Any action taken in 1990 could not fulfill that requirement.

These defenses go to the heart of the controversy. The motion to strike these defenses will be denied.

16. EPA has no authority to assess a civil penalty for activities, conduct or omissions occurring prior to the effective date of the FFCA.

Complainant contends that this defense only refers to assessment of a penalty during a certain time period and does not assert a defense to liability. Complainant points out that while the alleged violation began when Respondent first placed hazardous waste into the unit, penalties were assessed by EPA only for the daily violations that occurred after the effective date of the FFCA.

As Respondent contends, this defense may bear on the appropriateness of the proposed penalty. For reasons stated in the discussion of defense number nine above, Complainant's motion to strike defense number sixteen will be denied.

III. Cross-motions for Accelerated Decision

The general issue in this case is whether Respondent was required to have interim status or a permit for operating the Site 7 OB/OD unit under applicable law, and whether Respondent may be held liable for failure to do so. Specifically, the issues to be addressed are (1) whether the explosives burned and/or detonated in Site 7 are hazardous wastes; (2) if so, whether Respondent had authorization to operate Site 7 under interim status during relevant time periods; and (3) if not, whether the fact that Respondent ceased treatment in Site 7 prior to enactment of the FFCA bars liability. These questions will be discussed separately below, in terms of whether genuine issues of material fact exist and in terms of the issues of law.

According to Complainant, the undisputed facts establish that the Site 7 OB/OD unit was used to burn and/or detonate hazardous waste, that the Site 7 unit did not qualify for interim status, and that the Respondent was not issued a permit to operate the unit until 1993.

Respondent asserts that Complainant has not established a prima facie case because it has not shown that military munitions burned in Site 7 are hazardous waste, that interim status was lacking, or that Respondent was required to close Site 7.

Although the parties allege the absence of genuine issues of material fact and entitlement to judgment as a matter of law, the record must be reviewed to determine whether any such issues of fact exist with regard to the elements of Complainant's case and to

the defenses of the Respondent on the question of liability for the violation alleged in the complaint. Respondent's defenses numbered nine, eleven and sixteen would not bar liability as a matter of law, but may be relevant to the penalty question, as noted above. Defenses numbered one, five, six, seven, eight, fourteen and fifteen remain, and will be discussed below.

A. Whether the explosives burned and/or detonated in Site 7 are hazardous wastes

In order for a material to be classified as hazardous waste under RCRA, it must first be classified as a solid waste.[7/]

Respondent's position is that EPA has no authority to regulate the thermal treatment of military munitions. They are not solid wastes, Respondent argues, under the definition of "solid waste" in RCRA section 1004(27):

> any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under [the Clean Water Act] or source, special nuclear, or byproduct material as defined by the Atomic Energy Act . . . .

Respondent focuses on the fact that the word "including" is followed by the only forms that matter can take (i.e., solid,

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7/ "The term 'hazardous waste' means a solid waste, or combination of solid wastes . . . ." RCRA § 1004(5).

liquid, semi-solid or contained gaseous), arguing that the definition provides an exclusive enumeration of solid waste sources.

The definition under the State program is similar. It adds the word "rubbish," and material resulting from "municipal" operations and "institutional" activities. Tex. Health & Safety Code Ann. § 361.003(38) (Vernon 1992). Respondent asserts that material resulting from military activities is not included, citing language from a federal court decision: " . . . the scope of this definition [RCRA § 3004(27)] in referring to 'solid waste,' a term of art under [RCRA], excludes *military* hazardous wastes from its coverage." Barcelo v. Brown, 478 F.Supp. 646, 669 (D.P.R. 1979), *aff'd*, 643 F.2d 835 (1st Cir. 1981), *cert. denied*, 454 U.S. 816. Respondent also points to EPA's decision not to include military firing ranges and impact areas as "solid waste management units" wherein EPA stated, "[t]here is a strong argument that unexploded ordnance fired during target practice is not discarded material which falls within the regulatory definition of 'solid waste.'" 55 Fed. Reg. 30798, 30809 (July 27, 1990).

Respondent also emphasizes Complainant's failure to comply with the requirement in section 3004(y) (section 107 of the FFCA) for EPA to promulgate regulations "identifying when military munitions become hazardous waste for purposes of [RCRA]" by

April 6, 1993.[8/] Respondent argues that this provision would be unnecessary if military munitions had always been subject to RCRA. Waiver of sovereign immunity for thermal treatment of military munitions has not been resolved, and must be construed in favor of the sovereign, Respondent adds.

Distinguishing and disagreeing with language in the Barcelo opinion, Complainant argues that the language of RCRA section 1004(27) is broadly written and has been expansively interpreted to include any materials which are discarded, absent an explicit exemption. While military munitions are not specifically enumerated, they are not excluded. Also, the fact that exemptions are created in section 1004(27) for domestic sewage, point source and Atomic Energy Act nuclear-related material indicates that Congress intended broad jurisdiction over discarded material. Complainant emphasizes the distinction of some hazardous materials which are not regulated under RCRA prior to being discarded and those which are regulated because they are discarded. Also, Respondent admitted that the Site 7 unit is used solely for destruction and/or disposal of discarded munitions and other materials, including flares, aircraft starter cans and a wide range of explosives.

[8/] Section 3004(y) states as follows, in pertinent part: "Not later than 6 months after October 6, 1992, the Administrator shall propose, after consulting with the Secretary of Defense and appropriate State officials, regulations identifying when military munitions become hazardous waste for purposes of this subchapter . . . . Not later than 24 months after such date, and after notice and opportunity for comment, the Administrator shall promulgate such regulations."

Complainant cites the federal regulatory definition of "solid waste" in 40 C.F.R. § 261.2, in pertinent part:

> (a)(1) A *solid waste* is any discarded material that is not excluded by § 264.4(a) . . . or that is not excluded by variance . . . .
> (2) A *discarded material* is any material which is:
> (i) *Abandoned*, as explained in paragraph (b) of this section . . . .
> (b) Materials are solid waste if they are *abandoned* by being:
> (1) Disposed of; or
> (2) Burned or incinerated . . . .

Complainant reasons that the explosives are materials which were abandoned by being burned or incinerated, so they are solid wastes. Complainant asserts that the munitions treated in Site 7 also meet the definition of a reactive hazardous waste, which is assigned EPA hazardous waste number D003, under 40 C.F.R. § 261.23.

Complainant contends that military munitions are not exempt from RCRA, as section 6001 specifically requires federal facilities to comply with requirements for hazardous waste disposal in the same manner as any person subject to such requirements. The open burning of military munitions was specifically referenced in the May 19, 1980, Federal Register announcement of the regulations being promulgated under RCRA. 45 Fed. Reg. 33217 (May 19, 1980).

As to section 3004(y) of RCRA, Complainant argues that Congress could not possibly have ordered EPA to promulgate regulations for a category of materials which is not currently within the definition of solid waste. Complainant also argues that, if Congress intended to divest EPA of jurisdiction over military munitions, it could have explicitly done so or ordered the

Department of Defense to regulate such materials. This is even more clearly in order where EPA has interpreted military munitions to be hazardous waste, and Congress has amended and reauthorized RCRA on several occasions. (September 26 Response, attachments 1-9).

