UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
David Beachy, John Beachy and Edna Beachy, d/b/a Kalona Battery Company,	)	**Docket No. RCRA-VII-91-H-0023**
	)	
	)	
Respondents	)	

ACCELERATED DECISION

The Complainant, the United States Environmental Protection Agency, Region VII (EPA), issued a complaint in this matter on July 31, 1991, pursuant to section 3008(a) and (g) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928 (RCRA), alleging that Respondents, David Beachy, John Beachy and Edna Beachy, d/b/a Kalona Battery Company, violated the Act and applicable regulations in specified particulars. Specifically, it was alleged that Respondents failed to notify EPA of hazardous waste activity as required by section 3010 of RCRA, failed to prepare a closure plan for its facility as required by 40 C.F.R. § 264.112, failed to complete closure of the facility as required by 40 C.F.R. § 264.113, failed to establish financial assurance for closure of the facility as required by 40 C.F.R. § 264.143, and failed to establish financial liability coverage for the facility as required by 40 C.F.R. § 264.147.

Complainant proposed a compliance order and penalty of $331,418 for the alleged violations.

Respondents answered the complaint, denying the violations, contesting the appropriateness of the penalty and proposed compliance order and requesting a hearing. The parties each filed pre-hearing exchanges by January 30, 1992.

Under date of April 24, 1992, Complainant filed a motion for accelerated decision on the issue of Respondents' liability for the alleged violations. As a consequence of Respondents' claim and supporting evidence that they were financially unable to pay the proposed penalty, the parties have stipulated to a penalty in the amount of $500. The stipulation was filed on April 24, 1992. Complainant's correspondence dated July 13, 1992, states that the only issue remaining for resolution in this matter is the question of liability. Respondents have not submitted any response to Complainant's motion.

Technically, Complainant's motion may be granted on the basis of Respondents' failure to oppose the granting of the motion. The Rules of Practice, 40 C.F.R. Part 22, provide, "If no response [to a motion] is filed within the designated period [10 days after service of the motion, unless additional time was allowed], the parties may be deemed to have waived any objection to the granting of the motion." 40 C.F.R. § 22.16(b).

However, a finding of liability on the motion for partial accelerated decision will dispose of the entire proceeding, because the only issue remaining is that of liability. The issue of amount

of penalty has been resolved by the parties and Complainant has not pressed its request for issuance of the compliance order proposed in the complaint.[1/] In view of the significance of ruling on Complainant's motion, it will be reviewed on the merits.

By way of background, Respondents owned and operated a battery renovation business on a farm (facility or site) of approximately 80 acres near Kalona, Johnson County, Iowa. On May 2, 1988, EPA inspectors conducted a RCRA compliance evaluation inspection of the facility. Mr. John Beachy informed the inspectors that his battery business was basically no longer operating. The inspectors reported that over 2000 spent lead-acid batteries, some of which were sawed apart and some of which were intact, were stored in different locations on the property. A pile of lead melting residue was observed at the site. It was also reported that Mr. Beachy was asked, and that he responded in the negative, whether he had addressed RCRA regulatory requirements including a closure plan and financial requirements. A Notice of Violation for failure to make a hazardous waste determination on the lead melting residue pile was left with Mr. Beachy, who later reported that all

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[1/] Respondents' facility was referred to the Superfund program, according to Complainant's memorandum in support of motion for partial accelerated decision (hereinafter "motion") at 6.

batteries and related residues had been removed form the site. (Complainant's pre-hearing exchange, Exhibits 1, 3).[2/]

On January 10, 1991, David Beachy visited EPA's Region VII office and met with Complainant's counsel and other EPA officials and discussed this case (Exhibit 22). A RCRA sampling inspection was performed at the site on March 14, 1991. The site was found to be abandoned and the batteries had been removed from the property, but battery debris including lead oxide covered battery grids, lead bars and small lead chips were observed on the site. The inspection report concluded that lead levels in soil samples from former operating areas of the site were much higher than in background soil samples, and that cadmium levels were slightly elevated (Exhibit 3).

In its motion, Complainant asserts that there exist no genuine issues of material fact with respect to Respondents' liability for the alleged violations, and that Complainant is entitled to judgment as a matter of law.

In their answer (¶ 2), Respondents admit operating a battery reclamation facility, admit that some batteries were repaired, recharged, and sold, and that some batteries were melted for scrap lead. Respondents also state in their pre-hearing exchange statement (¶ 5) that they "purchased and renovated used batteries."

Respondents deny that the statutory and regulatory provisions cited in the complaint apply to them on the basis that they did not

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[2/] The Complainant's exhibits submitted with its pre-hearing exchange will hereinafter be referred to as "Exhibit" followed by the numerical designation assigned by the Complainant.

store batteries within the meaning of the applicable statutory provisions (Answer ¶ 2, Respondents' pre-hearing exchange ¶ 5). In their pre-hearing statement (¶ 4, 5), Respondents explain that "the site was not designated as a storage site," but that while determining whether the used batteries could be renovated, batteries were "stacked in and near a farm building for a short period of time." Respondents add that they were ignorant of any government regulations in connection with battery renovation during the time that they purchased and renovated used batteries.

Section 3010 of RCRA and the regulatory requirements at issue, Part 264 of the federal solid and hazardous waste regulations, apply to owners and operators of all facilities which treat, store, or dispose of hazardous waste, except as provided otherwise. 40 C.F.R. § 264.1. "Facility" means "all contiguous land, and structures ... used for treating, storing, or disposing of hazardous waste." 40 C.F.R. § 260.10. "Storage" is defined in the regulations as "the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed of, or stored elsewhere." Id. "Storage" is defined in the statute, section 1004(33), 42 U.S.C. § 6903, as "the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as to not constitute disposal of such hazardous waste."

