6/12/89

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
CHEMICAL RECLAMATION SERVICES, INC., AVALON, TEXAS,	)	Docket No. RCRA-VI-825-H
	)	
	)	
Respondent	)	

RCRA; Land Disposal Notification Requirements; Disposal by Under-Ground Injection Well:

The notification requirements for the land disposal of restricted wastes contained in § 268.7(a) do not apply to a generator of spent solvent wastes which were shipped for disposal by underground injection between November 11, 1986 and June 25, 1987.

Appearances:

For Complainant:

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U.S. Environmental Protection Agency, Region VI
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Dallas, TX 75202-2733

For Respondent:

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Before: Henry B. Frazier, III
Administrative Law Judge

ACCELERATED DECISION

I. Background - Violations Alleged & Proposed Penalty

This is a proceeding under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as amended, 42 U.S.C. § 6901 et seq. ("RCRA"). An administrative complaint was issued on August 2, 1988 by the United States Environmental Protection Agency ("EPA" or "Complainant" or "Agency") under Section 3008 of RCRA, 42 U.S.C. § 6928. The complaint alleged that Chemical Reclamation Services, Inc. ("CRS" or "Respondent") had violated the requirements of Subtitle C of RCRA, as amended by the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), Public Law 98-616, and the regulations promulgated thereunder.

More specifically, the complaint alleged that Respondent offered for transportation a restricted hazardous waste without first meeting the requirements of 40 C.F.R. § 268.7(a) promulgated pursuant to the HSWA amendment of Sections 3004(d) through (k) and (m) of RCRA, 42 U.S.C. § 6924(d)-(k) and (m). The complaint proposed, pursuant to Section 3008 of RCRA, 42 U.S.C. § 6928, that a civil penalty be assessed against Respondent in the amount of $23,000.00.

II. Background - Respondent's Answer

Respondent replied to the complaint, contesting the alleged violation and requesting a hearing. Respondent maintains that the wastes in question were being shipped for disposal by under-

ground injection and not for treatment to meet land disposal standards. Since injection well disposal of spent solvent waste is specifically exempted from the prohibition against land disposal, the Respondent contends that the requirements of 40 C.F.R. § 268.7(a) did not apply to the wastes in question and hence no violation has been committed.

Complainant concedes that the actual disposal of spent solvent wastes by deep-well injection was, under 40 C.F.R. § 268.30(a), exempted from the prohibition against land disposal until August 8, 1988. Nevertheless, Complainant insists that Respondent, as a generator of spent solvent wastes, had to comply with the requirements for notification of treatment standards of 40 C.F.R. § 268.7(a)(1) whenever shipping spent solvent wastes for disposal even though disposal was to be accomplished by deep-well injection.

III. Joint Motion for Decision on the Pleadings:

On March 29, 1989, the parties filed a Joint Motion for Decision on the Pleadings and stated that the "only remaining issue in this litigation is the legal question of whether 40 C.F.R. § 268.7(a) was applicable to CRS at the time it shipped its restricted wastes for disposal by deep-well injection..." Thereafter, the Respondent and the Complainant, on April 19, 1989 and on April 20, 1989, respectively, filed proposed conclusions of law and a proposed order together with a supporting brief. Reply briefs were filed by each of the parties on May 8, 1989.

With the joint motion, the parties submitted certain "Stipulations." As Presiding Officer, I may, pursuant to 40 C.F.R. § 22.20(a), render an accelerated decision without further hearing if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding.

On the basis of the joint stipulations and the complaint and answer, I make the following initial findings of fact and/or conclusions of law:

IV. Initial Findings of Fact and/or Conclusions of Law

1. Respondent is Chemical Reclamation Services, Inc. (CRS), a company incorporated and authorized to do business in the State of Texas. Complaint, p.2; Answer, p.1; Stipulations, p.1.
2. CRS owns and operates a reclamation business at its facility located one-fourth of a mile North of FM 55 and Highway 34, Avalon, Texas. Stipulations, p.2.
3. CRS recycles, stores and generates materials which constitute hazardous waste (as that term is defined at Section 1004(5) of RCRA, 42 U.S.C. § 6903(5) and 40 C.F.R. § 261.3) and hazardous industrial waste (as that term is defined at 31 TAC § 335.1). Stipulations, p.2; Complaint, p.2; Answer, p.1.
4. During the course of its business, CRS collects rainwater and water from distillation processes at its Avalon

facility. This wastewater has contained more than one (1) percent spent solvents having the designation EPA Hazardous Waste Code Numbers F001 to F005. Stipulations, p.2.