In reply, Respondent points out a Federal Register notice wherein EPA stated that military firing ranges and impact areas are not "solid waste management units" and unexploded ordnance is not "solid waste." The notice also acknowledges that the Barcelo case "has suggested that materials resulting from uniquely military activities engaged in by no other parties fall outside the definition of solid waste . . . ." 55 Fed. Reg. 30798, 30809 (July 27, 1990). Respondent disagrees that the nine attachments to the September 26 Response show that EPA has consistently interpreted military munitions to be hazardous waste. Respondent notes the distinctive treatment given to civilian munitions and military munitions, pointing out that materials left on a commercial firing range are governed by RCRA, but munitions remaining on a military firing range are not. Connecticut Coastal Fisherman's Association v. Remington Arms Co., Inc., 989 F.2d 1305 (2d Cir. 1993); 55 Fed. Reg. at 30809.

Respondent points out EPA's determination in a letter, dated November 30, 1984, that bullets are not hazardous wastes because they do not meet the test for reactivity. (Respondent's prehearing exchange, exhibit Y; September 26 Response, attachment 1). Additionally, Respondent avers that Complainant has not

specifically pled nor demonstrated that the munitions treated in Site 7 meet that test, i.e. reactivity to certain heat and shock conditions. According to Respondent, Complainant has not demonstrated that the munitions at issue are hazardous wastes. Also, this is a material fact which is in dispute, Respondent asserts. Respondent adds that the fact that Congress adopted section 3001(y) and did not amend section 1004(27) indicates adoption of the judicial interpretation in Barcelo and the Federal Register notice, 55 Fed. Reg. 30789.

As to the definition of "solid waste" in RCRA section 1004(27), Respondent's interpretation has no merit. It is clear that wastes resulting from military activities are not to be excluded.

The statutory definition does not indicate an exclusive list of sources of solid waste. Solid waste is not limited to material resulting from "industrial, commercial, mining, and agricultural operations" and "community activities." Respondent's argument that the preceding words, ". . . discarded material, including solid, liquid, semisolid, or contained gaseous material" necessarily renders the list of sources exclusive is not persuasive. According to Respondent's logic, an analogous but simpler phrase, "discarded material, including every kind of material which comes from factories and farms but does not include nuclear material" would necessarily exclude discarded material from any other source.

Courts have repeatedly interpreted the word "include" or "including" to be a term of enlargement and not a word of

limitation. Cruz v. Chesapeake Shipping, 932 F.2d 218, 225 (3d Cir. 1991); Exxon Corp. v. Lujan, 730 F.Supp. 1535, 1545 (D. Wyo. 1990), *aff'd*, 970 F.2d 757 (10th Cir. 1992) ("The use of the word 'includes' rather than 'means' in a definition indicates that what follows is a nonexclusive list which may be enlarged upon"); Chemehuevi Indian Tribe v. California State Board of Equalization, 757 F.2d 1047, 1054 (9th Cir. 1985); Pfizer, Inc. v. Government of India, 434 U.S. 308, n. 9 (1978) (definition with the word "include" is inclusive rather than exclusive); Highway & City Freight Drivers, Dockmen & Helpers, Local Union No. 600 v. Gordon, 576 F.2d 1285, 1289 (8th Cir. 1978), *cert. denied,* 439 U.S. 1002; American Fed. of Television & Radio Artists, Washington Baltimore Local AFL-CIO v. N.L.R.B., 462 F.2d 887, 889-90 (D.C. Cir. 1972); Automatic Devices Corp. v. Sinko Tool & Manufacturing Co., 314 U.S. 94, 99-100 (1941) ("the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle"), *citing*, Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 189 (1941); Helvering v. Morgan's Inc., 293 U.S. 121, 125 (1934); American Surety Company of New York v. Marotta, 287 U.S. 513, 517 (1932) ("In definitive provisions of statutes and other writings, 'include' is frequently, if not generally, used as a word of extension or enlargement rather than one of limitation or enumeration"); City of New York v. Exxon Corp., 697 F.Supp. 677, 684 (S.D.N.Y. 1988); Mayor & Board of Aldermen v. Drew Chemical Corp., 621 F.Supp. 663, 666 (D. N.J.

1985); U.S v. Thevis, 474 F.Supp. 134, 138 (N.D. Ga. 1979). *But cf.* Minnesota ex rel. Pearson v. Probate Court of Ramsey County, Minn., 309 U.S. 270, 273-4 (1939) (Use of word "include" defined the entire class of persons to whom the statute applies, not a portion of a larger class, where Court opined it "should not adopt a construction of the provision which might render it of doubtful validity.")

It has been noted:

> A term whose statutory definition declares what it "includes" is more susceptible to extension of meaning by construction than where the definition declares what a term "means." It has been said the word "includes" is usually a term of enlargement, and not of limitation . . . It, therefore, conveys the conclusion that there are other items includeable, although not specifically enumerated . . . .

Federal Election Commission v. Massachusetts Citizens for Life, 769 F.2d 13, 17 (1st Cir. 1985), *aff'd*, 479 U.S. 238 (1986) (quoting 2A N. Singer, Sutherland Statutes and Statutory Construction 133 (4th ed. 1984) (quoting Argosy v. Hennigan, 404 F.2d 14, 20 (5th Cir. 1968)).

The conclusion that Congress intended the word "including" to indicate enlargement rather than limitation, is strengthened by the fact that exclusions are enumerated in the definition. United States v. Newman, 982 F.2d 665 (1st Cir. 1992) (enumeration of

specific exclusions from operation of the statute is an indication that the statute should apply to all cases not specifically excluded); In re Gerwer, 898 F.2d 730 (9th Cir. 1990) (express enumeration of exceptions indicates that other exceptions should not be implied); Palmer v. United States, 472 F. Supp. 1068 (D. Hawaii 1990), *aff'd*, 945 F.2d 1134; U.S. v. Goldbaum, 879 F.2d 811 (10th Cir. 1989). Therefore, an exclusion for munitions or other wastes resulting from military activities is not indicated in the definition of "solid waste" in section 1004(27) of RCRA.

In addition, the EPA's broad interpretation of "solid waste" in 40 C.F.R. § 261.2, and the letters submitted with the September 26 Response (attachments 1-9), which contain relevant interpretations and applications, lend support to this conclusion.

The Barcelo v. Brown case predates both the regulatory definition of solid waste and the regulations promulgated on May 19, 1980. The section of those regulations which addresses open burning and waste explosives, 40 C.F.R. Part 265 Subpart P, and the preamble discussion, specifically reference thermal treatment of military explosives and the involvement of the Department of Defense:

> [a] ban on open burning of hazardous wastes was contained in the General Facility Standards section of the proposed regulations. . . . Comments received on the proposed standard centered around the military's need to dispose of explosives in the open. The Agency agrees that open burning and open detonation are currently the only alternatives for disposal of most munitions, and thus a modified and more detailed version of the proposed variance for waste explosives has been retained in the final rules.
> * * * *

> The Agency has decided to allow open burning and open detonation of waste explosives during the interim status period, provided that it is conducted at minimum distances from the properties of others. These minimum separation distances were developed and published by the Department of Defense. * * * * (45 Fed. Reg. 33217 (May 19, 1980) (Complainant's prehearing exchange, exhibit 73).
>
> § 265.382 **Open burning; waste explosives.**
> Open burning of hazardous waste is prohibited except for open burning and detonation of waste explosives. Waste explosives include waste which has the potential to detonate and bulk military propellants which cannot safely be disposed of through other modes of treatment. 45 Fed. Reg. 33251 (May 19, 1980)(Complainant's prehearing exchange exhibit 73).