Complainant asserts that Respondents are subject to the notification requirement of RCRA section 3010 and to the regulatory requirements set forth in 40 C.F.R. Part 264 by virtue of the

provision found at 40 C.F.R. § 266.80 stating that those requirements, inter alia, apply to "persons who reclaim spent lead-acid batteries that are recyclable materials." However, those requirements do not apply to "[p]ersons who generate, transport, or collect spent batteries, or who store spent batteries but do not reclaim them."

Complainant asserts in its motion (at 4-5) (see also, its pre-hearing exchange statement at 7):

> During David Beachy's visit to EPA Region VII offices on January 10, 1992, he said that lead-acid batteries were stored on site. (see Complainant's Exhibit #22 of the Pre-Hearing Exchange). Mr. Beachy reported that batteries were picked up from generators and taken to the facility for reclamation purposes. Prior to reclaiming, the batteries were stored on site. Those batteries which could not be reclaimed remained "in a pile" on site until such time as Respondents took them to a smelter for disposal. Therefore, "storage" as it is defined in RCRA took place at the facility prior to reclamation and continuously for several years for those batteries unable to be reclaimed.

It is clear from the record that Respondents reclaimed spent lead-acid batteries (Exhibits 1, 2, 3). Spent lead-acid batteries are a hazardous waste.[3/] Respondents admit in their answer that John Beachy is an owner and operator of Kalona Battery Company, that David Beachy is an operator of Kalona Battery Company, and that Edna Beachy is an owner of the property at issue (Answer ¶¶ 6, 7, 8, 19, 20, 21).

[3/] Spent lead-acid batteries are solid wastes which exhibit the characteristic of toxicity for lead. 40 C.F.R. § 261.24.

The only question presented is whether Respondents have raised a genuine issue of material fact by denying that they stored the spent batteries within the meaning of the statute and regulations. Stated another way, can Respondents defeat the granting of Complainant's motion by simply denying that their facility constituted a hazardous waste storage facility? Respondents have submitted no evidence in support of the denial.

Respondents also have not provided any further description of the extent of time the batteries were held on the premises. There exists in the record a handwritten document signed by John Beachy, dated August 31, 1990, statement numbered 3: "Shortest time about 1 hr. longest one week average 1 to 2 days" (Exhibit 2).

Even assuming that statement refers to the length of time that batteries were stored on the premises, and that it is true for purposes of ruling on a motion for accelerated decision, it is not sufficient to raise a genuine issue of material fact. Respondents have not pointed out how its stacking of the batteries "for a short period of time" constitutes an exception to the definition of storage, nor do I find any such exception in the statute or applicable regulations. It is clear that under the statutory and regulatory definitions (supra at 5), no particular holding period is required to constitute storage. Therefore, it can be concluded that Respondents are subject to the statutory and regulatory requirements cited in the complaint.

As to whether Respondents violated those requirements, the Complainant has submitted evidence in support of its claim that

Respondents did not comply with the requirements. Respondents have not asserted that they did comply, but have only generally denied the allegations in the complaint. Such general denials are insufficient to defeat a properly supported motion for summary judgment in federal court,[4/] and similarly cannot defeat a properly supported motion for accelerated decision in this forum.

Accordingly, it is concluded that no genuine issues of material fact exist with respect to Respondents' liability for the violations alleged in the complaint, and Complainant is entitled to judgment as a matter of law. Respondents are found to be in violation of section 3010 of RCRA, 42 U.S.C. §6930, for failing to file notification with EPA of hazardous waste activity, as alleged in Count I of the complaint. Respondents are further found to be in violation of 40 C.F.R. § 264.112 for failing to prepare a closure plan for the facility, in violation of 40 C.F.R. §264.113 for failing to complete closure of the facility in accordance with an EPA approved closure plan, in violation of 40 C.F.R. § 264.143 for failure to establish financial assurance for closure of the facility, and in violation of 40 C.F.R. § 264.147 for failing to demonstrate financial liability coverage for the facility for bodily injury or property damage to third parties.

Because the parties have stipulated to a penalty in the amount of $500, Respondents will be ordered to pay a civil penalty in the amount of $500 for the violations found herein.

[4/] Securities and Exchange Commission v. Bonastia, 614 F.2d 908, 914 (3d Cir. 1980); Federal Rule of Civil Procedure 56(e).

O R D E R

1. Complainant's motion for accelerated decision on liability is GRANTED.

2. Respondents, David Beachy, John Beachy and Edna Beachy, having violated RCRA and the regulations as determined herein, are jointly and severally assessed a penalty in the amount of $500 in accordance with section 3008 of RCRA, 42 U.S.C. § 6928.[5/] Payment of the full amount of the penalty shall be made by sending a cashier's or certified check in the amount of $500 payable to the Treasurer, United States of America, to the following address within 60 days of receipt of this order:

Regional Hearing Clerk
U.S. EPA, Region VII
P.O. Box 360748M
Pittsburgh, PA 15251

Dated this 29th day of June 1993.

Spencer T. Nissen
Administrative Law Judge

[5/] In accordance with Rule 22.20(b) (40 C.F.R. Part 22), this Order constitutes an initial decision, which, unless appealed to the Environmental Appeals Board (EAB) in accordance with Rule 22.30 or unless the EAB elects sua sponte to review the same as therein provided, will become the final order of the EAB in accordance with Rule 22.27(c).