5. On the following nineteen dates, CRS shipped wastewater containing more than one (1) percent spent solvents having the designation EPA Hazardous Waste Code Numbers F001 and F005 to Malone Service Company ("Malone") for deep-well injection:

November 11, 1986	March 18, 1987
December 10, 1986	April 27, 1987
December 11, 1986	April 29, 1987
December 16, 1986	May 4, 1987
December 19, 1986	May 11, 1987
January 5, 1987	May 13, 1987
January 6, 1987	May 29, 1987
January 28, 1987	June 5, 1987
February 10, 1987	June 25, 1987
March 11, 1987	

Stipulations, pp.2-3.

6. When shipping such wastewater to Malone for deep-well injection, CRS manifested such wastes and indicated on the manifests that the material was wastewater containing solvents and designated the state hazardous waste code for said material. Stipulations, p.3.

7. No notice or information, other than what appeared on the manifest, accompanied these waste shipments to Malone, including any notice under 40 C.F.R. § 268.7(a). Stipulations, p.3.

8. CRS has informed EPA that prior to shipment, such wastes were analyzed by CRS, but CRS did not retain results of such analysis. Stipulations, p.3.

9. Upon receipt at Malone, Malone analyzed such wastes and indicated their constituents on a form known as a "dump ticket." Stipulations, p.3.

10. All but one of the manifests and all the accompanying dump tickets indicate disposal by state code "D-80" indicating underground injection. Stipulations, p.3.

11. Such wastes may have been physically treated for solids removal prior to their disposal by deep-well injection. Stipulations, p.4.

12. EPA has jurisdiction in this matter pursuant to Section 3008 of RCRA, 42 U.S.C. § 6928. Stipulations, p.1.

13. Respondent is a "person" as defined at Tex. State. Ann. Act 4477-7(2) (Vernon 1987), 31 TAC § 335.1, Section 1004(15) of RCRA, 42 U.S.C. §6903(15), and 40 C.F.R. § 260.10. Complaint, p.2; Answer, p.1.

14. CRS' registered agent for service is Mark Buse, whose address is Chemical Reclamation Services, Inc., Post Office Box 69, Avalon, Texas 76623. Stipulations, p.1.

15. CRS, on or about August 18, 1980, notified EPA that it generated hazardous wastes at its Avalon facility. Stipulations, p.2; Complaint, p.3; Answer, p.2.

16. Respondent is a "generator" of hazardous waste as that term is defined at 31 TAC § 335.1 [40 C.F.R. § 260.10]. Complaint, p.3; Answer, p.2.

V. Issue to be Decided

The Stipulations contained, inter alia, the following additional statement: "In order to satisfy any concerns the presiding officer may have, EPA has agreed that it will not contest whether or not such wastes were disposed of by deep-well injection."

As Presiding Officer, I assure EPA that I have no concerns as to what EPA elects to contest or not to contest. My concern relates solely to my authority under 40 C.F.R. § 22.20(a). I may issue an accelerated decision without a hearing only "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding."

In response to Respondent's earlier Motion for Accelerated Decision (which I ultimately denied), EPA contended that "there is an outstanding issue of material fact as to whether Respondent shipped the restricted waste to Malone for disposal by underground injection." The above quoted statement from the Stipulations appears to constitute a grudging and somewhat convoluted withdrawal by Complainant of this previously held position. For

purposes of this decision, I conclude that the above quoted statement from the Stipulations constitutes, in effect, a concession by Complainant that the wastes were shipped to Malone for disposal by underground injection and that the wastes were disposed of by underground deep-well injection. This conclusion is supported by findings of fact numbers 5 and 11 which are based upon stipulations wherein EPA conceded that CRS shipped the wastes "to Malone Service Company ("Malone") for deep-well injection" and further, acknowledged "their disposal by deep-well injection." It is also supported by the joint statement of "the only remaining issue in this litigation" which EPA agreed was "whether 40 C.F.R. § 268.7(a) was applicable to CRS at the time it shipped its restricted wastes for disposal by deep-well injection."[1/]

The Stipulations also stated that "EPA withdraws its charges as to the other eighteen dates alleged in the Complaint." The complaint had alleged that Respondent had offered for transportation a restricted hazardous waste on thirty-seven (37) separate dates. With the withdrawal of charges as to eighteen (18) of those dates and the stipulation that such shipments occurred on the nineteen (19) remaining dates, no dispute exists between the parties as to how many shipments took place and when they occurred.