This rule is an EPA interpretation of RCRA, thus, assuming that RCRA § 1004(27) is ambiguous, deserves deference in the absence of Congressional intent to the contrary. Chevron U.S.A. v. N.R.D.C., 467 U.S. 837, 843 (1984).

The July 27, 1990, Federal Register notice pointed out by Respondent does not conflict with Complainant's position. Respondent focuses merely on EPA's comment concerning Barcelo v. Brown, but the passage as a whole, concluding that military firing ranges and impact areas are "not solid waste management units," does not support Respondent's argument. It reads as follows:

> The RCRA program has identified certain specific units and waste management practices at facilities about which questions have been raised concerning applicability of the definition of a solid waste management unit. One such question relates to military firing ranges and impact areas. Such areas are often potentially hazardous, due to the presence of unexploded ordnance. EPA has decided that such areas should not be considered solid waste management units. There is a strong argument that unexploded ordnance fired during target practice is not discarded material which falls within the regulatory definition of "solid waste." Ordnance that does not explode, as well as fragments of exploded ordnance, would

> be expected to land on the ground. Hence, the "ordinary use" of ordnance includes placement on land. Moreover, it is possible that the user has not abandoned or discarded the ordnance, but rather intends to reuse or recycle them at some time in the future. In addition, . . . Barcelo v. Brown . . . has suggested that materials resulting from uniquely military activities engaged in by no other parties fall outside the definition of solid waste, and thus would not be subject to section 3004(u) corrective action. (55 Fed. Reg. 30798, 30809.)

Thus, EPA's conclusion was based on a finding that certain material, namely unexploded ordnance at military firing ranges and impact areas, is not discarded material, which is the issue upon which the Barcelo case turned, and to which the regulatory definition of solid waste (40 C.F.R. § 261.2) is addressed. EPA's conclusion, and the reference to Barcelo,[9/] are not based upon construing section 1004(27) of RCRA to exclude discarded material resulting from military operations.

Furthermore, if section 1004(27) were so construed, then the generation, transport, treatment, storage or disposal of any waste that is hazardous and which results from military activities, would not be governed by RCRA or a state hazardous waste program under RCRA. This result would be absolutely irrational. Clearly the military, including Respondent, has acknowledged since at least 1980 the regulation of its hazardous wastes under RCRA. See, e.g.,

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[9/] A passage to which EPA was likely referring in the Barcelo opinion is the following: "it is obvious that Defendant Navy's military activities, although causing the incidental deposition of debris are not the discarding of material." While the sentence continues, "nor are they the result of an industrial, commercial, mining or agricultural operation," this is an alternate basis for the court's conclusion, and one that is no longer valid since EPA included military munitions in the May 19, 1980, regulations, 45 Fed. Reg. 33217, 33251.

Cross-motion exhibits H, J, L; Complainant's prehearing exchange, exhibits 15, 16, 17, 18.

EPA's alleged failure to comply with section 3004(y) of RCRA is not as significant a failure as Respondent believes. It provides, in pertinent part:

> (1) Not later than 6 months after October 6, 1992, the Administrator shall propose, after consulting with the Secretary of Defense and appropriate State officials, regulations identifying when military munitions become hazardous waste for purposes of this subchapter . . . . Not later than 24 months after such date, and after opportunity for notice and comment, the Administrator shall promulgate such regulations.

Thus, in April 1993, the proposed regulations were due, and in April 1995, the final regulations are due.

More importantly, however, the issue specified by Congress is not whether military munitions are hazardous wastes, but when such munitions become hazardous waste. In other words, the issue is not whether military munitions are hazardous, but when they become waste. This refers to the transition between munitions being in use and being "discarded," which is not altogether clear in light of possible reuse, reclamation, or recycling, and as evidenced by the Barcelo opinion, the July 27, 1990, Federal Register notice, and official correspondence from EPA. (September 26 Response, attachments 2, 4). Therefore, any alleged failure of the part of EPA to comply with section 3004(y) does not render all military munitions outside the definition of hazardous waste.

Complainant need not show that the munitions treated in Site 7 met any certain heat and shock conditions to establish such

munitions as hazardous waste. Complainant must demonstrate that they are "reactive" within the meaning of 40 C.F.R. § 261.23. The applicable paragraph of that definition, section 261.23(a)(6), requires that it be "capable of detonation or explosive reaction if it is subjected to a strong initiating source or if heated under confinement." Respondent has not pointed to any document which binds EPA to any specific heat or shock tests in interpreting section 261.23(a)(6).

EPA addressed a question of whether small arms ammunition intended for disposal are "reactive," in an intra-agency memorandum dated November 30, 1984, from John H. Skinner, Director of the Office of Solid Waste, to David Wagoner, Director of the Air and Waste Management Division, Region VIII. (September 26 Response, attachment 1; Cross-motion, exhibit Y). Referring to the preamble discussion of section 261.23(a)(6), the memorandum stated that shock and thermal instability are important elements, but noted that there was no Agency guidance regarding these criteria. Therefore, EPA relied on information provided by the U.S. Army and Remington Arms Company, certain tests, including drop tests, heating under confinement for 48 hours, setting a box of ammunition afire, and subjecting small arms to the "Sporting Arms and Ammunition Manufacturer's Institute" impact test. Results showed no evidence of mass propagation or explosion, so it was concluded not to fit the definition of "reactive." (Id.)

However, the application of section 261.23(a)(6) as discussed in that memorandum is not an interpretation that is binding on the

Agency, an official Agency interpretation, or a standard which is generally applicable. EPA has not represented it to be as such, and it is not in a format to be deemed as such. Therefore, EPA is not required to apply the tests described in the memorandum to establish that the waste burned and detonated in Site 7 is reactive hazardous waste.

Respondent has not presented any evidence or argument to support a claim that such waste is not "reactive" within the meaning of 40 C.F.R. § 261.23(a). Respondent merely states that it "is unaware of whether *any* of the military munitions thermally treated at OB/OD Unit 7 'responds' or 'reacts' to these heat and shock conditions," referring to the memorandum dated November 30, 1984. On the other hand, Complainant has established prima facie that such munitions are reactive hazardous waste. Respondent admitted that the items treated in Site 7 are reactive hazardous waste in its Part A and Part B permit applications, dated August 23, 1989, and October 1990, respectively. (Cross-motion exhibit J at Table III-1, exhibit L at II-18.)

Furthermore, it is contrary to common sense to deny that any of the materials treated in Site 7 were reactive. Respondent states that the items treated in Site 7 were all military munitions, which is a broader category than ordnance, and which is defined in an Air Force policy document as follows, in part:

> A device charged with explosives, propellants, pyrotechnics, initiating composition, or biological or chemical material . . . . Material used in discharging firearms or weapons that throw projectiles or initiate fire, disperse, or convey agents of warfare. . . . In

> general, nonnuclear munitions include toxic, nontoxic, biological, incendiary explosives, smoke agents, bombs, chemical spray tanks, warheads, rockets, explosive components of catapult and canopy remover devices, explosive demolition materials, grenades, mines, pyrotechnics, and all types of devices used in igniting and exploding them, such as, primers, detonators, fuses, cartridges, squibs, boosters, igniters, blasting caps and bursters. Also included are inert, sectionalized or empty models of live rounds and drill munitions and or explosive material.

(Cross-motion, n. 8, exhibit AA.) Respondent listed the following items as waste disposed of in Site 7 in the revision of its Notification of Hazardous Waste Activity, dated August 11, 1989: sticks TNT, dynamite, water gel, C-4, military ordnance, detonation cord, small arms, flair, pyrotechnics, aircraft associated components, thermal batteries, egress components. (Cross-motion exhibit H.) Respondent provided a detailed description of wastes treated in Site 7 in its Part B permit application dated October 1990 (Cross-motion, exhibit L at Tables II-D-1 and II-D-2). A serious contention simply cannot be made that none of these items, when exposed to "a strong initiating source or if heated under confinement," would explode.

Because Complainant has demonstrated prima facie that the munitions treated in Site 7 are reactive hazardous waste, and Respondent has not presented any specific facts to the contrary, no genuine dispute of material fact exists, and as a matter of law, such munitions are hazardous waste governed by RCRA.

B. Whether Respondent was authorized to operate Site 7 under interim status

Section 3005(e)(1) of RCRA sets forth the conditions for obtaining interim status:

> Any person who--
> (A) owns or operates a facility required to have a permit under this section which facility--
> (i) was in existence on November 19, 1980, or
> (ii) is in existence on the effective date of statutory or regulatory changes under this chapter that render the facility subject to the requirement to have a permit under this section,
> (B) has complied with the requirements of section [3010(a) of RCRA], and
> (C) has made an application for a permit under this section
> shall be treated as having been issued such permit until such time as final administrative disposition of such application is made . . . . This paragraph shall not apply to any facility which has been previously denied a permit under this section or if authority to operate the facility under this section has been previously terminated.

Respondent admits that the Base did not obtain interim status for any OB/OD units in 1980. (Motion, exhibits B and C, Cross-motion at 8.) In its 1980 Part A application, Respondent did not apply for authorization to operate any hazardous waste treatment or disposal unit, and did not file notification of burning of hazardous waste in the existing OB/OD unit, Site 6. Interim status for the Base covered only the storage of hazardous wastes listed in the Part A application submitted in 1980, and did not cover OB/OD activities. The Site 7 unit was not in existence on November 19, 1980; burning and/or detonating military explosives in Site 7 began in 1982. (Answer ¶¶ 19, 33.)

Complainant asserts that Respondent never qualified for interim status to treat or dispose of hazardous waste or for any OB/OD unit, and that the wastes being burned and/or detonated in Site 7 were being disposed of in a hazardous waste management unit without a permit or interim status. The Base voluntarily chose not to submit a Part B application for the facility by November 8, 1988. Interim status for the entire facility was forfeited as of 1982 and ability to qualify for newly regulated units was terminated, under RCRA § 3005(e) and 40 C.F.R. §§ 270.70(c) and 270.73(g). The revised Part A application submitted by the Base, listing the Site 7 OB/OD activity, was not filed prior to commencement of burning of explosives in the Site 7 unit; it was filed in 1989. By that time, Respondent's ability to obtain interim authority to operate was irrevocably lost, Complainant concludes, under RCRA § 3005(e)(1) and 40 C.F.R. § 270.70(c). 50 Fed. Reg. 28702, 28723 (July 15, 1985).

Respondent replies that upon filing of a revised Part A application in 1989, it was under the impression that it had satisfied the provisions of 40 C.F.R. § 270.72 for changes in interim status. The TWC then "established a course of conduct for the Air Force to follow by allowing [it] to continue operating OB/OD Unit 7." (Reply at 22.) Therefore, Complainant cannot revoke TWC's decision to allow it to operate, abruptly changing discretionary agency practice or interpretation, upon which Respondent reasonably relied.

Respondent adds that under RCRA section 3005(e)(1)(A)(ii),[10] it could not be required to submit an amended Part A application until June 10, 1988, six months after the regulatory changes requiring the facility to have a permit, when 40 C.F.R. Part 264 subpart X was promulgated. 52 Fed. Reg. 49694 (Dec. 10, 1987).

Respondent argues that interim status cannot be forfeited since 1982 for failure to file a Part B application by November 8, 1988. Instead, interim status for hazardous waste storage for the Lackland Air Force Base was lost on November 8, 1992, under section 3005(c)(2).[11] But, in 1989 and 1990, Respondent emphasizes, it submitted Part A and Part B applications for treatment of hazardous

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[10] The provision Respondent refers to provides: "Any person who . . . owns or operates a facility required to have a permit under this section which facility . . . is in existence on the effective date of the statutory or regulatory changes under this chapter that render the facility subject to the requirement to have a permit under this section . . . shall be treated as having been issued such permit . . . ." Section 3010(b) states, in pertinent part: "The regulations under this subchapter . . . shall take effect on the date six months after the date of promulgation thereof . . . ."

[11] Section 3005(c)(2) of RCRA provides, pertinent part: "Not later than the date eight years after November 8, 1984, in the case of each application for a permit under this subsection for any facility . . . which was submitted before such date, the Administrator shall issue a final permit . . . or issue a final denial of such application. . . . Interim status under subsection (e) of this section shall terminate for each facility . . . on the expiration of the . . . eight year period referred to . . . unless the owner or operator applies for final determination regarding the issuance of a permit under this subsection within -- . . . four years after November 8, 1984 . . . ."

waste.[12] Respondent asserts that TWC agreed that it had interim status upon such submission. Concerning the Federal Register notice relied upon by Complainant in support of its statement that interim status was irrevocably lost, Respondent points out that the notice concerns facilities which have had interim status "terminated," which has not occurred with respect to Respondent's facility.

The basic question presented here is whether authority to operate Site 7 under interim status was obtained, in light of the following facts: (1) that Respondent operated Site 7 prior to submitting notification under RCRA § 3010 and a permit application for hazardous waste treatment, and (2) that Respondent submitted these documents several years later. Further, it must be determined whether any communication by TWC to Respondent that authority was granted to operate Site 7, estops EPA from denying that Respondent had such authority. For the reasons set forth below, it is concluded that Respondent did not have authority to operate Site 7 under interim status, and that EPA is not estopped from claiming that Respondent had no such authority.

As a preliminary matter, some ambiguities and inconsistences in the record need to be addressed. The record shows that the TWC noted confusion, concerning state and federal requirements applicable to the Base and Annex, resulting from State regulatory agency jurisdictional changes. For example, in 1980, the Base and

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[12] It is noted that the 1989 revision to the Base's Part A application referred to disposal of hazardous waste, not treatment of hazardous waste. (Cross-motion exhibits H, J (Table III-1), L.)

Annex were assigned separate registration numbers. In 1981, those registration numbers were cancelled and they were assigned only one number by the agency which took over jurisdiction. (*See*, Complainant's prehearing exchange, exhibit 38, pp. 2-3.) Ambiguity exists also as to whether "facility" and "Respondent" refer to the Base, Annex or both. (e.g., Motion at 38 ". . . Respondent forfeited and lost interim status for the entire facility in 1982. . . . Respondents (sic) interim status and ability to qualify for newly regulated units was terminated by failing to file, by November 8, 1988, a Part B application.")