1/ Emphasis supplied.

Therefore, I find that no genuine issue of material fact exists in this case and I may issue an accelerated decision based upon the pleadings as requested by the parties.

The facts of the case may be summarized as follows: CRS generated wastewater from distillation of spent solvents and from collected rainwater which fell within the plant area located in Avalon, Texas. On nineteen (19) occasions, between November 11, 1986 and June 25, 1987, Respondent shipped this wastewater containing more than one (1) percent spent solvents having the designation EPA Hazardous Waste Code Numbers F001 through F005 to Malone Services Company (Malone) in Texas City, Texas, for disposal by deep-well injection. No notice or information, other than what appeared on the manifest, accompanied these shipments of restricted wastes to Malone, including any notice under 40 C.F.R. § 268.7(a). Thus, no notice of the corresponding treatment standard for land disposal of these wastes was attached to any of the manifests prepared by Respondent regarding these shipments of restricted wastes intended for disposal by deep-well injection.

The remaining issue to be decided in resolving the question of Respondent's liability is a legal issue. That issue is whether Respondent, as a generator of spent solvent wastes, was required to comply with the requirements for notification of treatment standards for land disposal of these wastes, pursuant to 40 C.F.R. § 268.7(a), even though the wastes so generated were being shipped by Respondent for disposal by underground injection.

VI. Contentions of the Parties

1. Complainant's Contentions:

Complainant's position with respect to the legal issue before me is that "the notification requirements of 40 C.F.R. § 268.7(a)(1) apply to all generators who handle restricted wastes exceeding the applicable treatment standards regardless of whether or when such wastes are ultimately land disposed." Thus, Respondent, as a generator, was required to meet the waste analysis, notice and recordkeeping requirements of section 268.7(a)(1).

Complainant avers that the EPA has consistently taken the position that "restricted" wastes are subject to those requirements even if such wastes are subject to an exemption, extension or variance making such wastes eligible for land disposal. Under 40 C.F.R. § 268.7, Complainant contends generators must determine whether their wastes are "restricted" at the point of initial generation, which is the point when the waste is first considered a hazardous waste subject to regulation by RCRA. To determine whether a hazardous waste is "restricted," generators must determine whether the waste belongs to a category of wastes that has been "prohibited" from land disposal by regulations or by the "hammer" provisions of RCRA. Complainant states that "prohibited" wastes are a subset of "restricted" wastes which are ineligible for land disposal. Thus, it would follow that a hazardous waste that is not "restricted" cannot be "prohibited" under Section 3004 of RCRA, 42 U.S.C. § 6924. On the other hand, Complainant

asserts that once a waste is considered "restricted," at least some of Part 268 requirements apply.

In the present case, Complainant acknowledges, the waste was eligible for land disposal under the underground disposal exemption. Thus, according to Complainant's reasoning, the waste is not considered "prohibited," but it is considered "restricted." Complainant insists that all wastes that are "restricted" must comply with the 40 C.F.R. § 268.7 waste analysis and recordkeeping requirements and all other applicable Part 268 requirements. Therefore, Respondent, as a generator of waste, was required to make a determination as to whether the hazardous waste was "restricted" under 40 C.F.R. § 268.30 and Section 3004(e) of RCRA, 42 U.S.C. § 6924(e).

Complainant defines "restricted" wastes as those categories of hazardous wastes that are "prohibited" from land disposal either by regulation or statute, regardless of whether such wastes are subject to the underground injection exemption which would make them eligible for land disposal. As noted earlier, Complainant states that "prohibited" wastes are a subset of "restricted" wastes. Thus, Complainant concludes that hazardous wastes numbered F001 through F005 (solvent wastes) were "restricted" as of November 8, 1986. Complainant claims that under the November 7, 1986 final rule, solvent wastes, specifically listed hazardous wastes from non-specific sources identified in 40 C.F.R. § 261.31 (EPA Hazardous Waste Number F001 through F005), are determined to be "restricted" from land disposal at the point

of generation. In support, Complainant cites the preamble to the November 7, 1986 final rule wherein it states:

> "Prohibitions on underground injection of these wastes are on a different schedule and are being addressed in a different rulemaking. The treatment standards, however, will apply when the restrictions are effective."[2/]

Thus, Complainant concludes, the treatment standards requirement will apply when the "restrictions," not the "prohibitions," are effective.