The complaint asserts, in paragraph 15, that Respondent had interim status for "the Facility." From the context of the surrounding paragraphs, this assertion appears to refer to the Annex, and interim status having been achieved pursuant to the notification and Part A permit application filed in 1990. The complaint also alleges that Site 7 did not qualify for interim status. (Complaint ¶¶ 25, 32.) Yet, in its Motion and Reply, Complainant asserts that Respondent "forfeited interim status for the entire facility in 1982." (Complainant's Motion at 29, 33, 34, 38; September 26 Response at 5.) The latter assertion is based on the Base's statement to TWC in a letter, dated May 14, 1985, "As you know, Lackland forfeited its 'interim status' for hazardous waste storage in September 1982, and therefore, became subject to the short-term 90-day hazardous waste accumulation limitation . . . ." In a letter to the TWC, dated September 20, 1982, the Base stated that it did not plan to submit the information required to

complete Part B of the permit application. (Complainant's prehearing exchange exhibits 49, 51.)

Despite the ambiguities, it can be deduced that interim status was achieved by the Annex pursuant to the 1990 Part A application for the activities listed therein,[13/] except for the activity of hazardous waste treatment in the OB/OD units, which exception Respondent disputes.

The distinction, between Respondent's attainment of interim status for storage and failure to attain it for the OB/OD units, is based upon the failure of the preceding operator, the Base, to properly include the OB/OD activities in its Part A application. The other activity listed in the 1990 Part A application, storage of hazardous waste, was listed in the Base's 1980 Part A application. Thus, authority for the Annex to operate a hazardous waste storage facility derived from the Base's authority to operate a storage facility.

The Base's assertion in 1982, that interim status for hazardous waste storage was forfeited, does not preclude the attainment by the Annex of interim status for such activity. Complainant has made a judicial admission in paragraph 15 of the complaint that the facility had attained interim status. Such an admission is binding. American Title Insurance Co. v. Lacelaw Corporation, 861 F.2d 224, 226 (9th Cir. 1988) (A statement in a

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[13/] See Complainant's prehearing exchange exhibit 35, Table III.

complaint, answer or pretrial order is a judicial admission); 9 Wigmore, Evidence, §§ 2589, 2590 (Chadbourn rev. 1981). An admission in a memorandum of law or brief, however, may not necessarily be held binding. 861 F.2d at 226-227. The complaint has not been amended to withdraw the admission. Consequently, any statements made in Complainant's motion and reply which may be construed contrary to the admission will not be so construed. Moreover, the TWC did not regard the Base's interim status as being terminated until 1992, as a letter to the Base, responding to its failure to respond to correspondence dated June 12, 1991, indicates.[14/] There is no evidence in the record that interim status for the Base or the Annex was "terminated" any time before 1992.

While Respondent derived interim status authority for storing hazardous waste from the Base's 1980 Part A application, authorization for treating hazardous waste in the OB/OD units was not obtained. Such authorization would necessarily have been obtained from either of two possible sources: (1) the Base's 1980 Part A application and 1989 submittal to revise it, or (2) the Respondent's 1990 Part A application.

Before Respondent acknowledged its responsibility for handling hazardous waste by submitting a permit application, the operation of Site 7 was already in violation of applicable regulatory

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[14/] "Because your facility did not file a Part B . . . application by November 8, 1988 . . . your facility loses interim status on November 8, 1992." Complainant's prehearing exchange, exhibit 53.

requirements under RCRA. The standards applicable to Site 7 at the time it began operation in 1982 were federal regulations. The RCRA regulations published in the Federal Register on May 19, 1980, include the listing of reactive hazardous waste in 40 C.F.R. Part 261, and 40 C.F.R. Part 265 Subpart P, which sets forth interim status standards for thermal treatment of hazardous waste. Subpart P authorizes open burning and detonation of waste explosives provided certain conditions are met, namely maintaining certain minimum distances from property of others and operating in a manner that does not threaten human health or the environment. 40 C.F.R. § 265.382.

Reactive hazardous wastes, coded D003, and thermal treatment (coded T04 on a Part A form), were not listed on the 1980 Part A permit application. (Complainant's prehearing exchange exhibit 34.) "During the interim status period, the facility shall not: (1) Treat, store, or dispose of hazardous waste not specified in Part A of the permit application; [or] (2) Employ processes not specified in part A of the permit application . . . ." 45 Fed. Reg. 33290, 33434 (May 19, 1980) (40 C.F.R. § 122.23(b) (1981), recodified at 40 C.F.R. § 40 C.F.R. § 270.71(a)).

In order to avoid such a violation, the 1980 Part A permit application had to be updated prior to operation of the Site 7 unit. The Base's attempt in 1989 to revise the permit was too late. Revisions were needed to add the military munitions as hazardous wastes, to add Site 7 as a hazardous waste management

unit, and to add treatment as a new hazardous waste activity, as these items were not listed in the 1980 Part A permit application.

Since 1980, under federal regulations governing interim status,[15] "New hazardous wastes not previously identified in Part A of the permit application may be treated, stored, or disposed of at a facility if the owner or operator submits a revised Part A permit application prior to such a change." 45 Fed. Reg. at 33434 (40 C.F.R. § 122.23(c)(1) (1981), recodified April 1, 1983 at 40 C.F.R. § 270.72(a)(1)) (emphasis added). Processes for the treatment, storage or disposal of hazardous waste may be added or changed "if the owner or operator submits a revised Part A permit application prior to such change (along with a justification explaining the need for the change) and the Director approves the change." 45 Fed. Reg. at 33434 (40 C.F.R. § 122.23(c)(3) (1981), recodified at 40 C.F.R. § 270.72(a)(3)) (emphasis added). The regulations later also provided that newly regulated units may be added if a revised Part A permit application is submitted on or before the date on which the unit becomes subject to the new requirements. 40 C.F.R. § 270.72(a)(6).

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[15] It is appropriate to note here the points in time at which State or federal hazardous waste laws pertinent to this case applied. The federal hazardous waste program was in effect in Texas until its base program, including permitting, was authorized by EPA on December 12, 1984. (49 Fed. Reg. 48300.) The interim status program of Texas became effective on March 15, 1990 (55 Fed. Reg. 7318, March 1, 1990), and the State miscellaneous units program was effective in Texas on December 4, 1992 (57 Fed. Reg. 45719, Oct. 5, 1992). The federal miscellaneous units program, 40 C.F.R. § Part 264 Subpart X, was not effective in Texas. (52 Fed. Reg. 46946, 46961 (December 10, 1987)).

When the State program went into effect in Texas, the obligation to submit revisions to the Part A permit application remained. 40 C.F.R Part 265 Subpart P, governing waste explosives, was incorporated by reference in the State interim standards at 31 TAC § 335.112(15). Under the Texas Consolidated Permit Rules (31 TAC Chapter 305), owners or operators of hazardous waste management facilities who qualify for interim status "shall file a revised Part A application with the executive director for any of the following changes during interim status: (1) new hazardous wastes not identified in the original application are stored, processed or disposed of at the facility; . . . (3) changes in the processes for management of the waste occur or additional processes are added . . . (5) newly regulated units for the storage, processing, or disposal of hazardous waste are added." 31 TAC § 305.51(a). Such changes must be reviewed and approved by the executive director of the state agency implementing the program. 31 TAC § 305.51(b). In deciding whether to approve the proposed change, the executive director may consider the requirements of 40 C.F.R. § 270.72. Id.