The Complainant also cites in support of its position 40 C.F.R. § 268.1(b), which describes, in a general way, those to whom Part 268 applies, and contends that since no exemption for underground deep-well injection of these wastes is spelled out in § 268.1(b), some provisions of Part 268 apply to Respondent.

Consequently, Complainant concludes that Respondent has violated Section 3008 of RCRA by failing, as a generator of restricted wastes, to comply with the notification of the applicable treatment standards requirement of 40 C.F.R. § 268.7(a).

2. Respondent's Contentions:

Respondent contends that the notification requirements of 40 C.F.R. § 268.7(a) did not apply to solvent wastes which were disposed of by underground injection prior to the promulgation of regulations for the restriction of injected solvent wastes on July 26, 1988. In support, Respondent cites 40 C.F.R. §

2/ 51 Fed. Reg. 40572 (November 7, 1986).

268.30(a)[3] and argues that it specifically excepted solvent wastes which were disposed of in an injection well from the land disposal restrictions of Part 268.

Respondent also relies upon "the preamble of the November 7, 1986 land disposal restriction regulations which states 'prohibitions on underground injection of these wastes [solvents and dioxins] are on a different schedule and are being addressed in a different rule-making.'"[4] In addition, Respondent points out that the preamble also noted that "'Congress established a separate schedule in Section 3004(f) for making determinations regarding the disposal of dioxins and solvents in injection wells.'"[5] Finally, Respondent maintains that its position is further substantiated by the statement in the preamble to the 1988 regulations applicable to underground injection wells that those regulations codified the sections of Part 268 applicable to injection wells.[6] There would have been no necessity to codify those sections of Part 268 had they already been applicable to solvent disposal by underground injecton, Respondent argues. Thus, as a matter of law, prior to the regulatory codification, CRS' solvent wastes which were underground injected were not sub-

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[3] See infra note 15.

[4] 51 Fed. Reg. 40572 (November 7, 1986).

[5] Id. at 40573.

[6] 53 Fed. Reg. 28120 (July 26, 1988).

ject to any provisions of Part 268, including the notification requirement in Section 268.7(a).

The Respondent summarizes its reasoning in a sylogism as follows:

"- Notification of treatment standards can be required only when treatment standards are applicable (otherwise there is nothing of which to give notice).

- Treatment standards were applicable only to wastes subject to land disposal restrictions.

- Therefore, notification of treatment standards is required only for wastes subject to land disposal restriction."

In summary, Respondent insists that the undisputed fact remains that CRS' wastes did not require treatment prior to underground injection, i.e., no treatment standards applied to the underground injection of the spent solvents in this case and hence no notification of treatment standards was required.

Respondent contends that Complainant's position that "restricted" wastes are subject to the Part 268 land disposal restriction regulations even if the wastes are subject to an exemption thereby making them eligible for land disposal, is wholly inconsistent with the concept and intention of an exemption. Respondent argues that Complainant has not cited any persuasive authority for this position. Furthermore, Respondent points out that Complainant insists that certain provisions of Part 268 are applicable in the circumstances of this case even though those

provisions are not identified as applicable in the regulations themselves. Respondent maintains that Complainant's position that notification of treatment standards is required even where no treatment standards applied eviscerates the very purpose for which the exemption of injection well disposal of hazardous wastes, including solvents, was intended.

Finally, Respondent contends that Complainant has attempted to counter the simple language of the notice requirement by creating definitions of the words "restricted" and "prohibited" and, insisting, without citation to any authority, that the undefined terms are not synonymous in this context. Respondent insists that a reading of Part 268 shows that the terms are used interchangeably and hence, for the purpose of Part 268, have the same meaning. Respondent maintains that Complainant cannot make up definitions in an attempt to establish its position that the wastes involved here, which were clearly not "prohibited," were somehow "restricted."

VII. Discussion and Conclusions

1. Statutory and Regulatory Background:

The 1984 HSWA amendments to RCRA prohibit the continued land disposal of untreated hazardous wastes beyond specified dates, "unless the Administrator determines that the prohibition...is not required in order to protect human health and the

environment for as long as the wastes remain hazardous..."[7/]

HSWA set forth a series of deadlines for EPA action. At certain deadlines, further land disposal of a particular group of hazardous wastes is prohibited if EPA has not set treatment standards for such wastes or determined, based on a case-specific petition, that there will be no migration of hazardous constituents from the unit for as long as the wastes remain hazardous.

Wastes treated in accordance with treatment standards set by EPA under the HSWA amendments are not subject to the prohibitions and may be land disposed.[8/]

Congress established a separate schedule for making determinations regarding the disposal of certain wastes, including solvents, in injection wells.[9/]

Effective November 8, 1986, HSWA prohibited further land disposal, except by deep-well injection, of, inter alia, solvent-containing hazardous wastes numbered F001, F002, F003, F004, and F005.[10/]

If EPA failed to set treatment standards or grant petitions for the disposal of such wastes by the statutory deadline, such wastes were prohibited from land disposal as of the November 8,

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7/ Sections 3004(d)(1), (e)(1), (f)(2), (g)(1), of RCRA, 42 U.S.C. §§ 6924(d)(1), (e)(1), (f)(2), (g)(1).

8/ Section 3004(m) of RCRA, 42 U.S.C. § 6924(m).

9/ Section 3004(f) of RCRA, 42 U.S.C. § 6924(f).

10/ Sections 3004(e)(1), (e)(2) of RCRA, 42 U.S.C. 6924(e)(1), (e)(2).

1986 deadline, except for disposal in injection wells, where the prohibition was effective as of August 8, 1988.

On November 7, 1986, EPA published the final rule to implement the prohibitions on the land disposal of hazardous waste mandated by HSWA.[11/] That rule was effective on the following day, November 8, 1986, which was the congressionally mandated deadline. Among other things, the regulations established procedures for setting treatment standards for hazardous wastes and promulgated specific treatment standards and effective dates for hazardous wastes, such as solvent-containing hazardous wastes, included in the first phase of the land disposal prohibitions. The summary of the preamble to the final rule said: "Prohibitions on underground injection of these wastes are on a different schedule and are being addressed in a different rulemaking. The treatment standards, however, will apply when the restrictions are effective."[12/]

Among the regulations published in November 1986, was 40 C.F.R. Part 268 - Land Disposal Restrictions.

Subpart A ("General") of Part 268 states that "[t]his part identifies hazardous wastes that are restricted from land disposal and defines those limited circumstances under which an other-

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11/ 51 Fed. Reg. 40572 (November 7, 1986).

12/ Id.

wise prohibited waste may continue to be land disposed."[13/] Subpart A also says: "Except as specifically provided otherwise in this part or Part 261 of this chapter, the requirements of this part apply to persons who generate or transport hazardous waste and owners and operators of hazardous waste treatment, storage, and disposal facilities."[14/]

In the Subpart on "Prohibitions on Land Disposal," EPA provided that, with certain exceptions not pertinent here, "[e]ffective November 8, 1986, the spent solvent wastes specified in 40 C.F.R. § 261.31 as EPA Hazardous Waste Nos. F001, F002, F003, F004, and F005, are prohibited from land disposal (except in an injection well)...."[15/]

The Subpart on "Treatment Standards" set treatment standards for F001-F005 spent solvents expressed as concentrations in waste extracts.[16/] It provides that a "restricted waste identified in this subpart may be land disposed without further treatment only if an extract of the waste...does not exceed the value shown...for that waste."[17/]

On July 26, 1988, EPA published the final rule to implement the statutorily mandated prohibitions on the underground injec-

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[13/] 40 C.F.R. § 268.1(a).

[14/] 40 C.F.R. § 268.1(b).

[15/] 40 C.F.R. § 268.30(a) (emphasis supplied).

[16/] 40 C.F.R. § 268.41.