The regulation, 40 C.F.R. § 122.22 (1981) (recodified at 40 C.F.R. § 270.10), which is applicable to States under 40 C.F.R. § 123.7 (1981) (recodified at § 271.14(d)), sets forth requirements for updating permit applications for facilities which have filed a Part A but not a Part B permit application. It provides that an owner or operator "shall file an amended Part A permit application: . . .(iii) As necessary to comply with provisions of § 122.23 [recodified at § 270.72] for changes during interim status or the

analogous provisions of a[n] [approved] State program." 45 Fed. Reg. at 33433 (40 C.F.R. § 122.22(c)(1) (1981), recodified at 40 C.F.R. § 270.10(g)(1)). "The owner or operator of a facility who fails to comply with the updating requirements of paragraph (c)(1) [later (g)(1)] of this section does not receive interim status as to the wastes not covered by duly filed Part A applications." 45 Fed. Reg. at 33433 (40 C.F.R. § 122.(c)(2) (1981), recodified at 40 C.F.R. § 270.10(g)(2)).

Therefore, Respondent could not have received interim status to operate Site 7 from the Base's Part A application and 1989 revision, because the requirements for updating the Part A permit application were not met.

Also, Respondent could not operate Site 7 under interim status authority on the basis of its November 1990 Part A application. Because the updating requirements were not met for adding treatment of reactive hazardous waste to the 1980 Part A application, Respondent could obtain interim status to operate Site 7 only if the OB/OD unit was considered to be a "facility" for which Respondent is independently applying for interim status. Respondent had to meet the criteria for interim status in RCRA section 3005(e). The first criterion is that the facility is: (1) a facility which was in existence on November 19, 1980, or (2) a facility which is in existence on the effective date of statutory or regulatory changes that render the facility subject to the requirement to have a permit. *See also*, 40 C.F.R. § 270.10(e)(1). The second and third criteria are that the owner or operator must

have "complied with the requirements of section 6930(a) of this title [3010(a) of RCRA]," and made an application for a permit.

As to the first criterion, Site 7 was not in existence on November 19, 1980. That is also the date on which 40 C.F.R. Part 265 Subpart P, concerning open burning and waste explosives, and Part 261, identifying reactive hazardous waste, became effective. Because November 19, 1980, is the effective date of the regulations which rendered Site 7 subject to the requirement to have a permit, it could not obtain interim status as a HWM facility.[16/] Instead,

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[16/] It is noted that there were no standards for permits for OB/OD units until the promulgation of Subpart X on December 10, 1987. (52 Fed. Reg. 46946, 46947.) The preamble to Subpart X includes the following discussion:

> The Agency is aware . . . that certain existing and future hazardous waste management practices and technologies do not or may not fit the description of any of the units covered by the existing regulations. If they do not fit these descriptions, then they cannot be fully permitted and can only operate as interim status facilities. This is not desirable because it prevents the construction of new units or expansion of existing units. For example, thermal treatment of hazardous waste in units other than incinerators, boilers, or industrial furnaces may not be fully permitted because such units are not at present covered by Part 264 or Part 266. This means that existing units with interim permit status under Part 265 may not receive a full Part 264 permit.
> * * * *
> The Agency promulgated interim status standards applicable to open burning/open detonation units in Subpart P of Part 265 (§ 265.382) on May 19, 1980 (45 Fed. Reg. 33251).
> 52 Fed. Reg. at 46946-46947, 46952.

Thus, under federal law, OB/OD units could operate only as interim status facilities, as they were not able to receive a full 40 C.F.R. Part 264 permit until after Subpart X became effective. However, the identification of reactive hazardous waste, in 40 C.F.R. Part 261, triggered the requirements for notification under RCRA § 3010 and for permit applications under RCRA § 3005, for all

(continued...)

it would be considered a "New Hazardous Waste Management facility," one which began operation or for which construction commenced after November 19, 1980. 40 C.F.R. § 270.2. As such, Site 7 must have applied for and received a permit prior to operation.[17]

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[16] (...continued)
owners and operators of facilities for the treatment, storage or disposal of hazardous waste. Those requirements, and those for interim status, including standards existing in Part 265, Subpart P were not affected by Subpart X. 40 C.F.R. § 264.3; 52 Fed. Reg. 46948. ("Subpart X will not supersede or replace any specific restrictions on activities contained in another subpart or provide a vehicle for escaping those restrictions.").

[17] ". . . [T]he Administrator shall promulgate regulations requiring each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter to have a permit issued pursuant to this section." RCRA § 3005(a). Accordingly, such regulations were promulgated, providing in pertinent part: "No person shall begin physical construction of a new HWM facility without having submitted Part A and Part B of its permit application and received a finally effective RCRA permit." 45 Fed. Reg. 33290, 33433 (May 19, 1980) (codified at 40 C.F.R. § 122.22 (1981), recodified at 270.10(f)(1)).

The interim status and RCRA permit requirements apply to "facilities." "Facility" and "Hazardous Waste Management facility" are defined as "all contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing or disposing of hazardous waste. A facility may consist of several treatment, storage, or disposal operational units (for example, one or more landfills, surface impoundments, or combinations or them.)" 40 C.F.R. §§ 260.10, 270.2; 31 TAC § 335.1 (slight variations in the wording, insignificant to this proceeding). The term "contiguous" means "being in actual contact; touching along a boundary or at a point . . . touching or connected throughout in an unbroken sequence." Webster's Ninth New Collegiate Dictionary 283 (1990).

The Base and the Annex are used largely for purposes other than treatment, storage and disposal of hazardous waste. Site 7 may be a "hazardous waste management facility," within the meaning of 40 C.F.R. §§ 260.10, 270.2, and Title 31 TAC § 335.1, adjacent to land which is used by the Annex for purposes other than
(continued...)

However, in the event that Sites 6 and 7 could be considered collectively as a hazardous waste treatment facility, and considering that Site 6 was in operation in November 1980 (Cross-motion, exhibit L, p. I-3), the analysis of whether the criteria for interim status were met will continue. The second criterion is that the facility complied with the requirements of section 3010(a) of RCRA. Under that provision, notification of hazardous waste activity must be filed within ninety days after promulgation of regulations in 40 C.F.R. Part 261.[18/] The notification requirement was triggered by the regulations identifying reactive hazardous waste, which were promulgated on May 19, 1980. Therefore, notification of treatment of reactive hazardous waste was required to be submitted before operation of the Site 7 OB/OD unit began.

Another requirement of section 3010(a) is that "No identified or listed waste subject to this subchapter may be transported, treated, stored, or disposed of unless notification has been given as required by this subsection." (*See also*, 45 Fed. Reg. at 33432, 40 C.F.R. § 122.21(c) (1981), recodified at 40 C.F.R. § 270.1(b)).

[17/](...continued)
hazardous waste management. Site 7 is physically separate from the Base and the hazardous waste storage facility for which the Base had interim status. (Motion, exhibit A; Cross-motion, exhibit L pp. 1-2, 1-3, 1-6, exhibit A figures 1-1, 1-3.)

[18/] Section 3010(a) states, in relevant part: "Not later than ninety days after promulgation of regulations . . . identifying by its characteristics or listing any substance as hazardous waste subject to this subchapter, any person . . . owning or operating a facility for treatment, storage, or disposal of such substance shall file . . . a notification stating the location and general description of such activity and the identified or listed wastes handled by such person."