[17/] 40 C.F.R. § 268.40(a).

tion of hazardous waste. Among other things, that final rule codified, at 40 C.F.R. Part 148, those sections of the regulatory framework for implementing the land disposal restrictions (Part 268) which are directly applicable to injection wells.18/

As for treatment standards for injected solvent wastes, EPA had proposed the adoption of the § 268.41 treatment standards.19/ In the final rule on July 26, 1988, EPA adopted those treatment standards for injection well disposal of solvent wastes.20/

2. Intepretation and Application of Statute and Regulations; Conclusions:

EPA insists that CRS, as a generator, was obliged to comply with the waste analysis provisions of 40 C.F.R. § 268.7(a)(1)21/ even though the waste was intended for disposal by deep-well underground injection. I disagree.

Section 268.7(a)(1) requires the generator to determine if the waste is restricted from land disposal under Part 268. If the waste is restricted from land disposal and does not meet

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18/ 53 Fed. Reg. 28118, 28120 (July 26, 1988).

19/ Id. at 28124; 52 Fed. Reg. 32448 (August 27, 1987).

20/ 53 Fed. Reg. 28120, 28124 (July 26, 1988).

21/ Section 268.7(a)(1) provides:

(a) Except as specified in § 268.32 of this part, the generator must test his waste or an extract developed using the test method described in Appendix I of this part, or use knowledge of the waste, to determine if the waste is restricted from land disposal under this part. (Continued on page 20.)

applicable treatment standards, the generator must notify the treatment facility in writing of the appropriate treatment standards set forth in Subpart D of Part 268 and of any applicable prohibitions set forth in § 268.32 of Part 268 or in RCRA section 3004(d). At the time this section was published, EPA also published treatment standards for the land disposal, other than by injection well, of F001 through F005 spent solvent wastes which standards were effective on November 8, 1986. There were no "applicable treatment standards" nor any "appropriate treatment standards" for the injection well disposal of F001 through F005 spent solvent wastes between November 11, 1986 and June 25, 1987. It was not until July 26, 1988 that EPA published treatment standards for the injection well disposal of these spent solvent wastes.

21/ Footnote #21 continued from page 19.

(1) If a generator determines that he is managing a restricted waste under this part and the waste does not meet the applicable treatment standards, or where the waste does not comply with the applicable prohibitions set forth in § 268.32 of this part or RCRA section 3004(d), with each shipment of waste the generator must notify the treatment facility in writing of the appropriate treatment standards set forth in Subpart D of this part and any applicable prohibitions set forth in § 268.32 of this part or RCRA section 3004(d). The notice must include the following information:

(i) EPA Hazardous Waste Number;

(ii) The corresponding treatment standards and all applicable prohibitions set forth in §268.32 or RCRA section 3004(d);

(iii) The manifest number associated with the shipment of waste; and

(iv) Waste analysis data, where applicable.

If, as EPA insists, section 268.7(a) required the Respondent to determine whether the restricted wastes herein met applicable treatment standards, there were none by which to make such a determination. The only applicable treatment standards applied to forms of land disposal other than injection well disposal. If one assumes that EPA's contention is correct, the only treatment standards to be applied would be those which, by statute and regulation, did not apply to injection well disposal of these wastes, i.e. the treatment standards for other forms of land disposal of these wastes. Since the then extant treatment standards did not apply, clearly the generator would have been forced to conclude that there were no "applicable treatment standards." As a result, according to EPA, the Respondent generator would then be compelled further to pursue this exercise in futility and "notify the treatment facility in writing of the appropriate treatment standards." Since EPA had not published any "appropriate treatment standards" for F001 through F005 spent solvent wastes which were to be disposed of by underground injection, EPA contends that the Respondent generator was expected to cite the "appropriate treatment standards" for other forms of land disposal of these wastes. I find no provision in Part 268 which provides such direction to the generator. As the Judicial Officer has said in another context: "The language of the regulations in question is unclear and misleading, and as a consequence, it would be manifestly unfair to impose a monetary penalty on anyone who failed to interpret

the regulations in a manner advocated by the Complainant."22/

EPA may have intended that all generators of hazardous wastes meet the waste analysis, notice and recordkeeping requirements of sectin 268.7(a)(1) regardless of whether or when such wastes are ultimately land disposed, including disposal by injection well, as Complainant contends. However, if that was EPA's intention, it should have stated so in more explicit terms than Complainant has been able to cite.

The Agency also relies upon 40 C.F.R. § 268.1(b) in support of its position. However, that provision does not provide a definitive answer to the question. It simply says: "Except as specifically provided otherwise in this part or Part 261 of this chapter," the requirements of Part 268 apply to "persons who generate or transport hazardous waste" and to "owners and operators of hazardous waste treatment, storage, and disposal facilities." Therefore, section 268.1(b) requires the reader to search throughout Parts 268 and 261 for provisions "otherwise." EPA would have us limit that search to section 268.1(c) which describes five circumstances in which prohibited wastes may continue to be land disposed.

There are two obvious reasons our search should not be so limited. First, the exception in section 268.1(b) is not limited

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22/ In re Liberty Light & Power, TSCA Docket No. VI-8C, Final Decision No. 81-4, at 3.

to the circumstances described in 268.1(c). The exception described in section 268.1(b) encompasses all of Parts 268 and 261. Second, section 268.1(c) is not worded as an exclusive list of exceptions to the coverage of Part 268. Section 268.1(c) simply describes five circumstances wherein prohibited wastes may continue to be land disposed. In our circumstances here, we are dealing with the disposal of spent solvent wastes F001 through F005 in an injection well. As EPA acknowledges, Section 268.30(a) specifically excepts the disposal of these wastes in an injection well from the prohibition against land disposal.

EPA contends, however, that this specific exception from the land disposal prohibitions of Part 268 does not constitute an exception to the remaining requirements of Part 268. In other words, even though the injection well disposal of these spent solvent wastes is excluded from the prohibitions against land disposal, these wastes are nevertheless subject to all the regulatory requirements of Part 268 as if they are intended for land disposal. In support of this reasoning, EPA argues, that if the Administrator intended an exemption from the remaining requirements of Part 268, the exemption would have been drafted in the same manner as those in section 268.1(c). However, there is nothing special about the manner in which section 268.1(c) was drafted. For example, it does not say (as some might expect from the EPA argument): "The requirements of this part shall not apply in the following circumstances:." Instead, as noted previously, section 268.1(c) simply describes five situations or

circumstances wherein "prohibited wastes may continue to be land disposed." In substance and effect, those five exceptions are not unlike the exceptions of injection well disposal of spent solvents F001 through F005 found in section 268.30(a).

The restrictions and treatment standards which were effective on November 8, 1986 were published to implement the land disposal restrictions, other than those on injection well disposal, and to promulgate treatment standards and associated effective dates for certain solvent and dioxin-containing wastes intended for land disposal.[23/] In support of its position, EPA also relies upon the second sentence in the following previously cited statement from the preamble to the final rule effective on November 8, 1986: "Prohibitions on underground injection of these wastes are on a different schedule and are being addressed in a different rulemaking. The treatment standards, however, will apply when the restrictions are effective."[24/]

The sentence upon which EPA relies is unclear and ambiguous. It is susceptible to several interpretations which are probably best illustrated by a simple diagram:

> "The treatment standards [for what?],
> however, will apply [to what?]
> when the restrictions [on what?]
> are effective."

23/ 51 Fed. Reg. 40575 (November 7, 1986).

24/ See supra note 2.

Or, to put it another way:

Which "treatment standards?"

To what will those treatment standards "apply?"

Which restrictions?

The "treatment standards" could mean those published in that final rule and which applied to the land disposal, other than by injection well, of these wastes, as EPA contends. Or the "treatment standards" could be those which EPA eventually would adopt for the injection well disposal of hazardous wastes, including spent solvents, on July 26, 1988. I concede that both treatment standards for F001-F005 spent solvent wastes turned out to be the same, but it could not have been known by EPA on November 8, 1986 that they would be the same. Indeed, it was not until August 27, 1987 that EPA proposed that they be the same[25/] and it was not until July 26, 1988 that EPA announced the final decision that the two treatment standards would be the same.[26/]

To what will the treatment standards (whatever the standards are) apply? To the land disposal, other than by injection well, of these wastes? Or to injection well disposal of these wastes? Or, as EPA seems to contend, to all land disposal, including disposal by injection well, of these wastes?

25/ 52 Fed. Reg. 32448 (August 27, 1987).

26/ See supra note 19.

Finally, to which restrictions is the sentence referring? Those restrictions on land disposal, other than by injection well, of these wastes? Or those restrictions on injection well disposal of these wastes?