Reactive hazardous waste, D003, was not included on the Base's notifications of hazardous waste activity submitted in 1980, 1983 and 1988 (Complainant's prehearing exchange exhibits 16, 17, 18). The form for notification under section 3010 of treatment of reactive hazardous waste was not provided until 1990. (Complainant's prehearing exchange, exhibit 15.) Because waste explosives were treated in the Site 7 unit prior to notification, Respondent did not comply with the requirements of section 3010(a). Consequently, the second criterion for attainment of interim status in section 3005(e) of RCRA was not met, and Respondent could not attain interim status authority to operate Site 7.

Under the State hazardous waste program, Respondent was in violation of 31 TAC 335.43(a), which provides: "Except as provided in subsection (b) of this section [relating to interim status] and § 335.2 of this title . . . no person shall store, process or dispose of hazardous waste without first having obtained a permit from the Texas Water Commission."

Respondent could not meet the criterion for interim status, set forth in subsection (b): "Any owner or operator of a solid waste management facility that is in existence on the effective date of a statutory or regulatory change that subjects the owner or operator to a requirement to obtain a hazardous waste permit who has filed a hazardous waste permit application . . . may continue the storage, processing, or disposal of hazardous waste . . . ." The State interim status standards approved by EPA in 1990, Title 31 TAC § 335.111 *et seq.* (Subchapter E) apply to owners and

operators of TSD facilities "who have fully complied with the requirements for interim status under [RCRA] § 3005(e)." Title 31 TAC § 335.111(a). As discussed above, Respondent had not so complied. It is concluded that Respondent did not have authority to operate Site 7 under interim status.

The issues of estoppel, detrimental reliance, laches and ratification raised in Respondent's fifth through eighth defenses do not change this conclusion. Respondent has not raised any genuine issue of material fact regarding these defenses, and they do not preclude liability as a matter of law. Respondent merely argues that it should be permitted the opportunity to present and go forward with a defense following Complainant's establishment of a prima facie case, after all facts have become available through the prehearing exchange. (Cross-motion at 32.) Complainant has filed its prehearing exchange. Respondent has not asserted or explained how any additional facts are reasonably expected to create a genuine issue of material fact, so a grant of additional time to uncover facts is not warranted. *See*, Federal Rule of Civil Procedure 56(f); Hudson River Sloop Clearwater, Inc. v. Department of the Navy, 659 F.Supp. 674 (E.D.N.Y. 1987), *aff'd*, 891 F.2d 414.

It is noted that application of estoppel against the Government is disfavored when it thwarts enforcement of public laws. Trapper Mining, Inc. v. Lujan, 923 F.2d 774, 781 (10th Cir.) *cert. denied*, 112 S.Ct. 81 (1991). Respondent has not demonstrated that estoppel should be applied against EPA on the basis that TWC had acknowledged and communicated to Respondent that it had interim

status to operate Site 7 as a hazardous waste facility, as alleged in defenses 6 and 7. Respondent asserts that "it had been widely assumed by both the State and the Air Force that the August 23, 1989 'Part A' permit application had sufficiently amended the facility's November 19, 1980 'Part A' permit application . . . It was also assumed by both Lackland and the regulators that the facility did, indeed, have interim status." (Cross-motion at 9.) Respondent cites a letter, dated May 7, 1992, from TWC to the Base, referring to its permit application, termination of interim status, and authorization to operate thermal treatment units. (Cross-motion, exhibit T.)

However, there is confusion in the letter as well as in other documents in the record regarding which "facility" had interim status. The TWC requested the Base to update its permit application to add the OB/OD units, and to file a Part B application for those units. (Cross-motion, exhibits G, K.) The revision to the 1980 Part A application was filed on August 23, 1989. (Cross-motion, exhibits I, J.) Subsequently, Respondent filed a Part A permit application, dated October 22, 1990. (Complainant's prehearing exchange exhibit 35.) Part B of the application, dated October 1990, listed the Base as the applicant and the Annex as the facility. (Cross-motion, exhibit L.) The TWC noted the discrepancy between the applicants and identification numbers in Parts A and B, and requested adjustments to the application materials, so that the Annex is the permit applicant for the OB/OD units (Cross-motion, exhibit S). When no response

was submitted, the TWC's letter, dated May 7, 1992, admonished the Base "about jeopardy to your interim status" and warned that "authorization to operate units presently governed under 40 C.F.R §§ 265.370-383 [Subpart P] will expire on November 8, 1992," because "your facility" did not file a Part B application by November 8, 1988. (Cross-motion, exhibit T.)

In that letter, TWC is apparently confusing interim status for hazardous waste storage pursuant to the 1980 Part A permit application (which is the only one for which a Part B could have been filed by November 8, 1988), with the 1989 and 1990 permit applications for the OB/OD units, for which the proper applicant was the Annex. (Cross-motion, exhibit T.) The State knew or should have known that interim status pursuant to the Base's 1980 Part A application did not cover the OB/OD units. "Interim status exists only for those activities included in the Part A application." Northside Sanitary Landfill v. Thomas, 804 F.2d 371, 373 (7th Cir. 1986) (The operation of a facility that has been granted interim status is limited to the types of wastes, as well as the processing, storage, and disposal procedures specified in the Part A application). The confusion and ambiguity in the May 7, 1992, letter undermines its reliability as assurance that Respondent had interim status for Site 7. Furthermore, the Government "is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." Trapper Mining, 923 F.2d at 781 (party relying on State official's interpretation of the law in a

letter assumes the risk that the interpretation is in error), *citing,* Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917).

In addition, it has not been established that the statements in the letter amount to affirmative misconduct rather than merely negligent oversight or mistake of law. For the Government to be estopped, there must be affirmative misconduct, not mere negligence. Bolt v. United States, 944 F.2d 603 (9th Cir. 1991). Mistake of law is not enough to estop the government. McQuerry v. United States Parole Commission, 961 F.2d 842 (9th Cir. 1992). In Bolt, *supra,* the Government was not estopped from declaring mining claims invalid under the Federal Land Policy and Management Act where it was not established that the National Park Service's approval of plan of operation for mining claim was not merely negligent oversight. The finding of invalidity was based on a failure to comply with annual recordation requirements. The claimant was not told that recorded papers had been checked or that annual recordation filing was sufficient. Similarly, in the matter at hand, Respondent was not told that it met the requirements for interim status for Site 7.

Acquiescence by a State also does not excuse a violation of RCRA. United States v. Lacks Industries, Inc., No. G87-413 CA, 29 ERC 2035, 2037 (W.D. Mich. 1989) (defense that State failed to act when defendant was disposing of hazardous waste after its permit had expired did not excuse violation); *accord,* Washington Tour Guides Association v. National Park Service, 808 F.Supp. 877 (D.

D.C. 1992). As a matter of law, the EPA is not estopped from claiming that Respondent was in violation of RCRA based on the State's action or failure to act. Ratification by the State has not been established and any detrimental reliance on the part of Respondent does not excuse the violation.[19/]

C. Whether Respondent is liable for a violation after enactment of the FFCA

Respondent's position is that no thermal treatment of military munitions occurred in the time period after the FFCA went into effect on October 6, 1992, and before a permit was issued on April 27, 1993. Therefore, Respondent could not be held liable for any violation.