EPA seems to contend that the sentence should be read as follows: The treatment standards [for land disposal, other than by injection well, of these wastes], however, will apply [to all land disposal, including disposal by injection well, of these wastes] when the restrictions [on land disposal, other than by injection well, of these wastes] are effective. To state the proposition refutes it: "The treatment standards, which do not apply, however, will apply when the restrictions, which do not apply, are effective."

When EPA published the statement that the "treatment standards, however, will apply when the restrictions are effective," it appears more likely that EPA meant:

> "The treatment standards [for hazardous wastes to be disposed of by injection well], however, will apply [to injection well disposal of these wastes] when the restrictions [on injection well disposal of these wastes] are effective."

This suggested reading of what is an otherwise unclear and ambiguous sentence is consistent with the statutory scheme reflected in Section 3004 of RCRA, 42 U.S.C. § 6924. I have no doubt that EPA's intentions, when it published this statement, were consistent with the statute.

Section 3004(h)(1) of RCRA, 42 U.S.C. § 6924(h)(1), provides that a prohibition in regulations issued under section 3004 (d), (e), (f) or (g), 42 U.S.C. §§ 6924 (d), (e), (f) or (g), takes effect immediately upon promulgation of the regulations. Section 3004(m)(1) requires EPA to issue any applicable treatment standards simultaneously with the promulgation of regulations issued under section 3004(d), (e), (f) or (g) prohibiting one or more methods of land disposal of a particular hazardous waste. Section 3004(m)(2) provides that any regulations setting treatment standards must have the same effective date as the applicable prohibitions promulgated under section 3004(d), (e), (f) or (g), respectively. Thus, regulatory prohibitions and treatment standards operate in tandem under the statutory scheme. Hence, it seems plausible to conclude that, by this sentence, EPA simply meant that treatment standards promulgated under section 3004(m) will apply when the restrictions to be promulgated under section 3004(f) are effective.

Section 3004(f) establishes the statutory prohibitions on disposal of hazardous wastes into deep injection wells. That subsection contains explicit provisions dealing with certain specified wastes, including, inter alia, solvents. Thus, under the statutory scheme established by Congress, when EPA issued regulations establishing prohibitions on the injection well disposal of solvents, it also was required to issue any applicable treatment standards for solvents intended for disposal in injection wells. EPA did that when it issued separate regulations

governing underground injection of hazardous wastes on July 26, 1988.

While section 3004(e) contains specific provisions governing the land disposal of solvents, that section specifically excepts disposal of such wastes by underground injection into deep injection wells. Thus, regulations issued to promulgate prohibitions on the land disposal of solvents pursuant to section 3004(e) and to establish simultaneously the treatment standards for solvents intended for land disposal were intended by Congress to be limited, at the time of their promulgation, to the land disposal of solvents excluding disposal into injection wells. The regulatory prohibitions and treatment standards for the disposal of solvents into injection wells was put on a separate schedule and provided for in a separate subsection, namely section 3004(f).

Likewise, section 3004(d), which establishes prohibitions for the land disposal of certain other hazardous wastes, specifically excepts the disposal of those wastes into injection wells from its coverage. Thus, the regulatory prohibitions and treatment standards for the land disposal of these wastes, was (like solvents and dioxins) put on a separate schedule and provided for in a separate subsection of HSWA from that subsection governing the disposal of these same wastes in underground injection wells.

For these reasons, I conclude Respondent, as a generator of spent solvent wastes which were shipped for disposal by underground injection between November 11, 1986 and June 25, 1987, was not required to comply with the notification requirements of 40

C.F.R. § 268.7(a). Accordingly, the question of the applicability of 40 C.F.R. § 268.7(a) having been resolved in Respondent's favor, Respondent is entitled to a judgment as a matter of law pursuant to 40 C.F.R. § 20.22.

ORDER [27]

It is hereby ordered that the complaint be, and it is hereby, DISMISSED.

Henry B. Frazier III
Administrative Law Judge

DATED: June 12, 1989
Washington, D.C.

[27] Pursuant to 40 C.F.R. § 22.27(c), this accelerated decision shall become the final order of the Administrator within forty-five (45) days after the service upon the parties unless an appeal to the Administrator is taken by a party or the Administrator elects to review the accelerated decision upon his own motion. 40 C.F.R. § 22.30 sets forth the procedures for appeal from this accelerated decision.