As to Complainant's allegation that Site 7 was in operation by virtue of Respondent's failure to close it, Respondent argues that it had no duty to close it under applicable law. According to Respondent, the duty to close did not arise unless one of the following two conditions occurred:

> Except as provided in this section, the owner or operator must submit his closure plan to the executive director in accordance with [40 C.F.R. § 265.112]. The owner or operator must submit his closure plan to the executive director no later than 15 days after:
> (1) Termination of interim status . . . or
> (2) Issuance of a judicial decree or compliance order under [RCRA or the State solid waste disposal statutes], to cease receiving wastes or close.

[19/] However, any facts regarding Respondent's reliance on TWC's recognition of interim status for Site 7 are matters to be considered in determining an appropriate penalty.

31 TAC § 335.118(a). Under the federal regulations, 40 C.F.R. § 265.113, Respondent asserts that it could not begin closure until after approval of the closure plan, which was submitted in October 1990, but not approved until April 27, 1993.

Complainant contends that a facility which is managing hazardous waste and which does not qualify for interim status must stop waste management operations and send hazardous waste to a permitted facility. 45 Fed. Reg. 33066, 33078 (May 19, 1980); Environmental Defense Fund, Inc. v. Gorsuch, 713 F.2d 802, 806-07 (D.C. Cir. 1983). Complainant explains that during the "active life" of the unit, which begins upon initial receipt of hazardous waste, each day that Respondent did not have a permit is a separate violation of section 3005 of RCRA. The active life of the TSD unit does not end until a permit is obtained or the Regional Administrator receives certification of final closure. 40 C.F.R. § 260.10. Complainant asserts that the liability of an illegal TSD facility under RCRA does not cease merely because the facility decides to stop or interrupt treatment or disposal operations, citing In re Gordon Redd Lumber, RCRA Appeal No. 91-4 at 25 (EAB, June 9, 1994) (facility which lost interim status and decided to cease operations and close was still subject to the requirements of 40 C.F.R. Part 265, until closure is certified).

In its Reply (at 15-20), Respondent maintains that it did not engage in any prohibited conduct after the FFCA was enacted, but that Complainant is asserting liability merely based on Respondent's status, not an act or failure to act. Respondent

points to language in section 3005(a) of RCRA which requires EPA to promulgate regulations requiring owners and operators to have a permit, upon which the treatment, storage or disposal of hazardous waste is prohibited except in accordance with a permit. Respondent emphasizes that the violation implies prohibited conduct, not status. Complainant's attempt to obscure the distinction by use of the word "operation" does nothing to help its case, as "operation" implies "performance" or "application" according to a dictionary definition. At the time action arguably should have been taken, the Air Force was not subject to a monetary penalty. Respondent adds that if the Part A permit application and closure plan submitted in October 1990 had been approved in a timely manner, then Site 7 could have been permitted or closed prior to October 6, 1992.

Respondent is charged with violating 31 TAC § 335.43(a) and section 3005(a) of RCRA. The State regulation prohibits any person from storing, processing or disposing of hazardous waste without first having obtained a permit, unless an exception under 31 TAC § 335.2 is met.[20/] 31 TAC § 335.43(a). EPA promulgated regulations pursuant to Section 3005(a) of RCRA, which include the following provision in 40 C.F.R. § 270.1(c): "owners and operators of hazardous waste management units must have permits during the active life (including the closure period) of the unit." Texas has included that provision in 31 TAC § 335.2(i)(the only difference

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[20/] The term "processing" was substituted by the State for the word "treatment" in the federal regulations. *See*, 31 TAC §§ 335.112, 335.152(c)(2).

between the federal and State provision is that, in the latter, the word "or" separates the words "owner" and "operator.")

The "active life" of Site 7 extended past the effective date of the FFCA. "Active life" is defined as "[t]he period from the initial receipt of hazardous waste at the facility until the executive director receives certification of final closure." 31 TAC 335.1; *see also*, 40 C.F.R. § 260.10. Therefore, Respondent was in violation of the Texas regulations from the time it began operating Site 7 until the date its permit was issued, in April 1993. The fact that Respondent stopped thermal treatment of military munitions in Site 7 prior to enactment of the FFCA does not bar a finding of liability.

The duty to close Site 7 did not arise in accordance with 31 TAC 335.118(a). That provision applies only to "owners and operators of hazardous waste . . . facilities who have fully complied with the requirements for interim status under [RCRA] § 3005(e)." 31 TAC § 335.111. As concluded above, Respondent had not fully complied with the requirements for interim status for Site 7, so section 335.118 is irrelevant. Because Respondent was never authorized to operate Site 7 under interim status, Site 7 was required to be closed.

Assuming arguendo that authorization existed to operate Site 7 under interim status, the duty to submit a closure plan existed since 1986. 51 Fed. Reg. 16444 (May 2, 1986). The closure plan was required to be submitted with a Part B permit application by November 8, 1988. RCRA § 3005(c); 40 C.F.R. §§ 264.112(a),

270.14(b)(13). A closure plan was not submitted until October 1990. Therefore, there is no merit to the argument that a closure plan was submitted but closure activities could not be conducted until it was approved. Respondent's defenses numbered 14 and 15 do not preclude a finding of liability.

Respondent's defense that EPA is estopped from claiming Respondent was required to perform any duties relating to interim status or loss of interim status on the basis that it was informed by EPA that it never had interim status also has no merit. If a HWM unit is not authorized under interim status to operate, it must comply with the standards and requirements set forth in the permitting standards, 40 C.F.R. Part 264 and 31 TAC Part 335 Subchapter F, which include closure requirements. See 40 C.F.R. § 264.1(b) ("The standards in this part apply to owners and operators of all facilities which treat, store, or dispose of hazardous waste, except as specifically provided otherwise in this part or part 261 of this chapter"); 31 TAC § 335.151(b) ("The standards in this subchapter apply to owners and operators of all facilities which process, store or dispose of hazardous waste, except as specifically provided for in § 335.41 of this title.")

While Respondent cannot be assessed penalties for violations occurring prior to enactment of the FFCA, October 6, 1992, the FFCA does not bar a finding of liability in this proceeding. Respondent was in violation of federal and State law, as charged in the complaint, continuously from the date it began operation in Site 7 until it was issued a permit in April 1993. Each day of violation

after enactment of the FFCA constitutes a separate violation which is subject to assessment of penalties, under section 3008(g) of RCRA. However, the issue of an appropriate penalty for the violation found herein is reserved for further proceedings.

O R D E R

1. Respondent's Motion to Dismiss for Default is DENIED.
2. Complainant's Request to Delay the Prehearing Exchange is GRANTED.
3. Complainant's Motion to Strike Affirmative Defenses is DENIED with respect to defenses numbered 1, 5, 6, 7, 8, 9, 11, 14, 15 and 16, and GRANTED with respect to defenses numbered 2, 3, 4, 10, 12, and 13.
4. Complainant's Motion for Partial Accelerated Decision is GRANTED.
5. Respondent's Motions for Partial Accelerated Decision on Liability and to Dismiss are DENIED.

Dated this 12th day of May 1995

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER ON MOTIONS**, dated May 12, 1995, in re: Lackland Training Annex, Dkt. No. RCRA-VI-311-H, was mailed to the Regional Hearing Clerk, Reg. VI, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: May 12, 1995

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